

Employee Grievance---Compeau v LRBOI Gaming Commission---Case# 03081GR

Summary: This matter involves a complaint filed by Ms. Compeau challenging her termination from employment by the LRBOI Gaming Commission.

Decision and Order: It is ordered that the decision of the LRBOI Gaming Commission is hereby **affirmed** and **upheld** **Appealed**

Court of Appeals---Compeau v LRBOI Gaming Commission---Case# 03129AP

Summary: This matter comes to the Court of Appeals on an appeal by Appellant, Ms. Compeau raising several issues on appeal regarding her termination from employment with the LRBOI Gaming Commission. The two issues raised were whether she was entitled to a second appeal of her termination, and if so, whether she should be granted the right to amend her appeal to include additional issues.

Decision and Order: The Court of Appeals **denies** Appellant's second appeal and petition to amend her original notice of appeal.

Enrollment---Dorian Ross et al v LRBOI---Case# 03089GC

Summary: In this matter Plaintiffs filed a "motion for summary judgment" pursuant to MCR 2.116(C) (10) claiming that they meet all of the requirements applicable to the Tribal Enrollment Ordinance, the 80/20 Judgment Distribution Plan, and the passage of Public Law 105-143. They assert that they are currently members of the LRBOI and as such are entitled to a share of the per capita distribution as established by the 80/20 Plan. The Little River Band of Ottawa Indians however asserts that the Tribe is immune from suit for damages. They also assert that since the Plaintiffs do not meet the definition of "qualified Tribal member" for one time per capita payments, the Tribe retains immunity from suit. They also added that the Plaintiffs' claim is barred by the doctrine of laches.

Decision and Order: Defendant's Motion to Dismiss based upon the Tribe's Sovereign immunity is hereby **granted**; Plaintiffs' Motion for Summary Judgment is hereby **denied**

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT
3031 Domres Road
Manistee, Michigan 49660

JANIS COMPEAU

Case No. #03081GR

Aggrieved

LITTLE RIVER BAND GAMING COMMISSION

Respondent

DECISION AND ORDER

The Aggrieved Party, Janis Compeau, filed an action challenging her termination from employment by the Respondent, Little River Band Gaming Commission. The Aggrieved Party was terminated by Respondent for disclosing confidential information relating to an ongoing compliance issue that was the subject of a Gaming Commission "Notice of Inquiry" ("NOI") process to an employee of Little River Casino Resort.

In her grievance appeal, the aggrieved party claimed that her termination was excessive and that other employees had similarly disclosed confidential information. Respondent, through the Tribal Attorney, filed a response to the Aggrieved Party's grievance appeal and also submitted a Brief on Appeal. In support of its position, Respondent also submitted: (1) a copy of the its Notice of Termination, which was received by the Aggrieved Party; (2) copies of statements prepared by witnesses (including the Aggrieved Party), which were obtained by Respondent in the course of its investigation of the alleged disclosure of confidential information by the Aggrieved Party; and (3) a previous written warning issued to the Aggrieved Party by her supervisor.

The Court held a hearing on June 23, 2003, commencing at approximately 10:03 a.m., at which time the Aggrieved Party was afforded the

opportunity to present arguments and testimony pertaining to her grievance appeal. The Court also afforded the Respondent the opportunity to provide responsive arguments.

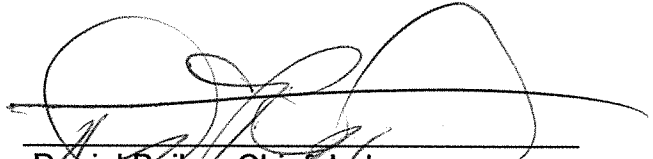
Upon due consideration of the arguments presented by the parties, a detailed review of the written documents submitted by the parties, a review of the applicable Ordinances, including the Tribal Government Operations Personnel Manual (Ordinance #02-600-01) and the Gaming Commission Ordinance (Ordinance #02-400-04), and the Court being otherwise advised of the premises:

