CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT

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LONG FAMILY LAND AND CATTLE COMPANY, INC.-RONNIE AND LILA LONG,

Plaintiffs,

vs.

EDWARD AND MARY MACIEJEWSKI and RALPH H. AND NORMA J. PSICKA, and THE BANK OF HOVEN,

Defendants.

PLAINTIFFS' RESPONSE IN RESISTANCE TO DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL

R-120-99

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Plaintiffs, Long Family Land and Cattle Company, Inc. and Ronnie and Lila Long (Longs), respond in resistance to Defendant, Bank of Hoven's (Bank), Motion for Judgment Notwithstanding the Verdict and for a New Trial, as follows:

I. Motion to Dismiss Plaintiffs' Claim for Breach of Contract:

1. Defendant Bank requests that this Court dismiss Plaintiffs' claims for breach of contract "in that there was no consideration given by Plaintiffs for the Loan Agreement. It was not a valid contract. There is no evidence whatsoever that the Lease With Option to Purchase was breached."

Plaintiffs resist this motion because the trial evidence shows that Defendant Bank's motion to dismiss Plaintiffs' claim for breach of contract is without merit.

(a) Consideration: Under the evidence presented at trial, the Loan Agreement and the Lease With Option to Purchase were two parts of the same transaction. Neither the Loan Agreement nor the Lease With Option to Purchase have a merger clause. Both documents were signed by the Bank and the Longs on the same day, December 5, 1996. The Loan Agreement

recites that the Bank has received the deed to the farmland and the house, sets out the credit given by the Bank for the deeds on the obligations of the Longs to the Bank, sets out the $70,000 operating loan and the $37,500 loan to buy 110 calves, and recites that the Bank will enter into a lease purchase option with Longs on the farmland "under a separate agreement attached hereto." The Loan Agreement specifically refers to the Lease With Option to Purchase as "attached" to the Loan Agreement. Clearly the two documents were two parts of the same transaction. Thus, the Court must examine both documents to determine if the performance of promises made within one agreement should be assessed by the promises referred to in the other.

The Bank drafted both documents. At all material times the Bank was represented by a lawyer, and the Longs were not. Where an ambiguity exists in a contract, it should be interpreted more strongly against the one who drafted the contract (the Bank) and caused the uncertainty to exist. Delzer Const. Co. v. S.D. State Bd., 275 N.W.2d 352, 357 (S.D. 1979).

It is clear that the transfer of the deed to the farmland and the house, the Loan Agreement, and the Lease With Option to Purchase were all part of the same transaction as shown by the trial evidence. Bank Officer, Charles Simon, wrote a letter to Ronnie Long dated April 26, 1996, (Plfs. Exh. 4) where he discussed the Bank foreclosing on the farmland and the house in Timber Lake. Following the meeting in late October 1996, Charles Simon wrote a summary of the proposed agreement between Longs and the Bank dated November 1, 1996 (Plfs. Exh. 5a). After the agreement was entered into on December 5, 1996, Bank officer, James Nielsen, summarized the agreement in his letter to Russell McClure dated December 12, 1996 (Plfs. Exh. 8). In addition, Charles Simon again summarized the agreement in a letter to Dennis Huber dated January 16, 1997 (Plfs. Exh. 10).

The evidence shows that the elements of the agreement were: (1) the Bank receives the farmland and the house by deed in lieu of foreclosure from the estate of Kenneth Long, and the Bank would credit $468,000 for the land and $10,000 for the house to reduce Longs' obligations to the Bank; (2) the remaining obligation of the Longs to the Bank of $343,875 guaranteed by the BIA would be amortized out over a 20 year term; (3) Longs would receive a BIA guaranteed loan from the Bank of $70,000 for annual operating expenses; (4) Longs would receive a direct loan from the Bank without BIA guarantee for $53,500, with a portion used to reduce bank debt and the balance of $37,500 used to buy additional cattle to increase their income; (5) Longs would lease the farmland from the Bank for two years, and the Bank would receive Longs' annual CRP payment of $44,198 each year for two years as rent, and Longs would have an option to purchase the farmland at the end of two years for a cash price of $468,000 minus the net sales price of the house in excess of $10,000 which was approximately $17,000, and minus the two CRP payments of $88,396, plus interest accrued at 8.5% on the balance over the two year period.

