LIST OF SMSC TRIAL COURT OPINIONS

Index Vol. 1
1988-1994

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

SCOTT COUNTY STATE OF MINNESOTA

Patricia Hove, Chairman,
SMSC Enrollment
Committee, et al.,

Plaintiffs,

v. Court File No. 001-88

Amy Stade, et al.

Defendants.

AND

Amy E. Stade, et al.,

Plaintiffs,

v. Court File No. 002-88

The Shakopee Mdewakanton
Sioux Community, et al.

Defendants.

CLERK'S NOTICE

Note that there is an error in the date of the *Order* and *Opinion and Order of Judge John E. Jacobson on His Disqualification* signed June 11, 1988. The Order and Opinion were signed and issued on July 11, 1988.

August 5, 2003

Jeanne A. Krieger
Clerk of Courts

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

Patricia Hove, Chairman, SMCS Enrollment Committee, et al., Plaintiffs,	)	
vs.	)	No. 001-88
Amy Stade, et al., Defendants.	)	
and	)	
Amy E. Stade, et al., Plaintiffs,	)	
vs.	)	No. 002-88
The Shakopee Mdewakanton Sioux Community, et al., Defendants.	)	

ORDER

Based upon the Memorandum Opinion accompanying this Order, upon the matters submitted to the Court during the hearing on this matter, and on all materials in the files herein, it is hereby ordered:

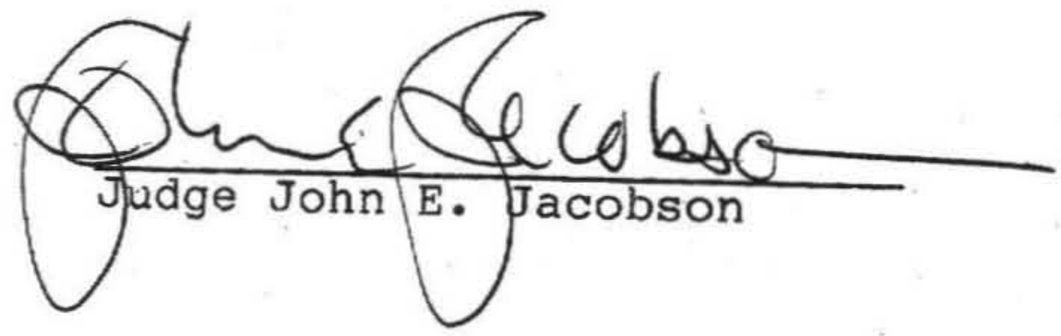
1. That Judge John E. Jacobson will take no part in this Court's decision, in either of these cases, on issues relating to the effectiveness of, or the effect of, the February 13, 1988 Ordinance which created or purported to create this Court.

2. That Judge John E. Jacobson will take part in this Court's decision on the Plaintiff's Motion for Preliminary Injunction in Hove v. Stade, No. 001-88 (Shak. Comm. Ct.).

3. That all questions concerning the appropriateness of

the participation of Judge John E. Jacobson in deciding the matters at issue in Stade v. Prescott shall be referred to the Chief Judge of the Court for decision, pursuant to Rule 36(d) of the Court.

June 11, 1988



Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

Patricia Hove, Chairman, SMCS Enrollment Committee, et al., Plaintiffs,	)	
vs.	)	No. 001-88
Amy Stade, et al., Defendants.	)	
and	)	
Amy E. Stade, et al., Plaintiffs,	)	
vs.	)	No. 002-88
The Shakopee Mdewakanton Sioux Community, et al., Defendants.	)	

OPINION AND ORDER OF JUDGE JOHN E. JACOBSON
ON HIS DISQUALIFICATION

Factual Background

In Hove v. Stade, the Defendants on June 20, 1988 filed a Motion seeking the disqualification of the undersigned in these proceedings. The Notice of Motion purported to set the Motion for hearing on June 21, 1988, which proceeding would not be in accordance with the Rules of Civil Procedure adopted by this Court; but by agreement of the parties, the Motion was heard, together with other matters, during a hearing on June 27, 1988.

The Motion was not accompanied by a separate Memorandum, but in the body of the Motion itself a number of arguments were raised in support of the complete disqualification of the undersigned from all participation in these proceedings. The

Movants correctly noted that at the time of the filing of their Motion to Disqualify, this Court had adopted no rules governing or guiding Judges in considering whether recusal, or disqualification, would be appropriate in any given proceeding. Therefore, the Movants argued by analogy from the Minnesota Code of Judicial Conduct ("the Minnesota Code"). Subsequently, on July 8, 1988, the Court adopted an amendment to its Rules of Civil Procedure, incorporating a new Rule 36, which governs the decisions of the Judges of the Court in these circumstances. (For the information of the parties, a copy of the amendment is attached hereto.) The decision herein is rendered under the provisions of Rule 36, which in pertinent part is similar to the provisions of the Minnesota Code relied upon by the Movants.

The Motion to Disqualify was made only in Hove v. Stade, No. 001-88 (Shak. Comm. Ct.); but the discussion which accompanies the Motion, and the grounds which are urged for disqualification, appear to be applicable to the issues in Stade v. Shakopee Mdewakanton Sioux Community, No. 002-88 (Shak. Comm. Ct.), as well. Accordingly, the Motion will be considered as if it were made in both cases.

Under Rule 36(a), the primary decision-maker, in the first instance, where disqualification is urged, is the affected judge. Accordingly, at this stage of the proceedings, I am the appropriate decision-maker.

Movants make several arguments in support of their contention that I should be disqualified in these matters. First, they note that they have asserted as a defense, in Hove v. Stade, the contention that this Court was not properly created, and therefore, effectively, does not exist. They assert that I have personal knowledge of the facts surrounding the creation (or the attempt to create) the Court, and they contend that I have expressed an opinion on the issue itself, in an affidavit which I executed on February 16, 1988, which is attached to their Motion. In the affidavit, I discussed the events, as I saw them, of the February 13, 1988 meeting of the

General Council of the Community at which the ordinance purporting to create the Court ("the Court Ordinance") was passed.

After the Movants filed their motion, the Defendants in Stade v. Shakopee Mdewakanton Sioux Community filed a Motion to Dismiss in that action, based in part upon their contention that the Court Ordinance, although valid and effective to create the Court, nonetheless did not have the effect of waiving the sovereign immunity from suit which the Community possesses. None of the parties have discussed the whether I should participate in the Court's decision on that issue; but clearly, the issue concerning whether the Court Ordinance is valid, and the issue of whether, if valid, it gives the Court power to hear cases where the government of the Community is a Defendant, are related. Accordingly, I will on my own motion consider whether I should disqualify myself to decide the Motion to Dismiss, based on my participation in the Februrary 13, 1988 meeting.

The second ground for disqualification urged by the Movants is that for a number of years I have served as one of the attorneys for the Community, and that during 1988 I was paid what they term "signicant attorney's fees" for past services by the present leadership of the Community. They contend that this prior relationship should act as a disqualifier because, they assert, I must have a bias, or at least the appearance of a bias, toward the present leadership of the Community. They also argue that I "...must have been privy to documents and information which will influence [me] that is not part of the record before the Court and will not become part of the record." (Motion, at †5). And they note that, by its terms, a contract for legal services between the Community and me extended from February 13, 1988 to February 12, 1989.

The Movants argue that the foregoing factors should be considered in light of the provisions of Canons 2 and 3 of the Minnesota Code. Canon 2 of the Minnesota Code in broad terms

requires a judge to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Canon 3 identifies specific instances where a judge should recuse himself, including instances where he has a personal bias concerning a party, or personal knowledge of the facts involved in a proceeding; and also including instances where he has served as a lawyer in the matter or controversy. The pertinent provisions of the Rules of this Court are Rule 36(a) and Rules 36(b)(1) and (2), which provide as follows:

> (a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned.
>
> (b) A judge of the Court of the Shakopee Mdewakanton Sioux Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:
>
> (1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in proviate practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it...

Discussion

In my view, the questions concerning my recusal essentially are two. The first concerns the effect of my participation in the February 13 meeting, and the second concerns my long-standing involvement with the Community.

1. Effect of Participation in February 13, 1988 Meeting.

I find the arguments forwarded by the Movants with respect to my participation in the meeting of the Community's February 13, 1988 General Council meeting, together with other facts not discussed by the Movants to have compelling force, which obliges me to recuse myself from considering whether the Court Ordinance was validly passed, and from considering whether it

has the effect of eliminating the Community's immunity from suit.

I did not draft the Court Ordinance; but, in addition to participating in the February 13 meeting of the Community's General Council, I did review and offer comment upon the Ordinance, prior to the meeting, in conversations with the draftsman of the Ordinance, Mr. James E. Townsend. And, of course, Mr. Townsned is serving as counsel for the Community in these cases.