DECISION

The Court finds that the Respondent's decisions was within the scope of its authority pursuant to the delegation of authority in the Gaming Commission Ordinance to make final decisions regarding the termination of employees of the Gaming Commission. While the Respondent is required to make such decisions in accordance with the procedures prescribed in Chapter 8 of the Personnel Manual, the role of the Tribal Court in reviewing decisions made under those provisions is limited to determining if the appropriate authority followed the appropriate procedures and did not act arbitrarily. Where the record confirms that the Tribal government or, in this case, the Gaming Commission has acted in accordance with the procedures prescribed in Chapter 8 of the Personnel Manual, the Court will not substitute its judgment for that of the person authorized to make personnel decisions. The Aggrieved Party's argument that the Respondent's decision should be reversed because a witness whose statement may have supported the Aggrieved Party is without merit. Personnel decisions will always require authorized personnel to exercise a certain amount of judgment and discretion under each situation's unique circumstances. All that is required is that the decision maker conduct a "reasonable" review or investigation of the circumstances before taking action.

IT IS SO ORDERED that the decision of the Respondent, Little River
Band Gaming Commission, is hereby affirmed and upheld.

Date: 6/25/03



Daniel Bailey, Chief Judge
Tribal Court

TRIBAL COURT OF APPEALS
LITTLE RIVER BAND OF OTTAWA INDIANS

JANIS COMPEAU,

Appellant,

Case No. 03129AP

v.

LITTLE RIVER BAND OF OTTAWA INDIANS
GAMING COMMISSION,

Respondent.

ORDER OF THE COURT OF APPEALS

This matter comes to the Tribal Court of Appeals on an appeal by Appellant, Janis Compeau, raising several arguments regarding her termination from employment by Respondent, Little River Band of Ottawa Indians Gaming Commission. This Court heard the oral arguments of the parties on October 13, 2003. Appellant raises two (2) matters to be addressed by this Court: (1) Whether she is entitled to a second appeal of her termination, and, if so (2) Whether she should be granted the right to amend her appeal to include additional issues?

ANALYSIS:

I. Right To A Second Appeal

Appellant argues that the process used to terminate her did not provide her due process as required by the Article III of the Tribal Constitution. Furthermore, she argues that unless this Court entertains an appeal of the Tribal Court's decision on her appeal to that court regarding her

termination, she will be denied due process and the right to petition for the redress of grievances.

The value of an appeal process is that it provides a mechanism by which errors can be corrected. Just as humans sometimes make mistakes, human institutions can also err. Fundamental fairness requires that there be a method to correct mistakes. This is the role of appellate bodies. It is a limited role. This limited role gives justice a second chance, if justice would otherwise be denied due to error. This role is very different than the role that some would ascribe to appellate bodies, i.e. that of substituting its own judgment in place of a judgment given by a lower body. Tribal law prescribes that there be no second-guessing, only an opportunity to ensure justice by correcting justice-denying mistakes. Management should have full management authority, subject only to tribal law. A court must not substitute its own judgment for that made by management if management followed tribal law. A person's due process rights and right to petition for the redress of grievances are not abridged if the number of times an appeal can be heard is limited to one. The critical aspect of both rights is that there was an opportunity to correct justice-denying mistakes. Having an opportunity to appeal provides adequate assurance that those kind of harmful mistakes can be corrected. It makes no sense to allow more than one appeal. An additional consideration is that finality of decision should not be something forever in the distance. It should come sooner rather than be put off until a later time. Justice delayed is justice denied. Thus, justice must be timely.

The Tribal Court below correctly limited its review on appeal to whether the administrative action was within the scope of administrative authority, whether the administrative action was arbitrary or capricious, and whether the administrative action was consistent with applicable procedures.