The agreement reached at the meeting in late October 1996, and summarized in the letters referred to above, was formalized by the Bank into two documents entitled Loan Agreement (Plfs. Exh. 6) and Lease With Option to Purchase (Plfs. Exh. 7). Both documents were signed on the same date, December 5, 1996. The Bank and the Longs signed both the Loan Agreement and the Lease With Option to Purchase. The final deed to the farmland was dated December 10, 1996, notarized on December 23, 1996, and was filed in the office of the Register of Deeds of Dewey County on December 27, 1996 (Plfs. Exh. 9).

Charles Simon testified on the cross-examination that although the deed, the Loan Agreement, and the Lease With Option to Purchase were separate documents, they were all

elements of a single agreement. The deed to the Bank for the farmland and the house are recited in the Loan Agreement (Plfs. Exh. 6), the BIA guaranteed annual operating loan of $70,000 and the direct loan of $53,500 with a portion used to reduce bank debt and the balance of $37,500 used to buy 110 calves are recited in the Loan Agreement, and the Loan Agreement states that the Bank will enter into a lease/purchase option on the farmland under a separate agreement attached hereto (Plfs. Exh. 6). In view of this evidence, the Bank cannot now argue that the Loan Agreement was a separate transaction from the Lease With Option to Purchase.

The consideration received by the Bank under the agreement is recited in the Loan Agreement and the Lease With Option to Purchase. As partial consideration the Bank received the deed to the farmland and the house, which according to the Loan Agreement, was worth $478,000. The Bank received the deed to the farmland and the house without having to foreclose on such real estate. Under the agreement the Bank avoided the uncertainty of foreclosure litigation and the legal expense of foreclosure, and avoided the one-year redemptive period under South Dakota law on agricultural real estate. During the period of redemption after foreclosure, the Longs would receive and retain their CRP payments and all income from the land. However, under the agreement, the Longs gave up their foreclosure rights and redemptive rights. As additional consideration, the Bank immediately received the deed to the house and sold it for $30,000, and the Bank received net cash of $26,478 (Plfs. Exh. 15). The Bank also received cash of $88,396 from Plaintiffs' two CRP payments (Plfs. Exh. 7). The Bank acknowledged such valuable consideration in the Loan Agreement, "the Bank of Hoven has received a deed to the property" (Plfs. Exh. 6), and in the Loan Agreement, "the lessor in consideration of the rents and covenants hereinafter mentioned." (Plfs. Exh. 7).

Plaintiffs submit there was sufficient evidence presented at trial to show that the Bank received and acknowledged good and valuable consideration for the agreement between the Bank and the Longs.

(b) Breach of Agreement: There was sufficient evidence presented at trial for the jury to conclude that the Bank breached the agreement. Charles Simon testified in cross-examination that it was the Bank's obligation under the Loan Agreement to request a 90% guarantee on the $70,000 annual operating note, and loan $70,000 to the Plaintiffs to pay operating expenses. The cash flow approved by everyone at the meeting in late October 1996, (Plfs. Exh. 8a) shows that the Longs needed $40,000 of the operating loan in November to pay expenses to get prepared for winter. Ronnie Long testified that he told everyone at the meeting that he needed to move his hay 20 miles from the hay fields where it was baled that summer to his cattle, which were already located in winter quarters in his Indian range unit. He testified that his winter range unit has deep wooded ravines that protect the cattle from winter winds and storms. He testified that he had some hay there in hay corrals, but for his herd of over 600 head, he needed to move a lot more hay to provide winter feed for the cattle. The agreements were signed December 5, 1996, but Charles Simon admitted in cross-examination that the Bank never did make the $70,000 operating loan to the Plaintiffs in December 1996, or at any time in 1997 or 1998.

The only request that the Bank made to the BIA to request a 90% BIA guarantee of the $70,000 operating loan is the first sentence of the last paragraph of James Nielsen's letter to Russell McClure dated December 12, 1996 (Plfs. Exh. 8). The BIA responded by requesting a more complete application (Plfs. Exh. 11). Charles Simon admitted in cross-examination that the Bank never submitted a more complete application.

In addition, Charles Simon admitted on cross-examination that the Bank had an obligation to make a direct loan of $37,500 to the Longs to buy cattle. He admitted the Bank never did make the direct loan of $37,500 to the Longs to buy 110 calves to increase their income so they could buy their land back. Charles Simon admitted that this loan did not require a BIA guarantee or a request to the BIA.