(I must note that I differ with the Movant's view of the effect of my February 16, 1988 affidavit: I do not understand the affidavit to express a view as to the validity or effect of the Ordinance. But the fact remaines that I did participate in the February 13 meeting, at the request of Mr. Townsend, who asked me to provide the General Council with my views of the effect of the Court Ordinance, stating that there was a substantial group of persons who might disregard his own commentary.)

It is not plain from the materials supplied by the Movants, but it appears possible that at trial in these matters the Movants may wish to submit evidence concerning the events of the February 13, 1988 General Council meeting, and concerning statements which I made during that meeting. Under these circumstances, I believe that my impartiality on these matters could reasonably be quesioned, and I therefore recuse myself as to them.

2. <u>Participation as an attorney, and receipt of fees</u>.

Under the terms of Rule 36(e), when matters are being heard by a three judge panel of the Court, as these matters are, it is possible for a judge to be disqualified to hear one portion of a matter before the Court, but still to participate in the Court's consideration of other unrelated portions of the same matter. Accordingly, my decision with respect to the effects of the Court Ordinance does not automatically answer the question of whether I should participate at all in these matters, and I am obliged to consider the Movant's other

arguments concerning disqualification.

The terms of the attorney contract which I executed with the Community contemplated a term extending to February, 1989; but when I decided to accept this Court's offer of a judgeship, I notified the Community that I was electing to terminate my participation under that contract. Accordingly, the question of the appropriateness of my involvement in the issues in these cases concerns my past involvement as an attorney for the Community, and my having received fees in the past for those services.

I consider that this is a much more difficult question than that posed by the issue of the Court Ordinance's effect. The common law gives judges two equally powerful obligations: if it is inappropriate for a judge to serve on a case, then the judge must recuse himself or herself; but if it is not inappropriate to serve, then he or she must serve. See generally, Wolfson v. Palmieri, 396 F.2d 121 (2nd Cir., 1968).

And the mere fact that a judge has served as an attorney for a party, or for a government, is not in and of itself sufficient under Rule 36(b) (or under common standards of judicial conduct--see National Auto Brokers Corporation v. General Motors Corporation, 572 F.2d 953 (2nd Cir. 1978), cert. denied 439 U.S. 1072 (1979) to permit the judge's recusal when that party or that government later appears before the court.

Nor is the possibility that a judge may have certain factual knowledge about the litigants a per se disqualifier, under Rule 36(b) or in general jurisprudence. See Union Independiente De Empleados De Servicios Legales v. Puerto Rico Legal Services, Inc., 550 F. Supp. 1109 (D.P.R. 1982).

Rather, the crucial requirement is that a judge not have participated, or been associated with, a matter actually in controversy before him. So, in considering the effect which my participation as an attorney for the Community has in these matters, I must engage in a particularized analysis with respect to the various issues which appear in these two already convoluted cases. I will do so serially:

a. Motion for preliminary relief in Hove v. Stade.

The Plaintiffs in Hove v. Stade seek a preliminary injunction against various persons, to keep them from blocking a road. (Earlier, they apparently sought relief concerning a meeting that was anticipated; but that matter was not pursued during the June 27, 1988 hearing before this Court). I am aware of no connection which my earlier involvement with the Community might have with this issue, which arose after I terminated my service for the Community, and of which I have no knowledge whatever. Therefore, I will not recuse myself as to it.

b. Motion for preliminary relief in Stade v. Shakopee Mdewakanton Sioux Community.

The Plaintiffs in Stade v. Shakopee Mdewakanton Sioux Community seek five separate forms of preliminary relief: (1) They seek an order protecting the voting rights of Amy Stade, Tracy Rath, Scott Campbell, Anthony Brewer, and Anita Barrientez. (2) They seek money payments from the Community's "per capita" payments program for Amy Stade, her minor children, Scott Campbell, Anthony Brewer, Susan Totenhagen and her minor children, Anita Barrientez and her minor children, Tracy Wisnewski and her minor children, Joseph Brewer and his minor chidren, and Paul Enyart. (3) They seek to prohibit the "nullification" of land assignments made to Anita Barrientez and Paul Enyart. (4) They seek the restoration of jobs formerly held by Tracy Rath, Terry Rath, and Cheri Crooks Bathel. (5) And they seek the restoration of payments amounting to 3% of the revenues of the Community's bingo hall to Norman Crooks.

Obviously, the matters which the Court must hear to decide these claims are likely to be extremely diverse. From the materials presented by the Movants, and the materials I am aware of, I do not see a reason now why I should recuse myself as to any of these issues--that is, I am not aware that I have had any direct involvement in the situations which are involved in any of these matters. However, I take very seriously my

obligation to maintain not only the Court's actual impartiality, but also its appearance of impartiality. I therefore am electing to refer the question of the propriety of my participation in these matters to the Chief Judge, under the provisions of Rule 36 (d).

Let an Order be entered accordingly.

June 11, 1988

Judge John E. Jacobson

filed
7/13/88

JUDICIAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Patricia Hove, et al. and
The Shakopee Mdewakanton Sioux
Community,

Plaintiffs,

vs. ORDER
NO. 001-88

Amy Stade, et al.,

Defendants.

The above referenced matter was heard before the court sitting en banc on June 27, 1988 at William Mitchell College of Law in St. Paul, Minnesota. The Plaintiffs appeared by their counsel, James E. Townsend, 701 Fourth Aveneue South, Minneapolis, MN 55415. The Defendants appeared by their counsel, Lance W. Riley, Edina Executive Plaza, Suite 308, 5200 Willson Road, Edina, MN 55424. The matter was brought on by Plaintiffs seeking a preliminary injunction directing Defendants to:

1. a. refrain from obstructing or impeding the normal flow of vehicular or pedestrian traffic along the right of way leading from County Road 83 to the public building and parking lots of the Shakopee Mdewakanton Sioux Community Reservation;

b. refrain from harassing, intimidating or otherwise impeding the public from normal and free ingress and egress to the above mentioned public buildings and parking lots;

2. for costs, fees and disbursements and such other relief as the Court may deem just and appropriate.

Based upon the pleadings, exhibits, motions and memorandums of law filed and oral arguments, the Court makes the following

ORDER

The motion for a preliminary injunction sought by the plaintiffs is denied.

By The Court

Dated: July 12, 1988.

Kent P. Tupper
Chief Judge

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

Patricia Hove, Chairman, SMCS Enrollment Committee, et al., Plaintiffs, vs. Amy Stade, et al., Defendants.	No. 001-88
and	
Amy E. Stade, et al., Plaintiffs, vs. The Shakopee Mdewakanton Sioux Community, et al., Defendants.	No. 002-88

MEMORANDUM OPINION ON
MOTIONS FOR PRELIMINARY INJUNCTIONS

Before Chief Judge Kent P. Tupper, Judge Henry M. Buffalo, Jr., and Judge John E. Jacobson. (Judge Jacobson did not participate in section 2.a. of the Court's opinion).

On June 27, 1988, this Court heard argument on motions for preliminary injunctive relief, made under Rule 29 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community, in both of the above-captioned cases. On July 13, 1988, the Court denied the motion for preliminary relief in Hove v. Stade; and the Court granted in part and denied in part the motion for preliminary relief in Stade v. The Shakopee Mdewakanton Sioux Community. This Memorandum Opinion is filed in support of those decisions.

1. The motion for a preliminary injunction in Hove v. Stade.

In Hove v. Stade the Plaintiffs sought a preliminary injunction restraining the Defendants from interfering with or obstructing vehicular or pedestrian traffic on the right of way leading from Scott County Road 83 to the public bulidngs and parking lots on the reservation of the Shakopee Mdewakanton Sioux Community ("the Community"). The Plaintiffs further sought an order restraining the Defendants from harassing, intimidating, or otherwise impeding the public from the normal and free ingress and egress to and from the Community's public buildings. Finally, the Plaintiffs sought costs and fees from the Defendants.

After careful consideration, the Court denied the Plaintiff's motion in its entirety. The granting of the preliminary relief is discretionary, and should only occur in extraordinary circumstances where the Court is satisfied that irreparable injury will occur absent the relief:

> To warrant the granting of an injunction on the ground that irreparable injury is threatened, the injury contemplated must be real, not fancied; actual, not prospective; and threatened, not imagined.
>
> Association of Professional Engineering Personnel v. Radio Corporation of America, 183 F. Supp. 834, at 834 (D. Nev. 1960).

See generally, Wright and Miller, Federal Practice and Procedure, §§2942 and 2948.

Here, giving due weight to the evidence presented to the Court, the Court finds that one incident took place, on June 3, 1988, in which Scott County Road 83 was blocked for a short period of time. The incident has not been repeated, and there does not appear any significant likelihood that it will be repeated in the future.