II. Right To Amend Appeal To Include Additional Issues

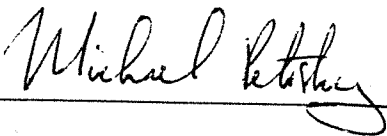
Both parties to an action have a responsibility and obligation to ensure that all issues,

evidence, testimony, and arguments are made timely. Fundamental fairness dictates timely presentation. The presentation of new evidence or new issues before this Court on review will never be permitted. This Court is a reviewing court and it will rely on the record as developed by the parties below. In the rare instances where there is newly discovered evidence that will effect the outcome of a matter, a petition for its consideration must be made to the appropriate finder of fact. However, that is not the situation here because Appellant admits that she did communicate confidential information to another person. See Defendant's Brief In Opposition To Appellant's Claim Of Appeal And In Opposition To Appellant's Request To Amend Her Notice of Appeal, Exhibit # 3. That Exhibit is a response written by Appellant herself in which she says "I did say something to the effect of her whole family being mentioned in the response." It is also clear from a review of the record that Appellant was aware of the employee prohibition against the disclosure of confidential information and that employees could be disciplined or terminated from employment for failure to carry out duties and obligations.

FOR ALL OF THE FOREGOING, THIS COURT DENIES APPELLANT'S SECOND APPEAL AND PETITION TO AMEND HER ORIGINAL NOTICE OF APPEAL.

12/15/03

DATED



MICHAEL PETOSKEY
CHIEF JUSTICE

LITTLE RIVER BAND OF OTTAWA INDIANS
TRIBAL COURT

DORIAN ROSS, RYAN TATE,
DANA HUNTER-TATE, TRACY TATE,
GLENN LONE, JR., DWAN LONES
STERLING BARNETTE, ALVINA ELDRIDGE,
JACOLA BARNETTE, DELIA TILLMAN,
JORDAN ROSS, LUCIEN ROSS,
STREISAND SEBLES, YOLANDA SMITH,
WILLIAM PRICE, JR., TINA PRICE, AND TAMIKO LONES,

Case No. 03089GC

(Collectively "Plaintiffs")

v.

LITTLE RIVER BAND OF OTTAWA INDIANS,

Defendant

William J. Brooks (P43014)
Legal Department
Little River Band of Ottawa
375 River Street
Manistee, MI 49660
(231) 398-6821

Clara L. Larry
Clara L. Larry & Associates
Attorney for Plaintiffs
29 South LaSalle Street, Suite 1250
Chicago, IL 60603-1514
(312) 332-5303

**DECISION AND ORDER REGARDING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
DEFENDANT'S MOTION TO DISMISS**

Plaintiffs filed a Motion for Summary Judgment pursuant to MCR 2.116(C)(10) claiming that they meet the requirements of the applicable Tribal Enrollment Ordinance (97-200-01), and the 80/20 Judgment Distribution Plan enacted pursuant to Indian Claims Commission Dockets Number 18-E, 58, and 364, and the passage of Public Law 105-143 cited as "The Michigan Indian Land Claims Settlement Act" of December 15, 1997 (the 80/20 Plan). They assert that they are currently members of the Little River Band of Ottawa Indians and as such are entitled to a share of the per capita distribution as established by the 80/20 Plan.

Defendant, The Little River Band of Ottawa Indians, filed a Motion to Dismiss, or a Motion for Summary Disposition, pursuant to TRCP 4.3; MRCP 2.116(C)(4), (7), and (10). Defendant asserts that based upon Article XI Section 2 of the Little River Band Tribal Constitution and Section 6.02 of the 80/20 Judgment Fund Plan, the Tribe is immune from suit for damages. Defendant asserts that since the Plaintiff's do not meet the definition of "qualified Tribal member" for one time per capita payments under Section 1.05 of the 80/20 Plan, the Tribe retains immunity from suit. Defendant also asserts that the Plaintiffs' claim is barred by the doctrine of laches.

I. Factual Background

The following facts are uncontested: Most of Plaintiffs applied for enrollment with the Tribe between September 18, 1997 and January 7, 1998. With the exception of Jordan Ross, whose application was submitted by his mother, Delia Ross, since he was a minor in September 1997, each Plaintiff who applied for enrollment was over the age of eighteen (18) at the time his or her application was submitted and signed the application in his or her own name. Delia Ross,

mother of Jordan Ross, was enrolled but other applicants received letters of denial on November 6, 1997, January 7, 1998, January 8, 1998, and February 10, 1998. The only evidence submitted by the Plaintiffs indicating that an appeal was filed was a written letter from Delia Ross dated November 20, 1997, purporting to appeal the denial on behalf of all members of her extended family. Delia Ross provided no written documentation that she was authorized to submit this letter on behalf of other family members. With the exception of Delia Ross, none of the Plaintiffs' individual enrollment files contained any document or record indicating an appeal of their denial of eligibility in 1997 or 1998.