Longs submit there was sufficient evidence presented at trial for the jury to decide that the Bank breached the Loan Agreement (Plfs. Exh. 6), and that such breach prevented Plaintiffs from performing under the Lease With Option to Purchase (Plfs. Exh. 7).

(c) Breach of Implied Covenant of Good Faith: It is clear from the trial evidence that a binding contract existed between Plaintiffs and the Bank. Every contract contains an implied covenant of good faith and fair dealing which prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract. Restatement (Second) of Contracts, 205 (1981). {fn7}(1) 3 A. Corbin, Contracts 541, at 97 (1960); 5 S. Williston, A. Treatise on the Law of Contracts 670, at 159 (3rd Ed. 1961). A majority of American jurisdictions recognize a duty to perform a contract in good faith. See Burton, Breach of Contract And the Common Law Duty to Perform in Good Faith, 94 Harvard L. Rev. 369 (1980). The concept is written into the Uniform Commercial Code (U.C.C.) 1-203 which is set forth in SDCL 57A-1-203:

> Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

"Good faith" is defined as "honesty in fact in the conduct or transaction concerned." SDCL 57A-1-201(19).

The application of this implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by his lack of good faith, limited or

completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties. Summers, "Good Faith" In General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195 (1968); Burton, Breach of Contract And the Common Law Duty To Perform In Good Faith, supra; e.g., Shaw v. E. I. Dupont DeNemours and Company, 126 Vt. 206, 226 A.2d 903 (1967). Garrett v. BankWest, 459 N.W.2d 833 (S.D. 1990).

Good faith is derived from the transaction and conduct of the parties. Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Restatement (Second) of Contracts, supra, Comment a. But good faith is not a limitless duty or obligation. The implied obligation "must arise from the language used or it must be indispensable to effectuate the intention of the parties." Sessions, Inc. v. Morton, 491 F.2d 854, 857 (9th Cir. 1974).

Considered as a whole, this Court instructed the jury correctly on the issue of good faith. Instruction 11 is South Dakota Pattern Jury Instruction 47-17, and Instruction 11a is South Dakota Pattern Jury Instruction 47-18. The Bank's criticism of these instructions has no merit considering the citations of authority supporting these standard pattern jury instructions. There was sufficient evidence presented at trial for the jury to conclude that the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA for the $70,000 operating loan, or when it failed to make the $37,500 direct bank loan to purchase 110 calves which did not require BIA guarantee or approval. The Bank also acted in bad faith when it failed to make an emergency loan to Plaintiffs to feed and care for the cattle pending BIA approval of the 90% guarantee of the $70,000 operating loan. Ronnie Long testified that just before

Christmas of 1996, he met with the CRST–BIA liaison officer, John Lemke, and requested help to obtain part of the $70,000 operating loan that the Bank promised. John Lemke told Ronnie Long that the Bank could make an immediate emergency loan protective advance under 25 CFR 103, in an amount up to 10% of the existing BIA guarantee of $428,000, which would be a protective advance emergency loan of $42,800, and such emergency loan would be automatically guaranteed by the BIA. John Lemke called the Bank and informed the Bank that the loan could be made without any additional BIA approval. Charles Simon admitted on cross-examination that the Bank knew that the Longs needed to move their hay from the hay fields 20 miles to where the cattle were located on the winter range unit, and that the Longs needed money to move the hay before winter set in. However, the Bank did not make a protective advance loan to feed and care for the cattle as authorized by 25 CFR 103.

The Bank argues that it could not make the $70,000 operating loan that it promised to make to the Longs because the BIA did not agree to increase the existing 84% guarantee to a 90% guarantee. However, the Bank made a loan of $40,595 to the Longs in April of 1997 under the 84% guarantee. The problem was it was too late then to move the hay to the cattle and save the cattle in the winter storms of mid-January 1997. The cash flow required an operating loan of $40,000 in November of 1996 to prepare the operation for winter. Why didn't the Bank loan the Longs $40,595 on December 5, 1996, when the agreements were signed instead of April when it was too late?

Longs submit there was sufficient evidence presented at trial for the jury to conclude that the bank did not act in good faith in connection with the agreements entered into with the Longs, and that such lack of good faith prevented the Longs from receiving the agreed benefits of the contract.