The Court in no way intends to suggest that it considers

the June 3 incident trivial; and it specifically rejects Defendants' arguments that the obstruction of the free flow of traffic on the Community's reservation could be an appropriate exercise of First Amendment rights. But it appears that at the present time, the June 3 incident was isolated, and therefore the probability of irreparable injury, which would be requisite of preliminary relief, is lacking at this time.

2. The motion for a preliminary injunction in Stade v. The Shakopee Mdewakanton Sioux Community.

The Motion for preliminary relief in Stade v. The Shakopee Mdewakanton Sioux Community presents a factual and legal matrix far more complex than that involved in Hove v. Stade. The Plaintiffs variously allege, in support of their motion, that they are being denied a wide range of rights, based solely on their political views. The Plaintiffs claim that they wrongfully have been deprived of monies, of voting rights, of employment, and of land. (Indeed, the range of parties, issues, and facts presented by the case are so diverse that, in the view of the Court, the claims are misjoined. The Court will not dismiss the claims on these grounds, but at a pretrial conference which will be scheduled with all deliberate speed, the Court will seek a segmentation or separation of the parties and issues in the case, to permit orderly processing of the various claims).

a. This Court's jurisdiction.

Prior to dealing with the merits of the Plaintiffs' motion, the Court must deal with a jurisdictional matter. In this action the Community argues that it has not waived its immunity from suit, and therefore cannot be the subject of preliminary relief. But the Court has concluded that if it has jurisdiction then preliminary relief is appropriate here, as to a part of the Plaintiff's claims. So, the Court must decide what the probability is that the Community has submitted itself to the power of this Court.

The Defendants have exhaustively discussed the principles

of tribal sovereignty. The lengthy list of cases cited by Defendants hold either that Indian tribes have sovereign immunity from suits in Federal and State courts, absent a waiver of that immunity, or that those courts lack subject matter jurisdiction to decide certain matters involving Indian law.

The United States Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978), discussed tribal forums and the Indian Civil Rights Act of 1968 when it stated--

> ...Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the law which these forums are obligated to apply. Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians... [citations omitted].
>
> 436 U.S., at 65.

The cases cited by Defendants deal with claims of sovereign immunity by tribes and tribal officers in Federal and State court actions. It is clear that the Supreme Court and lower Federal courts have given great consideration to the desire of Congress not to intrude needlessly in tribal self-government, although the Supreme Court did caution tribes in Martinez--

> ...Congress retains authority expressly to authorize civil actions for injunctive and other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.
>
> Ibid, at 75.

This Court concludes that the Shakopee Mdewakanton Sioux Community was mindful of the need to have a tribal court to resolve intratribal disputes when it passed Resolution Number 02-13-88-01 and to provide a tribal forum to enforce the substantive provisions of the ICRA.

Yet the Defendants are asking this court to decide that Section II of Ordinance 02-13-88-01 is not a waiver of the

sovereign immunity of the General Council, Business Council, and the Officers and Committees of the Community.

But the plain reading of the ordinance, in Section II, states that this Court has original and exclusive jurisdiction to hear and decide all controversies arising out of the Shakopee Mdewakanton Sioux Community Constitution, its By-Laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its officers or the Committees of the Community pertaining to (1) membership, (2) the eligibility of persons to vote in the proceedings of the Shakopeee Mdewakanton Sioux Community or in the Community elections, (3) the procedures employed by the General Council, Business Council, the Committees of the Community or the officers of the Community in the performance of their duty. In addition, the Ordinance provides that the Tribal Court shall have jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et seq..

The Court is aware that a grant of jurisdiction to courts to hear certain types of civil causes of action is not in and of itself a waiver of sovereign immunity. For example, statutes which grant Federal courts Federal question jurisdiction and diversity jurisdiction are not in themselves waivers of the sovereign immunity of the United States or its officers, or for that matter of tribal sovereign immunity. But the fundamental provision of the Indian Civil Rights Act is that "No Indian tribe in exercising powers of self government shall...", and from that languange the Act proceeds to set forth various rights similar to those contained in the Bill of Rights to the United States Constitution. And Section II of the Ordinance Number 02-13-88-01 gives this Court the jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the ICRA. It would make very little sense to say that this Court has original and exclusive jurisdiction over violations of the ICRA, which only relates to actions by an Indian tribe and its officers, and to

then conclude that this was not a waiver of sovereign immunity.

The Court therefore decides that the language of Section II of Ordinance 02-13-88-01 is an explicit waiver of the sovereign immunity of the General Council, Business Council, and Officers and Committees of the Shakopee Mdewakanton Sioux Community, as to those areas of jurisdiction set forth in that Section.

The Court does not express any opinion at this time as to whether a money judgment can be enforced against the Community, its Councils, Committees, or Officers. This opinion only relates to the motions before the Court; and as to them, the Court finds that it has the jurisdiction to hear the pending case, and that the Community by Ordinance number 02-13-88-01 has waived its sovereign immunity for the categories of causes of action set forth in the second section of the Ordinance.

(Judge John E. Jacobson took no part in the Court's decision on this portion of the case.)

b. <u>The Claim of Norman M. Crooks for 3% of the net revenues of the Little Six Bingo Hall</u>.

The Plaintff Norman M. Crooks alleges that he is entitled to receive from the Community, on an ongoing basis, monies equal to three percent of the net revenues of the Community's commercial bingo enterprise. He has supplied the Court with a arbitration decision, resulting from litigation in the United States District Court for the District of Minnesota, affirming his right to these monies; and he alleges that the Community nonetheless has failed to pay him for a number of months.

The Community admits that Mr. Crooks has been denied the payments which the arbitration decision contemplated, but it alleges that the monies were rightfully withheld as an offset for monies which, it is alleged, Mr. Crooks owes the Community. However, the Community has not pleaded that it has a money judgment against Mr. Crooks, or even that it presently is seeking such a judgment; nor has it counterclaimed against Mr. Crooks in this action. Hence, the Community at this point is

merely stating a naked claim for an unliquidated sum.

Given the findings of the arbitrators, to the effect that Mr. Crooks is entitled to the three percent payments, the probability appears extremely high that Mr. Crooks will prevail with respect to his claim that he is entitled to those monies. And, as is noted below, although the mere denial of money by one party to another usually is not sufficient grounds for obtaining preliminary relief, in instances where the probability of success on the merits is quite high it may be appropriate to preliminarily enjoin nonpayment. The Court believes that this is such a case.

The Community paid to the Court sums representing several month's installments of Mr. Crooks' three percent monies. It did not then file any additional materails with the Court. And even if it were to have done so, the Community clearly would not be in the position of a "stakeholder" initiating an interpleader action, since the Community itself has claimed the sums. Accordingly, the Court has no framework of rules within which to accept and hold those monies. And in view of the Court's decision that Mr. Crooks is entitled to a preliminary injunction restraining the Community from withholding the monies, and since the Community clearly intended that the Court would have dispositive power over the monies when it forwarded them to the Court, the Court will transmit to Mr. Crooks the monies it has received, and order that his three percent payments not be withheld from him pending these proceedings.

Obviously, the Court expresses no view here with respect to the merits of, or consequences of, any action the Community may have against Mr. Crooks for damages.

c. Remaining claims for relief.

Four other categories of prayers for preliminary injunctive relief are sought in the Plaintiffs' motion: (1) Amy Stade, Tracy Rath, Scott Campbell, Anthony Brewer, and Anita Barrientez seek an order mandating that they be permitted to vote in the Community's General Council. (2) Amy Stade,

Susan Totenhagen, Anita Barrientez, Tracy Wisnewski, Joseph Brewer and the minor children of each of them, together with Scott Campbell, Anthony Brewer, and Paul Enyart, seek an order mandating that they be paid from the Community's "per capita" program. (3) Anita Barrientez and Paul Enyart seek a mandate prohibiting the nullification of land assignments which they claim. And (4) Tracy Rath, Terry Rath, and Cheri Crooks Bathel seek reinstatement in their former jobs.

Each of these persons has in common the claim that they have been mistreated by the Community because of their political views; but there the commonality stops. The factual and legal context varies, from one category of claim to another, and within categories, as well.

Each of the categories of claim, except the first (pertaining to voting rights), allege deprivation of property--which by definition can be recompensed by the payment of money. And it is hornbook law that if a claim has an adequate remedy at law, then the injury alleged is not irreparable and the use of the court's equitable powers is not appropriate. Glasco v. Hills, 558 F.2d 179 (2nd Cir. 1977); Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589 (8th Cir. 1984).

The Court is mindful, however, that irreparable injury can on occasion be found in the denial of money payments or other property rights. See e.g., Gorrie v. Heckler, 606 F. Supp. 368 (D. Minn. 1985). This may be particularly true in instances where the entity doing the denying is a government. And if the circumstances are appropriate, the denial of voting rights certainly could be alleged to be irreparable injury, as well.