As a member, Delia Ross admitted that she was provided a copy of the 80/20 Plan, voted on its adoption, and was aware of the requirements for enrollment. Plaintiffs understood the deadline for enrollment under the 80/20 Plan was January 30, 1998. Plaintiffs provided no evidence that they investigated whether their names were on the rolls or perfected an appeal during 1998, the critical time for compiling the rolls under the 80/20 Plan. Plaintiffs' files contain no evidence of any communication with the Little River Band either by contact with the enrollment office or the filing of any action in Tribal Court between November 1997 and March of 2001 when they submitted applications. It is undisputed that Plaintiffs' names are not found on any list of "qualified Tribal members" that were maintained under the 80/20 Plan.

After the Plaintiffs tendered applications in March and April 2001, they were enrolled as members of the Little River Band. Subsequently, Plaintiffs formally initiated a request for per capita distribution under the 80/20 Plan. In October 2001, the Plaintiffs individually signed a notarized letter that was sent to the Tribal Council requesting a per capita distributive share as a member of the Tribe. The letter did not refer or rely upon pending to any prior appeal during

1998. Plaintiffs attempted to obtain relief from the Tribal Council and in September 2002 met with the Tribal Council to discuss their demands for per capita payment. The Tribal Council informed the Plaintiffs that they did not meet the criteria established under the 80/20 Plan and informed the Plaintiffs that the Tribal Council was unwilling to take action to grant a per capita distribution to them outside of the scope of the 80/20 Plan.

II. Legal Analysis

A. Applicable Law

1. The Constitution of the Little River Band of Ottawa Indians provides:

“ARTICLE XI - SOVEREIGN IMMUNITY

Section 1. The Tribal Council shall not waive or limit the right of the Little River Band to be immune from suit, except as authorized by tribal ordinance or resolution or in furtherance of tribal business enterprises. Except as authorized by tribal ordinance or resolution, the provisions of Article III of the Constitution shall not be construed to waive or limit the right of the Little River Band to be immune from suit for damages

Section 2. Suits against the Little River Band in Tribal Courts Authorized.

(a) The Little River Band, its Tribal Council members, Tribal Ogema, and other Tribal officials, acting in their official capacities, shall be subject to suit for declaratory or injunctive relief in the Tribal Court system for the purpose of enforcing rights and duties established by this Constitution and by the ordinances and resolutions of the Tribe.

(b) Notwithstanding the authorization provided in subsection (a) of this Section, persons shall not be entitled to an award of damages, as a form of relief, against the Tribe, its Tribal Council members, the Tribal Ogema, or other Tribal officials acting in their official capacities; provided that the Tribal Council may by ordinance waive the right of the Tribe or Tribal officials to be immune from damages in such suits only in specified instances when such waiver would promote the best interests of the Tribe or the interests of justice.

(c) The Tribe, however, by this Article does not waive or limit any rights which it may have to be immune from suit in the courts of the United States or of any state.”

2. Relevant provisions of the Tribe's Plan for the Use and Distribution of Little River Band of Ottawa Indian Judgment Funds, Dockets 18-E, 58, and 364 (The 80/20 Plan) state:

1.05. **“Qualified Tribal member for one time per capita payments.** For purposes of determining eligibility for receiving a per capita payment under any Tribal plan for the use and distribution of the Little River Band of Ottawa Indians' share of the Dockets 18-E, 58, and 364 Judgment Funds, 'qualified Tribal member' shall mean any individual who has applied for enrollment before 12:00 a.m. (midnight), Friday, January 30, 1998, and is duly enrolled in the Little River Band of Ottawa Indians in 1998, and is duly enrolled in the Little River Band of Ottawa Indians in accordance with Article II of the interim Constitution and the Tribal Ordinance No.94-1018-01 or Tribal Ordinance No. 97-200-01.