The Bank argues that the $30,000 of Longs' income that was released to them in September 1996, or the $23,968 loaned in December 1996, or the $40,595 loaned in April 1997, somehow satisfied the Bank's obligation to loan the Longs $70,000 for operating money under the Loan Agreement. However, Charles Simon admitted on cross-examination that these monies were not part of the Bank's obligation under the Loan Agreement loan to the Longs $70,000 for operating expenses to feed and care for their cattle during the winter of 1996-1997. Ronnie Long testified without contradiction that the $30,000 of his income released to him in September 1996, was three months before the contracts were signed in December 1996, and was not part of the $70,000 operating loan promised by the Bank, and such amount was approved by the Bank for payment only on approved designated old bills, some of which were quite old and threatening to sue for judgment. Similarly, the $23,968 loan in December 1996, was for items specifically approved by the Bank and was not part of the $70,000 operating loan or for the purpose for moving hay to the cattle or for winter cattle feed or care (Plfs. Exh. 22). Ronnie Long testified that the $40,595 in April 1997, was way too late to feed or care for the cattle as the winter was over, and part of this money was to repay the $23,968 loaned in December (Plfs. Exh. 22).

The trial evidence is clear: the Bank breached the implied covenant of good faith by failing to submit a complete application to the BIA for an increase in the percentage of the existing BIA guarantee from 84% to 90% for the $70,000 operating loan, for not making a timely emergency protective advance loan to feed and care for the cattle, and for not making the direct loan of $37,500 for the Longs to purchase an additional 110 head of calves to increase their income to enable them to buy their land back from the Bank. The breach of the Loan Agreement, and the breach of the implied covenant of good faith and fair dealing by the Bank

prevented the Longs from receiving the agreed benefits of the agreements and prevented the Longs from performing under the Lease With Option to Purchase.

(d) Discrimination: Defendant Bank alleges that this CRST Tribal Court has no jurisdiction to decide Plaintiffs' claim that the Bank, in selling the Longs' land, unfairly discriminated on the basis of race against the Longs, who are enrolled Indian members of the CRST, in favor of Psickas and Maciejewskis, who are not enrolled members of the CRST (Plfs. Exh. 26). Plaintiffs object to the Bank attempting to raise a jurisdiction issue post trial. At the pretrial hearing on the Bank's Motion for Summary Judgment, the Court asked Bank counsel whether or not the bank was contesting jurisdiction of the CRST Tribal Court as to any issue in this case. Counsel for the Bank responded to the Court that this Court does have jurisdiction in this matter. Again during the trial, the Court asked Bank's counsel the same question, and Bank's counsel responded that the Bank started a suit in state court, but when the Longs filed their action in this Court, the Bank decided to submit to the jurisdiction of this Court. Therefore, the Bank should be precluded from now alleging that this Court does not have jurisdiction over the discrimination issue or over any other issue raised by the pleadings or the trial evidence in this case.

The Bank cites as authority for its lack of jurisdiction allegation the United States Supreme Court case, Nevada v. Hicks, 121 S. Ct. 2304 (2001). However, the Hicks case does not apply in this case. In Hicks, the United States Supreme Court held that a Nevada tribal court did not have jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law while off the reservation. 121 S. Ct. at 2309-13. Applying the familiar principles of Montana v. United States, 450 U.S. 544 (1981), the Supreme Court determined, among other things, that:

(1) tribal authority to regulate state officers executing process relating to state offenses that occurred off the reservation was not essential to tribal self-government or internal relations – to "the right to make laws and be ruled by them"; and

(2) Congress did not strip states of their inherent jurisdiction on reservations with regard to off-reservation violations of state criminal laws.

Id. at 2313. The Court's holding was "limited to the question of tribal-court jurisdiction over state officers enforcing state law," and explicitly left "open the question of tribal-court jurisdiction over nonmember defendants in general." Id. at 2309 n.2; see also, id. at 2319 (Souter, J. concurring); id. at 2324 (Ginsburg, J. concurring).

Inasmuch as Hicks is factually and legally distinguishable from the case at hand, the Hicks case does not apply, much less govern, the jurisdiction of this Court over the issue of race discrimination presented in this case.