But for preliminary injunctive relief to issue in such cases, the balance of the other factors to be considered in connection with injunctive relief--the likelihood of success on the merits, the potential for injury to the Defendants, and the public interest--must favor the movants.

In this case, given the materials before the Court, it cannot be said that the balance lies there. As has been noted,

the factual and legal claims of the movants are diverse; and the Court has been provided with no real discussion of the legal merits of their claims within the context of the laws applicable to the Community. The movants have supplied affidavits discussing their factual situation; but there has been little provided to relate that situation to the laws and rules of the Community. For example, in a number of instances, a movant alleges that that he or she was admitted to membership in the Community, and the Community then denies the allegation; but neither party discusses the membership requirements or procedures--or the disenrollment procedures, for that matter--which would appear to be at the heart of the issue. Hence, it cannot be said that the movants have made a showing that they likely will succeed on the merits. The foregoing failure is particularly significant in light of the fact that the Community is a very small cosmos. If money is paid to one person, other persons' payments are reduced by a proportionate amount. If one person is permitted to vote, the voting power of the other Community members voters will be measurably diluted. If land is given to one person, it must be denied to another.

So, if the Court cannot find a likelihood of success on the merits, it also cannot find that a preliminary injunction would be harmless to the Community or consistent with the public interest. And in this case, except for the clear showing made by Mr. Crooks, noted above, the Court has not been supplied with materials sufficient to enable it to find that the Plaintiffs, or some of them, likely will succeed on the merits. Therefore, this not a situation where the Court finds that irreparable injury, of the sort not compensable by damages, will flow from the Community's actions; and a preliminary injunction must therefore be denied to all of the movants save Mr. Crooks.

July 15, 1988

Kent P Tupper

Chief Judge Kent P. Tupper

Judge Henry M. Buffalo, Jr.

Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Ronald Welch, Cigarette Commissioner, Leonard Prescott, Chairman, Shakopee Mdewakanton Sioux Community, Plaintiffs, vs. Norman M. Crooks, d/b/a/ Crooks Smoke Shop; Lucky Lady Casino, Defendants.	MEMORANDUM OPINION No. 003-88

The Plaintiffs in this matter seek a Preliminary Injunction, under the Community's gaming control and cigarette sales licensing ordinances, and under Rule 29 of this Court, against the Defendants, restraining them and all others acting in concert with them from continuing to operate a casino and a cigarette sales facility on the Shakopee Mdewakanton Sioux Reservation ("the Reservation"). The Plaintiffs also seek an order restraining the Defendants and others acting in concert with them from interfering with the Plaintiffs' access to a billboard on lands within the Reservation occupied by the Defendant Norman M. Crooks. The Defendants resist the Motion on a number of grounds. As the detailed recitation below reveals, the factual and legal context of this litigation is complex and hotly disputed.

The Order of the Court which accompanies this Memorandum grants the Plaintiff's Motion as to the casino facility and, in some measure, as to the billboard, and denies it as to the cigarette sales facility. This Memorandum discusses the

materials which have been placed before the Court, and the significance which the materials have had in the Court's determination.

Factual Background

Little in the materials and argument before the Court present areas where the parties agree. The parties do not agree with respect to whether the correct persons are named as parties. They do not agree as to which of three distinct gaming-control ordinances of the Shakopee Mdewakanton Sioux Community ("the Community") now is in effect to govern such businesses. And that is just the beginning. Nonetheless, the Court has found that certain fundamental facts, and certain aspects of the law, are abundantly clear, and together they justify the relief granted herein.

It is undisputed that the casino facility--the Lucky Lady Casino--and the cigarette sales facility--the Crooks Smoke Shop--presently operate, and for some time have operated, on lands within the Reservation. It is undisputed that the casino operates video gaming devices and sells "pull tabs", another form of gaming, and that the cigarette sales facility sells cartons of cigarettes to the general public. It is undisputed that the Community does not own, or have any management responsibility for, either of the two businesses. It is undisputed that the casino does not presently hold a license from the government of the Community to operate a commercial gaming facility, although the Defendants assert that the government of the Community should by law be obliged to issue such a license to the casino. And it is undisputed that the Crooks Smoke Shop does not have a license from the government of the Community to sell cigarettes on the Reservation in 1988, although the Defendants assert that a license was paid for, and that the government of the Community not only cashed the check in payment for the 1988 license, but also in 1988 has cashed other checks representing taxes imposed by the Community on such businesses.

The foregoing summary nearly exhausts the areas of agreement between the parties. The Plaintiffs allege that the Defendant Norman M. Crooks, and his agents and employees, own and operate both the casino and the cigarette sales facility. Norman M. Crooks denies that he has any ownership interest in either. Similar denials appear in affidavits which have been submitted on his behalf by Stanley Crooks and Laurene Crooks. Norman M. Crooks maintains that his wife, Edith Crooks, now is and always has been the sole owner of the Lucky Lady Casino, and the same assertion is made in an affidavit of Laurene Crooks, who states that she is the manager of the Casino. Stanley Crooks, a son of Norman M. Crooks, asserts in an affidavit that the Crooks Smoke Shop is owned by a Minnesota corporation of which he, Stanley Crooks, is a director and officer, and that at no time has Norman M. Crooks been either an officer or an owner of that corporation.

On the Plaintiff's side of the litigation, Ronald Welch asserts that he is the Cigarette and Liquor Commissioner for the government of the Community, having, he says, been appointed by the Community in July, 1986. But the Defendants deny that Mr. Welch holds that office, and assert, instead, that Ms. Lois Brewer was appointed to a two year term as Cigarette and Liquor Commissioner on September 9, 1986.

The parties also disagree with respect to which Ordinance of the Community this Court should apply, when considering whether the Lucky Lady Casino is properly in operation. The Defendants assert that the currently effective gaming ordinance is #6-24-87-004, which they claim was adopted on June 24, 1987 and has not been the subject of an effective repeal. The Plaintiffs, on the other hand, deny that ordinance #6-24-87-004 was ever validly adopted, because of irregularities which are asserted to have taken place during the meeting of the General Council of the Community when the ordinance was considered. The Plaintiffs assert, instead, that the Community's original ordinance, 003-82, as amended on March 26, 1985, remained in effect until it was repealed on September 1, 1988 by Ordinacne

8-12-88-1. And in turn, the Defendants deny that Ordinance 8-12-88-1 was validly adopted, because they question the legality of the referendum proceedings by which it was placed before the Community.

The billboard in question is also the subject of a number of fundamental disputes, most particularly with respect to its ownership. The Community claims that it owns the billboard, and that it has both the right to use the sign and the right to remove it from its present location. Norman M. Crooks claims, instead, that he in fact is the billboard's owner. It at least is apparently agreed by the parties that the sign was erected on Mr. Crooks' land assignment several years ago with his permission; that the sign was paid for by the commercial bingo enterprise which is owned by the Community; and that Mr. Crooks did not himself pay for the sign. The record before the Court is unclear as to whether the payment was made solely by the Community's agent which at that time was managing its commercial bingo enterprise, or whether the Community, directly or indirectly, also participated in the payment. Mr. Crooks contends that he simply has permitted the Community to use the sign for a number of years, at first without compensation, and subsequently in return for certain payments. No documents detailing the parties' relationship with respect to the sign's ownership--no leases, licenses, deeds of gift, memoranda, or anything similar--have been provided to the Court.

In this thicket, there is at least one other fact which the parties do not dispute, though they argue heatedly over its import: The Defendant Norman M. Crooks occupies the lands on which are located the casino, the cigarette sales facility, and the disputed billboard. He has the use of those lands pursuant to a document entitled "Indian Land Certificate", dated April 10, 1964. The Certificate, which was signed by the Superintendant of Minnesota Agency of the Bureau of Indian Affairs, United States Department of the Interior, states:

> TO ALL WHOM IT MAY CONCERN:
>
> It is hereby certified that Norman Melvin Crooks, a member of the Mdewakanton band of Sioux Indians residing

in Minnesota, has been assigned the following described tract of land, viz:

[description omitted]

It is also certified that the said Norman Melvin Crooks, and his heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land. If said land should be abandoned for 2 years by the allottee, then said land shall be subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian.

It is also declared that this certificate is not transferable and that any sale, lease, transfer or incumbrance of said land, or any part thereof to any person or persons whomsoever, except it be to the United States, and as herein provided, is and will continue to be utterly void and of no effect.

...