In order for any duly enrolled Tribal member to be entitled to the one time per capita payment, the member's application for enrollment must be received at the Tribal offices before 12:00 a.m. (midnight), Friday, January 30, 1998. If an applicant who timely files his/her application is denied enrollment and fails to appeal the decision, that person will lose his/her right to the one time per capita payment if he/she reapplies and becomes a duly enrolled member at a later date. All persons eligible for the one time per capita payments must be living as of the effective date of this plan. any person who has received distribution from another tribe pursuant to Dockets 18-E, 58, 18-R, and 364 of the Indian Claims Commission shall not be eligible to receive the one time per capita payment from the Little River Band of Ottawa Indians...”

3.02. **How per capita payment will be made.** In order to fairly compensate all members of the Little River Band of Ottawa Indians, the per capita payment may be made in two payments. The first payment will be based on the completion of two separate rolls, which will be completed within 30 days after the effective date of this plan. One roll will list each duly enrolled qualified member. The second roll will list each applicant who filed his/her application by 12:00 a.m. (midnight), Friday, January 30, 1998, whose application is still pending. The number of persons on these two rolls will be added together and divided into the total per capita amount, which will equal the amount of the first check that each duly enrolled member will receive. The balance remaining, if any, after all eligible applications have been processed and the appeals time has run shall be divided by the total number of qualified tribal members enrolled from the two rolls described above and distributed to such qualified tribal members in a second payment. A more detailed explanation of this process is outlined in Appendix 1.”

Section 6: Tribal Sovereign Immunity

6.01 Nothing in this plan shall provide, or be interpreted to provide, a waiver of the sovereign immunity from suit of the Little River Band of Ottawa Indians or any of its governmental officers and/or agents.

6.02 Nothing in this plan shall create a duty of financial obligation on the part of the Little River Band of Ottawa Indians or any of its officers and/or agents to provide judgment fund distribution payments to an individual, who alleges that he/she did not receive a per capita distribution check provided, however, that the Little River Band of Ottawa Indians must show:

(a) The individual's name does not appear on any of the rolls authorized under this plan; or

(b) The individual's name: (i) appeared on one of the rolls authorized under this plan, and, (ii) a copy of the per capita check is returned by the Tribal Administration as proof of distribution to the last known address of the individual entitled to a per capita check."

3. The relevant provisions of Tribal Enrollment Ordinance 97-200-01, enacted

October 12, 1997 state:

Section 3. Enrollment Procedure.

3.01 Application forms to be filed by or for applicants for enrollment will be furnished by the Enrollment Officer, or other persons designated by the Enrollment Committee, upon written or oral request. The Enrollment Officer may also send application forms to persons known to be eligible for enrollment together with the notice of preparation of the roll.

3.02 A separate application is required for each individual seeking enrollment or for whom enrollment is sought. A parent of a minor under the age of 18 may file an enrollment application on behalf of his/her child(ren). Legal guardians of other legally incompetent persons may file enrollment applications on behalf of such persons; however, the Enrollment Officer may require proof of a guardian's status as a condition of approving an application submitted on behalf of such person. The Enrollment Officer shall assign a control number to each application received.

3.03 The burden of proof rests with each person submitting an application for enrollment to establish the applicant's eligibility for enrollment pursuant to Section 2 of this Ordinance.

Section 8. Appeal of Enrollment Decisions.

8.01 All appeals from decisions of the Enrollment Officer or Enrollment Committee shall be heard by the Tribal Court. Until such time as appointments are made to the Tribal Court, an Appeals Board of three (3) tribal members shall rule in any and all enrollment decisions in accordance with this Section 8. One (1) member of the Appeals Board shall be appointed by the Tribal Council, one (1) member of the Appeals Board shall be designated by the Enrollment Officer and one (1) member of the Appeals Board shall be appointed by the Enrollment Committee.

8.02 Any person, including the parent or legal guardian of a minor or incompetent, who has been rejected for enrollment or subject to disenrollment has a right to appeal the decision of the Enrollment Committee.