In Sage v. Sicangu Oyate Ho, Inc., 473 N.W.2d 480 (S.D. 1991), the South Dakota Supreme Court held:

> Assertions of state subject matter jurisdiction over contracts between reservation Indians and outsiders have generally been found either to infringe tribal sovereignty or to be preempted by federal law. "It is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands 'presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.'" White Mountain Apache Tribe v. Smith Plumbing Co., 856 F2d 1301, 1305 (9th Cir. 1988) (quoting Iowa Mut. Ins. Co. v. LaPlante, 480 US 9, 18, 107 SCt 971, 977 94 LEd2d 10 (1987)) (citations omitted). "'A tribe may regulate … the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.'" Brendale v. Confederated Yakima Indian Nation, 492 US 408, 428, 109 SCt 2294, 3007, 106 LEd2d 343, US reh'g denied, 492 US 937, 110 SCt 22, 106 LEd2d 635 (1989) (quoting Montana v. United States, 450 US 544, 565, 101 SCt 1245, 1258, 67 LEd2d 493 (1981)). See also Babbitt Ford, Inc. v. Navajo

Indian Tribe, 710 F2d 587, 592 (9th Cir. 1983), cert. denied, 466 US 926, 104 SCt 1707, 80 LEd2d 180 (1984).

Montana v. United States, 450 U.S. 544 (1981) is the seminal case concerning civil jurisdiction of this Court over non-Indians. In Montana, the Supreme Court set forth a two-prong test to determine whether this Court maintains civil jurisdiction over non-Indians. It is the first prong of this test that decides jurisdiction here.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, **even on non-Indian fee lands.** A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. (Emphasis added.) Id. at 565.

As stated above, the Bank submitted itself to the jurisdiction of this Court on all issues presented in this case. The Bank benefited from its dealings with the Longs because they were eligible for BIA guarantees that would not be available to the Bank had the Longs not had the status of enrolled Indians in accordance with BIA regulations. The land, cattle, hay, and machinery of the Longs, which the Bank took as collateral for the loans to the Longs, were all located on the CRST Reservation. Negotiations concerning the agreements occurred on the Longs' land and at the CRST planning offices. The Bank had more than minimum contacts with the CRST Reservation and its enrolled members, the Longs, in forming the agreements that are at issue in this case. Certainly the Cheyenne River Sioux Tribe, and the CRST Court, has jurisdiction over the issues in this case, and has jurisdiction over the Bank that has entered into consensual relationships with CRST members through commercial dealings, contracts, leases or other arrangements. Montana at 565.

In this case, this CRST Tribal Court has jurisdiction over the issue of whether the Bank has discriminated on the basis of race against the Longs concerning the sale of the Longs'

land located within the CRST Indian Reservation to non-Indians. It is of utmost importance to the tribe that banks doing business and benefiting from business on the CRST Reservation with members, do not discriminate unfairly on the basis of race favoring non-member customers over member customers. That is exactly what happened in this case.

Charles Simon, in his letter to Ronnie Long (Plfs. Exh. 4) stated that he had been talking to Ronnie Long about the Bank foreclosing on the farmland and the house. He states that the house would be sold and the farmland "would be deeded back and sold to you on a contract." He then states that the Bank changed its mind after talking to its legal counsel who pointed out difficulties in selling the land back to the Longs on a contract for deed. "This is because of possible jurisdictional problems if the Bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." The Bank refused to sell the Longs' land back to them on a contract for deed solely on the basis of race, because Longs are Indians enrolled in the CRST, and Long Family Land and Cattle Company, Inc. is owned by CRST enrolled tribal members, Ronnie and Lila Long. The Bank required the Longs, solely on the basis of their race as Indians, to pay for their land in cash, a lump-sum payment of $468,000 at the end of the two-year lease.

However, the Bank sold the land to the Maciejewskis, who are non-Indians, on a bank financed contract for deed with ten years to pay for the land, and with the annual payments of approximately $24,000 which were paid for by the government FSA farm program payments of $24,000 per year on the land (Plfs. Exh. 25). If the Longs had been offered the same financing package that the Bank gave to the non-Indians, the Longs would have had no problem buying back their land from the Bank. The Longs could have continued the CRP contracts and received annual CRP payments of $44,198 a year, which would have made the annual contract

for deed payments to the Bank, or the Longs could have farmed the land and received the FSA payments of $24,000 a year plus the crops, which would have made the contract for deed payments.

In addition, the Bank sold 320 acres of the Longs' land to the Psickas for $155 per acre, but the bank charged the Longs $210 per acre to buy back the same land from the Bank. Ronnie Long testified without contradiction that if the Longs had been given the same financing package that the Bank gave to their non-Indian customers, the Longs would have had no problem buying their land back from the Bank. The Longs were unfairly treated differently from the non-Indian customers of the Bank solely on their status as Indians (Plfs. Exh. 4).