The language of this document is somewhat confusing, since it twice refers to Mr. Crooks as an "allottee". Plainly, this is an error, since the certificate by its terms does not allot the land, but rather assigns it. All allotment of Indian lands necessarily ceased in 1934, as a matter of Federal law, with the passage of the Indian Reorganization Act, 25 U.S.C. §461 (1988). What Mr. Crooks holds, then, is a land assignment, which is terminable if the land is not used by him during a continuous two-year period, and which cannot be the subject of a sale, lease, or transfer. This is consistent with the statutes under which the Shakopee Mdewakanton Sioux Reservation was established, which contemplated that property purchased for the benefit of the Mdewakanton Sioux would be held by the United States for the common benefit of all such persons, and it is also consistent with the statute by which United States government recently gave to the government of the Shakopee Mdewakanton Sioux Community the authority to issue land assignments on the Reservation, Pub. L. No. 96-557, 94 Stat. 3262 (December 19, 1980).

In the materials submitted to the Court, in two separate sets of briefs, there are certain other significant facts,

which the parties have not much discussed, but which the Court believes must be undisputed, given the source of the materials. Specifically, the materials supplied by the Defendants in opposition to preliminary relief include several documents which directly contradict statements made elsewhere by or on behalf of the Defendants. First among these are the minutes of a meeting of the General Council of the Community which took place on June 3, 1987. The minutes were supplied to the Court attached to a September 9, 1988 affidavit of Susan M. Totenhagen, which affidavit certifies the minutes' accuracy. The minutes, and an attached "Attendance List", indicate that both the Defendant Norman M. Crooks and his wife, Edith Crooks, whom Mr. Crooks contends is the sole owner of the casino, both attended the June 3 meeting. The minutes report the the following discussion took place concerning testimony to be submitted to the United States Congress in connection with that body's deliberations on a Federal statute involving Indian gaming:

> Glynn Crooks moves to have the tribal attorney write up testimony of Norman M. Crooks as an individual gamer to be presented for the Washington hearings, by hand vote. (Resolution #6-3-87-004). Joe Brewer seconds. Vote taken: 18 yes, 0 no, 9 abstentions and the Chair not voting. Motion carried.

The minutes contain no indication that either Norman M. Crooks nor Edith Crooks voiced any suggestion, at that time, that the Lucky Lady Casino was is fact owned by Edith Crooks, not Norman M. Crooks.

The affidavit of Ms. Totenhagen also attaches the testimony that was prepared and presented to Congress in accordance with the just-quoted Resolution. The testimony is signed by Norman M. Crooks. In the midst of several pages of discussion concerning the effect of the proposed legislation, the testimony contains the following statements:

> ... I own and operate a private game on the Shakopee Reservation, under the authority and consent of the

Shakopee Mdewakanton Sioux Community.
...I have, in reliance upon the Community, invested a substantial amount of time, effort, and capital into my gaming operation.
...

/s/ Norman M. Crooks
Norman Crooks
Owner and Operator
Individual Gaming

Then, attached to an August 10, 1988 affidavit of Laurene Crooks, the manager of the casino, is a copy of a License dated July 25, 1985, signed by Ms. Lois Brewer, which states:

LICENSE FOR GAMBLING DEVICES

License is hereby granted to NORMAN M. CROOKS for the operation of Gambling Devices such as: Paddlewheels, Tipboards, Pull Tabs, Ticket Jars or other apparatus at 2390 Sioux Trail N.W. Prior Lake, MN for the term of one year or less, beginning with the 25th day of July, 1985 to December 31st of the calendar year of issuance. Subject to the ordinances and regulations of the Shakopee Mdewakanton Sioux Community pertaining thereto.
...

And finally, another attachment to the Laurene Crooks affidavit is a license, in similar terms, also signed by Lois Brewer, dated April 10, 1987, having a term from January 1, 1987 to December 31, 1987. The license runs to the Lucky Lady Casino, the address of which is 2390 Sioux Trail, N.W., Prior Lake, Minnesota--the same address as the one listed in Norman M. Crooks' 1985 license.

All of this, disclosed by the Defendants' own documents, strongly suggests to the Court that the statements, by Norman M. Crooks and others, that he does not own, and never has owned, any interest in the Lucky Lady Casino, that the casino is solely the property of his wife, are intended as a sham on the Court, and a sham not particularly well maintained, at that.

The factual situation disclosed by the documents concerning the Crooks Smoke Shop is more complex, however. Those documents contain no indication that Norman M. Crooks in

fact is an owner or operator of that facility. None of the records of the facility--memoranda, cancelled checks, and so forth--disclose any such interest. The only evidence before the Court suggests that the facility is owned and operated by a Minnesota corporation in which Norman M. Crooks has no direct interest or responsibility.

And, as was noted above, aside from the conceded facts that Norman M. Crooks did not pay for the disputed billboard, and that it is located on his land assignment, the record is bare of helpful information on that dispute.

Discussion

1. The Lucky Lady Casino. As has been noted, the Court is convinced that the arguments by Norman M. Crooks to the effect that he does not now, and never has, owned any interest in the Lucky Lady Casino are completely undercut by the documents he himself has given the Court. But that fact does not alone resolve the question presented to the Court at this stage of the proceedings--the question as to whether preliminary relief is appropriate to prohibit further operation of the casino.

The Defendants maintain that ordinance number 6-24-87-004 is the ordinance which presently governs gaming on the Reservation, and although they concede that the Gaming Commission contemplated by that ordinance has never been appointed, and that no license to Mr. Crooks or the Lucky Lady Casino has ever been issued under the ordinance, still they assert that a Commission should have been appointed, and that Commission should have been issued a license to the casino. And they contend, in the alternative, that acutally no license is necessary because, they argue, Mr. Crooks can do whatever he pleases in the way of establishing or permitting businesses on his lands--that he is not properly the subject of any control by the government of the Community.

Additionally, the Defendants argue that the casino should not be the subject of preliminary relief, in light of the

traditional standards governing the grant of such relief discussed in Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981). They argue that the Community is not irreparably harmed by the continued operation of the Lucky Lady Casino, because the Community's own gaming facilities have not suffered, indeed have prospered, during the time that the Lucky Lady Casino has been in existence; they argue that, assuming the Community's gaming control ordinance is being violated by the casino, still there is no irreparable harm merely because of that fact. They term such harm "intangible". They argue that the public interest lies in fostering private enterprise on Indian reservations, and that great harm will be worked to a significant number of employees of the business--not to mention the business' owner or owners--if the business is closed. They suggest that any harm to the Community caused by the casino's existence is merely economic, and consequently is compensable by money damages. They suggest that the Community is barred from preliminary relief by laches, having permitted the casino to operate for a significant period. And finally, they argue that, should relief be granted, it must be conditioned on the posting, by the Community, of a significant bond.

The Court rejects all of these arguments. In doing so, the Court finds it unnecessary to decide which of the three gaming control ordinances discussed by the parties is applicable here, because each of the ordinances clearly prohibits the operation of any gaming facility on the Reservation unless a valid license has been issued by the Community. And whatever may have been the validity of past licenses, the Lucky Lady Casino concededly has had no license to operate at least since December 31, 1987. The argument that the casino should have had a license issued by some person or entity, which perhaps does not exist but should have been appointed, runs afoul of the fact that none of the three ordinances give any person the right to compel the issuance of a gaming license. Under each of the three ordinances, the issuance of a license plainly is a discretionary act. So, even

if a Gaming Commission or other officer in fact should have been appointed, and should be available to receive license applications--even if this Court had been asked to issue, and did issue, an order of mandamus on the point--it would be wholly improper for the Court to assume that such an entity or officer, once in place, would or should issue a license to the Lucky Lady Casino.

Nor does this analysis change by virtue of the fact that the Lucky Lady Casino may have been the subject of previous licenses. It is hornbook law that--

> A license confers on the licensee the right to engage in the licensed business only for the term specified. A prior expired license is functus officio and confers no rights on the licensee, except in certain cases where by statute it entitles him to a renewal on compliance with certain conditions.
>
> 13 Minnesota Dunnell's Digest, section 5.01

None of the three gaming control ordinances which have been placed before the Court give any licensee the right to any automatic renewal, or to any particular process, when an existing license expires. Hence, the fact that the casino might have been previously licensed is wholly without legal import.

The Defendants' arguments concerning the jurisdiction of the Community's ordinances over the Norman M. Crooks land--arguments to the effect that the Community cannot exercise any control over his activities on "his land"--also are without merit. Norman M. Crooks is not a sovereign. He does not have the powers of a government, and he cannot displace or ignore the powers of the Community's government. The fact that Mr. Crooks is an Indian, and that his land lies within the boundaries of the Reservation, may mean that under certain circumstances his activities may not be the subject of certain State and local laws; and subject to the terms of his Land Assignment Certificate, he has the right to use the land he has been assigned within the bounds of the law. But his

land assignment is not a legal vacuum. Under the Community's Constitution, the Community's government has the power, inter alia:

> To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals, and general welfare of the community by regulating the conduct of trade and the use and disposition of property upon the reservation, providing that any ordinance directly affecting non-members shall be subject to review by the Secretary of the Interior.
>
> Article V, Section 1(h), Constitution of the Shakopee Mdewakanton Sioux Community, as amended May 22, 1980.