8.03 The applicant appealing a decision of the Enrollment Committee shall [sic] the burden of proof on appeal.

8.04 All appeals shall be made in writing to the Tribal Court. An application shall have sixty (60) calendar days from the date of the adverse decision appealed from to file an appeal with the Tribal Court.

8.05 An applicant shall be granted a sixty (60) day extension to file his/her appeal if a written request for an extension is filed with the Tribal Court within the sixty (60) day period described in subsection 8.04.

8.06 Parties may submit any additional supporting evidence or documents which were not previously furnished to the Enrollment Officer or Enrollment Committee and may include a copy of or reference to applicable Tribal records or records of the Bureau of Indian Affairs which relate to the applicant's eligibility for enrollment under Section 2 of this Ordinance.

8.07 The Tribal Court shall permit all parties to examine records submitted on appeal and to provide testimony or other evidence which would support or refute the application for membership or continuance of membership.

8.08 The sole issues on appeal will be to determine if the Enrollment Officer or Enrollment Committee made an error in rejecting the application for enrollment or in disenrolling the applicants. The burden of proof shall remain with the individual affected by the decision of the Enrollment Committee.

B. Analysis

Defendant's Motion to Dismiss is based upon TRCP 4.3, MCR 2.116(C)(4)(7) and (10).

TRCP 4.3, Dismissal of Actions, provides in relevant part:

"2. Involuntary Dismissal. If the Plaintiff fails to comply with these rules or a Court Order or if there is no basis for action in laws or claims, a defendant may move for dismissal of an action against the Defendant.

(b) Unless specified in the Order of Dismissal, any dismissal of an action under these rules operates as an adjudication on the merits. Exception to this rule is dismissal for lack of jurisdiction."

MCR 2.116(C)(4) provides for dismissal when the Court lacks jurisdiction of the subject matter. MCR 2.116 (C)(7) provides, in part, for the dismissal when a claim is barred by immunity granted by law. MCR 2.116 (C) and MCR 2.116(C)(10) provide for dismissal where, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment or partial judgment as a matter of law.

MCR 2.116(C)(4) as a basis for summary disposition tests the court's subject matter jurisdiction. "Summary disposition for lack of jurisdiction under MCR 2.116(C)(4) is proper when a plaintiff has failed to exhaust administrative remedies." *Citizens for Common Sense in Government v. Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). Reviews pursuant to MCR 2.116(C)(4) require deciding whether the pleadings establish that the defendant is entitled to judgment as a matter of law or the documentary evidence indicates no genuine issue of material fact. *Bock v. General Motors Corp.*, 247 Mich App 705, 710 (2001).

Pursuant to MCR 2.116(C)(7) contents of the complaint may be accepted as true unless contradicted by documentation by the moving party. *Maiden v. Rozwood*, 461 Mich 109, 119 (1999).

Article XI, Section 2 (a) of the Tribal Constitution authorizes suits against the Tribe for declaratory or injunctive relief. Article XI, Section 2(b) precludes suits against the Tribe for an award of damages unless the Tribe by Ordinance specifically waives its immunity from such suit. Here defendants assert sovereign immunity based upon Tribal Constitution, Article XI, Section 2 (b) that precludes suits for damages against the Tribe or its officials.

“Indian Tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara Pueblo v. Martinez*, 436 US 49, 58 (1978). “As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit, or the tribe has waived its immunity.” *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 US 751, 754-756 (1978). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *Santa Clara Pueblo, supra*, at 58-59.

Section 6 of the 80/20 Plan maintains the Tribe’s sovereign immunity. However 6.02(a) requires the Tribe to establish that the individual’s name does not appear on any of the rolls authorized under this plan. Here it is undisputed that the Plaintiffs are not on the rolls established pursuant to the 80/20 Plan. Most likely, the reason the Plaintiffs’ names did not appear on the rolls was due to their failure to appeal their denial in the manner required.