The Bank now argues that the Maciejewskis had a better financial standing and balance sheet than the Longs did. If that was the case, why didn't the Bank state that in the letter to Ronnie Long (Plfs. Exh. 4)? The truth is stated in the letter. The Bank unfairly discriminated against the Longs solely on the basis of race and their status as members of the Cheyenne River Sioux Tribe. The Bank cannot now try to put a spin on the facts and make an argument more favorable to the Bank than the letter the Bank sent to Ronnie Long which is the trial evidence (Plfs. Exh. 4).

Longs submit there was sufficient evidence presented at trial for the jury to conclude that the Bank intentionally discriminated against the Longs based solely on their status as Indians or tribal members.

(e) Damages: The Bank complains that the jury's verdict regarding damages shows no relation to the actual evidence which was produced at trial. On the contrary, Ronnie Long testified without contradiction that the damages the Longs suffered as a result of the breach of agreement by the Bank totaled $1,236,792. His testimony concerning his calculation of

damages is quite detailed (Plfs. Exh. 23). The loss of the cows that would have produced calves in the future is not speculation. The Longs have been producing calf crops from their cow herd on the same land for decades.

The Bank argues that even if the Bank had made the $70,000 operating loan and the loan for $37,500 to the Longs to buy cattle, the Longs' financial condition would not have been good enough in two years to buy their land back. This argument flies in the face of Bank officer James Nielsen's testimony. His letter to Russell McClure dated December 12, 1996, states that with the restructuring agreements the Bank feels that the Longs' operation will cash flow even during the low cattle price cycle and begin to build the financial structure of the ranching operation. He enclosed the financial statements and cash flows to support this positive position (Plfs. Exh. 8).

The Bank argues that it was not the Bank's breach of the agreements, or lack of good faith in performing the agreements, that caused the Longs to suffer damages. Rather, it was the weather. This was the Bank's argument to the jury. The jury probably bought some of this argument because the jury awarded the Longs only about 62% of the damages they requested. This is the providence of the jury, however, and is not grounds for support of the Bank's motion for judgment notwithstanding the verdict.

II. New Trial: The Bank argues that this Court should grant a new trial because the Court allowed the jury to hear evidence on the Longs' issues of race based discrimination. The Bank argues that the evidence of race based discrimination made it "virtually impossible for the jury to return a fair and impartial verdict based on the evidence and the law." On the contrary, the jury was properly instructed by the Court according to the law, and there is absolutely no indication that the jury did not consider all of the evidence and render a fair and impartial verdict based on

the evidence and the law. We all must be responsible for our actions. The Bank wrote the letter stating that the Longs could not have a favorable contract for deed financing package solely because of their status as Indians and enrolled members of the CRST. The Bank wrote that letter, and it must now be held responsible for taking that position. The letter states the truth of the discrimination issue. The evidence shows that the Bank gave substantially more favorable financing arrangements to its non-Indian customers. This evidence of the Bank's discrimination is clear to non-tribal members as well as to tribal members.

III. Conclusion: Based on the trial evidence, the rulings of the Court, the instructions to the jury, and the jury verdict, the Longs respectfully submit that the trial was conducted in a fair and impartial manner and according to applicable law. Therefore, the Court should deny the Bank's motion for judgment notwithstanding the verdict and for new trial.

Respectfully submitted this 31st day of December, 2002.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

BY: James P. Hurley

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served copies of the Plaintiffs' Response in Resistance to Defendant's Motion for Judgment Notwithstanding the Verdict and New Trial upon the persons herein next designated, all on the date below shown, by depositing copies thereof in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

Mr. David A. Von Wald
Attorney at Law
P.O. Box 468
Hoven, SD 57450

Mr. Kenneth E. Jasper
Attorney at Law
P.O. Box 2093
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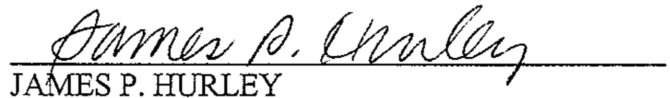
which addresses are the last addresses of the addressees known to the subscriber.

Dated this 31st day of December, 2002.



JAMES P. HURLEY