The exercise of this authority is entirely consistent with Federal law, which long has held that the rights of Tribal members, whether they be rights in land, treaty rights, or whatever, are subordinate to, and subject to the regulation of, Tribal governments. See e.g. Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649 (1976); United States v. Felter, 546 F. Supp. 1002, 1022 (C.D. Utah, 1982); United States v. State of Washington, 520 F.2d 676, 690-1 (9th Cir. 1975), cert. denied 423 U.S. 1086 (1976). It also has recently received the express sanction of Congress, in the context of gaming, in sections ___ and ___ of the National Indian Gaming Act of 1988, P.L. _____. Hence, the Community can require, and has required, the issuance of a license to Mr. Crooks as a necessary precondition to his operation of his casino.

The Defendants arguments concerning the irreparable harm issue also are unavailing. In the view of the Court, irreparable injury is worked to the Community simply by virtue of the fact that its gaming control authority is being ignored. Contrary to the Defendants' assertion, the Court is of the view that open defiance of lawful regulation--at least a regulation aimed at controlling such a volatile activity as commercial gambling--itself constitutes irreparable injury to the government. It is settled law that when a government, or an agency of a government, enters a court in a civil context and

seeks injunctive relief to end activities that violate its laws, it does not stand on exactly the same footing as does the private litigant. See e.g., Government of the Virgin Islands v. Virgin Islands Paving, Inc., 714 F. 2d 283 (3rd Cir. 1983), where the Court noted that--

> Numerous cases support the Government of the Virgin Islands' assertion that when a statute contains, either explicitly or implicitly, a finding that violations will harm the public, the courts may grant preliminary equitable relief on a showing of a statutory violation without requireing any additional showing of irreparable harm.
>
> Ibid., at 286. See also, Securities and Exchange Commission v. Management Dynamics, Inc., et al., 515 F.2d 801, ad 808-9 (2nd Cir. 1975).

In the view of this Court, any of the Community's three gaming control ordinances is such a statute; so a showing that the Lucky Lady Casino is operating without a license justifies the issuance of a preliminary injunction without any further showing.

This is not to say, however, that the Court is of the view that no further showing or irreparable injury has been made. Each of the licensing ordinances which have been placed before the Court give the government of the Community the right and the obligation to inspect licensed businesses, and to review operating reports from such businesses. Given the public's interest in gaming control, the Community' government's inability to exercise those rights also constitutes irreparable injury. Further, it is reasonable to believe, as the Plaintiffs assert, that the existence of the Lucky Lady Casino has taken business, and will continue to take business, from the Community's own gaming businesses, in amounts which cannot be ascertained and which therefore are not easily compensable at law. The mere fact that the revenues of the Community's own gaming businesses have increased during the period that the Lucky Lady Casino has operated does not suggest to the Court

that the former have not been injured by the latter. It is more reasonable, in the Court's view, to believe that the Community's businesses would have grown faster, had the Lucky Lady Casino not been competing for gaming dollars.

The Court is not unsympathetic to the Defendants' arguments concerning the harm that will be worked to them, and to employees of the casino, by the Court's order. But in the Court's view, the probability is great that the Plaintiffs will succeed on the merits; the harm that the Community would suffer, should its laws continue to be flouted, is greater than the harm that will be suffered to individuals by the grant of the Plaintiffs' Motion; and the public interest in this matter lies with having the Community's laws enforced. Hence, in the balance harms contemplated by Dataphase, supra, the Plaintiffs must prevail.

The Defendants' arguments respecting laches can be dealt with in fairly short order. The Court is of the view, first, that there has been no unreasonable delay in commencing or pursuing this matter. This Court itself did not exist until early in 1988, and this action was filed, and preliminary relief was sought, not long after the Court was created. Then, following a hearing on the Plaintiffs' motion, the Court was notified that the parties were attempting to resolve their differences, and both parties requested the Court to take no action on the Plaintiffs' Motion for a period of time. When the discussions among the parties led to no conclusion, the Court was notified and proceeded with all deliberate speed to wade through the masses of materials it had received.

Further, and significantly, it seems clear the the Defendants actually have not been harmed by the delays of which they complain. Indeed, given the documents before the Court, it seems clear that with every day that has passed, they have made more money. And laches simply does not act as a bar to an injunctions against a party's continuing to profit from unlawful actions. Costin v. Shell, 280 S.E.2d 42 (N.C. App. 1981).

Lastly, the Court declines to order the Community to post a bond, as a condition to the relief it grants against Mr. Crooks and the Lucky Lady Casino. By Rule 29 of the Rules of Civil Procedure of this Court, we have adopted the provisions of Rule 65 of the Federal Rules of Civil Procedure concerning injunctive relief; and under Rule 65 of the Federal Rules, the government of the United States of America is not subject to the bond provisions that apply to private litigants. But we do not decide here whether, under our Rules, the government of the Community stands in the same position as the government of the United States in Federal Court. Instead, we look to the language of Rule 65(c) of the Federal Rules, which state that a bond should be provided--

> ...in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. ...

Such bonds are available to the party against whom preliminary relief is awarded only if the underlying litigation was prosecuted maliciously and without probable cause. Lektro-Vend Corporation v. Vendo Company, 403 F. Supp. 527, at 537 (N.D. Ill. 1975), aff'd 545 F.2d 1050 (7th Cir. 1976), rev'd on other grounds 434 U.S. 881 (1977). Given the weight of the evidence recited above, it is the view of the Court that it is unlikely that action has been and will be prosecuted maliciously or without probable cause. Accordingly, the Court declines to require the Plaintiffs to post a bond.

2. The Crooks Smoke Shop. As is noted above, the Court is not able to find evidence in the record that suggests that Norman M. Crooks is the owner of the Crooks Smoke Shop. But the Plaintiffs argue that if Mr. Crooks in fact is not the owner, still one or more of the persons who have submitted affidavits to the Court in this matter have admitted that they have an ownership interest in the facility, and they therefore

have sufficient notice of these proceedings to justify this Court directing them to cease their operations. Though we recognize that it is within a court's power to restrain the actions of persons who are not named in litigation, if those persons are acting in concert with persons actually before the Court, still we are troubled by the reach which the Plaintiffs' urge the Court to make with respect to the Crooks Smoke Shop. In our view, it is a far greater reach, as to the Smoke Shop, than it is as to the Lucky Lady Casino, where we think it is apparent that Norman M. Crooks is the facility's actual owner, or at the very minimum is a sufficiently involved actor that other persons involved in the casino operation are effectively doing his bidding.

Further, while the Community's ordinance governing the sale of cigarettes gives a license applicant, or the holder of a previous license, no greater right to receive subsequent licenses than do any of the Community's gaming control ordinances, still the Crooks Smoke Shop undeniably paid for a 1988 cigarette sales license, and paid taxes to the Community on its cigarette sales for a period of months, and the Community accepted those payments. The Community only began rejecting tax payments from the shop about the time this litigation was filed. Representatives of the Shop, in affidavits, indicate that the remaining tax payments will be made, if the Community will accept them. Under these circumstances--and particularly given the acceptance by the Community of the 1988 license fee--we are unprepared to issue a preliminary injunction against the shop during what little remains of 1988.

Clearly, we wish to be understood to be making no finding whatever concerning the issuance of licenses or the operation of the Crooks Smoke Shop after December 31, 1988.

3. <u>The Billboard</u>. Given the facts recited above, it seems clear that none of the Defendants paid for the disputed billboard. To the Court, that is strongly suggestive of a

conclusion that the Community, or one of its businesses, owned the sign when it was erected; and the Court sees nothing in the record plausibly suggesting that title to the sign likely was transferred to any of the Defendants. So, the present situation appears to be one where a sign which probably does not belong to the Defendants, and which has been used by the Community as an important aid for its businesses, is located on the land assignment of the Defendant Norman M. Crooks. Under these circumstances, the Court is of the view that the equitable balance and the public interest lies in favor of maintaining the status quo. Mr. Crooks in the past has requested and accepted payments from the Community's business; and to require him to continue to suffer the sign's presence without such payments is unfair. Hence, to maintain the relative positions of the parties during this litigation, the Court's order directs all parties to leave the billboard where it is; restrains the Defendants from interfering with the Community's access to the sign; and directs the Community within one week to pay to Mr. Crooks an amount equal to the most recent annual payments made to him in this connection. Should this litigation continue for an extended period, the Court will consider the amounts and timing of additional payments.