Section 1.05 of the 80/20 Plan defines “qualified Tribal member for one time per capita payments.” This provision also states that: “If an applicant who timely files his/her application is denied enrollment and fails to appeal the decision, the person will lose his/her right to the one time per capita payment if he/she reapplies and becomes a duly enrolled member at a later date.” That is precisely the situation here.

Section 3.02 of the Plan was developed to assure that all pending applicants and those with duly filed appeals be listed on a roll and an amount set aside until final determination of their eligibility for enrollment occurred. If the Plaintiffs had filed an appeal of the denial of their application for enrollment in the manner specified by Tribal Ordinance 97-200-1, their case would have been either been decided before the roll for 80/20 Plan distribution was finalized or they would have been listed on the provisional roll as an applicant whose enrollment was pending pursuant to Section 3.02 of the 80/20 Plan, and funds would have been set aside for payment in the event they became members.

At the time of the Plaintiffs' denial of their application for enrollment, November 1997 through February 1998, Tribal Ordinance No. 97-200-01, enacted on October 12, 1997 was in force. While the Plaintiffs assert that they filed an appeal, they provided no evidence that their appeal complied with the requirements of Section 8 of Tribal Ordinance 97-200-1. Section 8.01 of the Ordinance provides that all appeals must be filed in Tribal Court. Section 8.04 provides that appeals must be made in writing and filed within sixty (60) calendar days from the date of the adverse decision appealed from. Section 8.05 provides for a sixty (60) day extension to file an appeal if request for an extension is made.

The record is devoid of any evidence of the filing of an appeal in the manner specified in Section 8 of Tribal Ordinance 97-200-01. Thus the Plaintiffs were not "qualified Tribal members" pursuant to Section 1.05 of the 80/20 Plan, nor listed as applicants whose enrollment was pending pursuant to 3.02 of the Plan.

The Tribe's sovereign immunity is preserved in Section 6 of the 80/20 Plan. Section 6.01 provides that the Plan is not to be construed as a waiver of the Tribe's immunity from suit.

However, the requirements of Section 6.02 of the 80/20 Plan protect the rights of individuals whose names are on the rolls. The Tribe has established that the Plaintiffs' names do not appear in the rolls authorized under the Plan, thus the Tribes sovereign immunity has not been waived.

The Tribe claims that the award of the amount equal to a member's share of the per capita 80/20 Plan is an award of damages precluded by the Tribal Constitution. The Tribe argues that since the Plaintiffs are not "qualified Tribal members" pursuant to the provisions of the 80/20 Plan, and all funds allocated to "qualified Tribal members" have already been distributed, any payment must be considered an award of damages against the Tribe. Plaintiffs have not established that they duly appealed their denial of membership in the manner required under the Plan. The Tribe has established that Plaintiffs are not on the Plan rolls. Under these circumstances, the Tribe's sovereign immunity is preserved by Article XI, Section 2(b) of the Tribe's Constitution, and Sections 1.05 and 6.02 of the 80/20 Plan. Thus the Tribe has not waived its sovereign immunity from suit for damages.¹

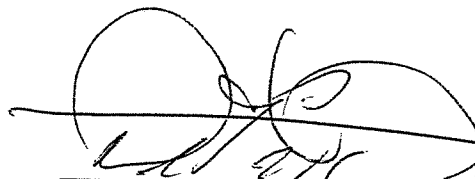
For the reasons stated above:

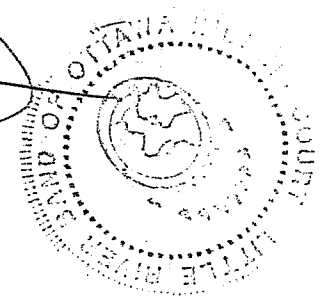
Defendant's Motion to Dismiss based upon the Tribe's sovereign immunity is Hereby Granted; Plaintiffs' Motion for Summary Judgment is Hereby Denied.

IT IS SO ORDERED.

Dated

11/3/04


Daniel Bailey, Chief Judge



¹This Court need not consider Defendant's claim that laches applies. Since this Court does not have jurisdiction based upon sovereign immunity, pursuant to TRCP 4.3, this Court does not consider the merits of Plaintiffs' claim, nor of any equitable defenses.