Date: December 16, 1988

Honorable Kent P. Tupper
Chief Judge

Honorable John E. Jacobson
Associate Judge

Honorable Henry M. Buffalo, Jr.
Associate Judge

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Ronald Welch, Cigarette Commissioner, Leonard Prescott, Chairman, Shakopee Mdewakanton Sioux Community, Plaintiffs, vs. Norman M. Crooks, d/b/a/ Crooks Smoke Shop; Lucky Lady Casino, Defendants.	ORDER No. 003-88

This matter having come before the Court by the Plaintiffs' Motion for a Preliminary Injunction, and having been heard on August 11, 1988, now therefore, based on all of the facts, pleadings, and arguments herein, it is hereby ordered:

1. That the Defendant Norman M. Crooks, d/b/a the Lucky Lady Casino, their agents, employees, and all others acting in concert with them, are hereby enjoined from managing, conducting, or in any way operating bingo, video games or other electronic gaming equipment, selling pull-tabs or engaging in any other gaming activity whatsoever on the Shakopee Mdewakanton Sioux Reservation until further order of this Court.

2. That the Defendant Norman M. Crooks, his agents and employees, and all persons acting in concert with them, are hereby enjoined from interfering with, obstructing, or otherwise impeding employees and agents of the Shakopee

Mdewakanton Sioux Community from maintaining and utilizing the sign located adjacent to the Crooks Smoke Shop at the intersection of Sioux Trail N.S. and County Road 83 on the Shakopee Mdewakanton Sioux Reservation.

3. That no party to this action shall seek to remove the sign referred to in paragraph 2 of this Order during the pendency of this litigation, or until further order of this Court.

4. That within one week from the date of this Order, the Plaintiffs shall pay to the Defendant Norman M. Crooks a sum equal to the total of the annual payments most recently made to him for the use of the sign referred to in paragraph 2 of this Order.

5. That the Plaintiffs' Motion for a Preliminary Injunction restraining the Defendants from continuing to operate the Crooks Smoke Shop, Inc. during the remainder of calendar year 1988 is denied.

Date: December 16, 1988

Honorable Kent P. Tupper
Chief Judge

Honorable John E. Jacobson
Associate Judge

Honorable Henry M. Buffalo, Jr.
Associate Judge

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Amy E. Stade, et al., Plaintiffs,	)	
vs.	)	Case No. 002-88
The Shakopee Mdewakanton Sioux Community, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Summary

This matter comes before this Court on cross-motions for summary judgement, under the provisions of Rule 28 of our Rules of Civil Procedure. The Plaintiffs, members of the Shakopee Mdewakanton Sioux Community ("the Community"), contest the validity of two ordinances ("the Referendum Ordinances"), the purpose of which is to establish a procedure for voter registration and voting by mail for the Community's General Council.

The first ordinance is dated October 2, 1986 ("the October Ordinance"). It contained a "sunset" provision, under which it would expire six months after its effective date, unless it was amended. The second ordinance is dated January 13, 1987 ("the January Ordinance"), and was voted upon by mail, under the procedures of the October Ordinance. The January Ordinance describes itself as a "Bylaw Amendment".

A relatively large number of official actions apparently

have been submitted for vote by the referendum procedure of the two Referendum Ordinances. The Plaintiffs contend not only that the Referendum Ordinances are void, but also that all actions purportedly taken under both also are void.

The Plaintiffs' principal argument in support of their position is that the Referendum Ordinances are inconsistent with the Bylaws of the Community. Article III, Section A of the Bylaws discusses meetings of the General Council. It requires that such meetings be held in public places, and mandates that a defined quorum be present for any such meeting to be effective. The quorum requirements of the Referendum Ordinances--in terms of the fraction of Community members that is required for the Community's General Council to do business--is not different than the requirements in the Bylaws; but both Referendum Ordinances establish procedures under which General Council votes can take place without the necessity of any specific number of Community members gathering together in one place at one time. This, the Plaintiffs contend, varies from the requirements of the Bylaws, and therefore, in their view, neither the October Ordinance nor the January Ordinance could be effective unless they were adopted in a manner that would suffice to amend the Bylaws. The Plaintiffs then argue at some length that neither ordinance was so adopted, and from that argument follows their conclusion that both ordinances, and all actions taken under them, are void.

The Defendants respond by urging that the Plaintiffs lack standing; and they argue that, even if the Court should hold that the Plaintiffs have standing, still the procedures by which the Referendum Ordinances were passed were sufficient to amend the Community's Bylaws.

In considering these arguments, the Court has noted that the Community's Bylaws were not adopted by an election under the provisions of section 16 of the Indian Reorganization Act

of 1934. Rather, they are simply contained in an ordinance, adopted in 1972--an ordinance which in its Article IV states that it cannot be amended unless the amendment carries by "an affirmative vote of two-thirds (2/3rds) of the eligible voters". Neither party has discussed, and we do not find it necessary to reach, a question which this provision may present, relating to the extent to which one session of the Community's General Council can limit the powers of future sessions of that body by imposing requirements that ordinances may not be amended except by a majority larger than fifty percent plus one.

In the view of the Court, the decision of this case in fact does not require us to reach any of the questions which have been argued by the parties. We think that, properly read, the Refendum Ordinances simply are not inconsistent with the Community's Bylaws. Therefore, although the January Ordinance is couched in terms of an "amendment" to the Bylaws, we believe that it is, and the October Ordinance before it was, a wholly consistent supplement to the Bylaws' procedures.

From this view, and from the fact that there is no dispute among the parties that a simple majority of the voters, following proper procedures, adopted both the Referendum Ordinances, it follows that the Defendants are entitled to an Order of Summary Judgment on the question of whether or not the two Ordinances are consistent with the Community's Bylaws.

It is our view, however, that it is inappropriate to dispose of the entirety of this case at this time through Summary Judgment, because there is one aspect of the Referendum Ordinances which may present difficulties. Section 7.B. of the October Ordinance, and section 8.A. of the January Ordinance, provide that persons who are otherwise eligible to vote in General Council proceedings may not vote with respect to their own disenrollment, and further provide that any person related

by blood to such person also shall not be eligible to vote in such proceedings if in some manner the two persons' memberships are "dependent on a common finding of contested fact". We do not find that either party in this matter has briefed the legality of these provisions sufficiently to enable us to rule on their validity. There appears to be no colorable basis in the Community's Bylaws to fault the provisions. But read broadly, we believe the Plaintiffs' Complaint can be viewed simply to contend that the October and January Ordinances are inconsistent with law; and we believe that the parties should be given the opportunity to brief and argue the validity of these provisions, under all applicable law, in specific detail.

Discussion

Because this Court has not been in existence for an extended period of time, the body of case law which it has issued is necessarily small. With this in mind, and considering both the need for establishing a basis upon which parties in the future may ascertain the law which this Court will apply to cases before it, and the importance of the particular issues raised in this case, we believe it is appropriate for us to begin our discussion by acknowledging certain principles of law that will guide us, as they long have guided other courts.

The United States Supreme Court, in Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) stated:

> ...as separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.
>
> 98 S.Ct., at 1675.

The Court also observed that this lack of constraint could be modified by the plenary power of Congress:

> As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. [cits.]
>
> Ibid, at 1676.

The Court went on to explain that, by enacting Title I of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§1301 - 1303 (1988), Congress had exercised that plenary authority. The Court held that the ICRA did not authorize any Federal remedies other than habeas corpus; but it stated that tribal forums may vindicate rights created by the ICRA. Accordingly, this Court considers that the ICRA is law which it must and will apply to matters brought before it.

In discussing the manner in which the ICRA should be applied, the Martinez Court noted that--

> By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under [25 U.S.C.] §1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.
>
> Ibid., at 1683.

This Court is of the view that such tradition and custom clearly is appropriate material for inclusion in its decision-making processes. However, neither of the parties in this case have offered any evidence of tribal tradition or custom regarding the interpretation of tribal laws, in question in this case. Therefore, we will consider the matters before us looking strictly to principles of common law, and to federal and state court decisions which have dealt with similar issues.

Having said that, we will expound on the role of this Court in the Community's affairs. First and foremost, this

Court cannot and will not exercise legislative or administrative powers. It can and will only exercise judicial power. It is not for this Court to make, amend or change the law, but only to apply it. If a statute is constitutional, any unfairness which it may work is a matter for the legislative body and not the Court to correct: What law ought to be is for the legislative body; and what law is, rests with the Court. When the intention of the legislative body has been ascertained, it is the duty of the Court to give full effect to that intention without limiation or qualification of judicial action.

From these principles follows the fact that the legislative body of the Community may exercise its powers to meet the vital needs of a changing society. The legislative body has the essential police powers of government, and those powers are among the least limitable of governmental powers. See District of Columbia v. Brooke, 214 U.S. 138 (1909). The limits of the police power are not capable of exact definition; but the power extends to all matters where the general public welfare, morals, and health of the Community are involved. The police power in its broadest sense includes all legislation and almost every function of civil government. An exercise of police power which is consistent with the Community's Constitution will be upheld where it has for its object the public health, safety, morality or welfare, and where it is reasonably related to the obtainment of those objectives. And the burden of showing that a legislative act is so arbitrary or unreasonable as to abridge the rights of citizens rests upon the complaining party, and is a heavy one, not easily met. See Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

It often happens--as it has happened in this case--that courts are called upon to reconcile statutes or ordinances which apparently conflict with one another. Where two validly adopted provisions are in irreconcilable conflict, the one more

recently adopted controls. Great Northern Railway Co. v. United States, 155 F. 945 (8th Cir. 1906), 208 U.S. 452 (1907). And, of course, more particular statutory provisions govern over more general ones. Northern Border Pipeline Co. v. Jackson County, 512 F. Supp. 1261 (D. Minn. 1981); Fagerlie v. City of Willmar, 435 N.W.2d 641 (Minn. App. 1989). But clearly, if possible it is the first duty of a court to construe two enactments of the legislative body in such a manner as to give effect to both. Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957). Atwell v. Merit Systems Protections Board, 670 F.2d 272 (D.C. Cir. 1981). Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D.D.C., 1944). It is this last principle which is our chief guide in this case.

The provisions of Ordinance No. 3, adopted by the General Council of the Community on July 11, 1972, serve as the Community's Bylaws. The aspects of that ordinance upon which the Plaintiffs have put their principal reliance are those which discuss public meetings of the Community. In their entirety, those provisions are as follows:

ARTICLE III. MEETINGS.

Section A. General Council Meetings.

1. Regular meetings shall be held the second Tuesdays of January, March, May, July, September and November.

2. Special meetings shall be called:

a. By any member of the Business Council at any time he deems it necessary.

b. By any member of the Business Council upon receipt of a petition signed by at least seven (7) members of the General Council.

3. All meetings shall be held in public places at all times practical, and all eligible voters shall be notified of the time and place in writing by mail with 48 hours notice in advance and a copy of the agenda

to be included with said notice.

4. One-third (1/3) of the eligible voting members of the Community shall constitute a quorum, and no business shall be transacted unless a quorum is present.

In this language there is no specific statement that there must be public meetings in order for the General Council to vote on a matter. Nor is there any specific discription of the manner in which a vote of the General Council must take place. The closest thing to a requirement on either point is the provision of Article III, Section A.4., to the effect that no business may be transacted by the General Council of the Community unless a quorum of one third of the eligible voters is "present".

The Plaintiffs infer from that provision that one cannot have a quorum "present" without having persons together in one room; and since a quorum must be "present" before the General Council can conduct business, the Plaintiffs conclude that the General Council cannot conduct business without meetings.

In our view, however, the quorum requirement in the Bylaws does not foreclose the Community from adopting a procedure where a quorum is deemed to have been "present", in the consideration of a matter, if the requisite number of eligible persons review the matter and cast votes on it, even if those persons do not gather in one room at one time to cast those votes. The word "quorum" does not connote anything more than simply a minimum number of members that is required before a particular body can transact business. See generally, Words and Phrases, Vol. 35A, page 634 (West, 1963). Adding the word "present" to the quorum requirement, though it could be read to require physical simultaneous presence at a meeting, also simply can be read simply to require participation in the deliberation on a matter: from the early days of American jurisprudence, courts have been willing to find, in the context

of governmental decisions, that the word "present" can mean that the requisite number of decision-makers considered and voted on the matter, whether or not they all were present at the same time. See e.g., Niles v. Edwards, 30 P. 134, at 135 (Cal. 1892). Given our obligation, discussed above, to read the Bylaws ordinance and the Referendum Ordinances together in an harmonious manner, we find that this latter interpretation is the appropriate one.

But the Plaintiffs argue that Article III, Section A.3., which requires that all members must receive written notice of special meetings, creates an inference that no business can be transacted unless such a meeting is called. Again, however, the simple fact is that the Bylaws ordinance does not say that. The notice requirement of the Bylaws serves two purposes: it provides assurance that Community members will be given a reasonable chance to arrange their schedules in such a way that they can participate in the Community's affairs, if they choose to do so; and it gives members some chance to consider and deliberate in advance on the items of business on which they will be asked to act. We would be reluctant to find the Referendum Ordinances to be wholly consistent with the Bylaws if either of these purposes were ill-served by them. But in our view, both Referendum Ordinances can be read to be consistent with both of these purposes. (This reading of the Referendum Ordinances may require changes in the procedures which have taken place in the past, but those changes are slight.)

An understanding of the mechanics of the Referendum Ordinances is essential to our holding, here. Under the Ordinances, every member of the Community who is entitled to vote in General Council meetings also is entitled, at any time, to request ballots under the referendum voting procedures. This requesting procedure is straightforward and non-discriminatory: it involves the member providing his or

her notarized signature and current address to the Community's Enrollment Officer. If the request is granted, the member is placed on a list of persons registered to vote under the referendum procedure, and he or she thereafter automatically will receive ballots for all matters submitted for referendum vote. If the ballot request is denied, an appeal process is provided. Matters may be submitted for referendum by members; and the Community's Chairman has broad discretion to determine what other matters that are before the Community's General Council shall be voted upon in this manner.

Each matter that is voted upon by the referendum procedure is the subject of substantial notice: the period in which voting will take place is not be less than ten days in duration. During that period the General Council can meet and discuss matters, provided that no votes may be taken on matters that are pending in the referendum process.

Hence, persons who are on the list of members that have registered for the referendum procedure are given even more notice--more opportunity to deliberate on the matters before them, to discuss them with others, and to arrange their schedules in such a fashion that they can participate in the governmental process, if they choose to--than they would receive if all matters were dealt with at Community meetings which, under the Bylaws, could be called on two days notice. As to those persons, then, we do not see that the notice provisions of the Bylaws in any way conflict with the Referendum Ordinances. But matters are on a different footing for members who have elected not to request referendum ballots. Those persons, as we see it, might not be notified of fundamental changes that are being considered by the General Council. This, we think, is inconsistent with the spirit, if not the letter, of the notice provisions of the Bylaws. The Bylaws do not require that business be done by meetings; but we believe that, fairly read, they do require that every member of

the Community who would receive notice of a General Council meeting must also receive notice that a matter is being considered for referendum vote.

We are not saying, by the foregoing, that ballots must be sent to all such persons: the ballot request and verification procedures in the Referendum Ordinances are unobjectionable. But we believe that, to harmonize the Referendum Ordinances and the Bylaws, it is necessary that all persons who might be eligible to successfully request referendum ballots be notified of the nature of the matters that will be voted by referendum procedure. In that manner, members who have chosen not to register for the referendum process can make an ongoing, informed choice as to the consequences of continuing to fail to register. Assuming that, in the future, referendum voting procedures are handled in this way, we do not believe they conflict with the Bylaws.

However, if such notice has not routinely provided to Community members in the past--and we believe from the record that it has not--we do not hold that the many actions taken by the General Council by referendum are thereby void. Counsel informed the Court during oral argument on this matter that the level of Community participation in the referendum procedure was over fifty percent, and that every member of the Community has been informed by certified mail of his or her ongoing right to participate in the process. So, persons who are not participating in the process at this time can reasonably be said to have made the conscious choice not to do so. Ordinarily, if a Court decides that a modification is necessary in the reading of a statute which has been in place for a period of time, the Court will not upset the actions that previously have been taken under that statute if the actions were taken in good faith. Here, reinforcing the thrust of that doctrine, it would be a complete miscarriage of justice to work disruption of settled governmental decisions simply at the

behest of persons who for their own reasons elected not to attempt to participate in those decisions.

We have reached the foregoing conclusions, harmonizing the Bylaws and the Referendum Ordinances, mindful of the fact that it is not undesirable for a government like the Community's to meet and air the views of all members before transacting business. But the Community's decision to adopt a system where voting by mail is an option is clearly within the legislative prerogative. From the materials before the Court, it is evident that the community's history is a tumultuous one, where meetings of the General Council have been marred by violence and disorder. Under these circumstances, the Community's exercise of its police power to adopt the Referendum Ordinances is not an unreasonable one.

As a final matter, the Plaintiffs objected, in their written materials, to certain procedural aspects of the October, 1987 meeting of the General Council, at which the October Ordinance was approved. But in oral argument before this Court on January 17, 1989, the Plaintiffs waived their objections to these matters. Therefore, we do not here consider them.

As we have noted above, the thrust of our Opinion and Order is that the Referendum Ordinances are not inconsistent with the Community's Bylaws. Therefore, the Plaintiffs' objections to the Referendum Ordinances, based upon the argument that the procedures by which they were adopted were inadequate to amend the Bylaws, are irrelevant to the Ordinances validity. We hold that the Defendants are entitled to Summary Judgment as to the consistency of the Referendum Ordinances with the Bylaws. But we hold open for further proceedings the issue of the consistency with applicable law of Section 7.B. of the October Ordinance and Section 8.A. of the January Ordinance.

ORDER

Based upon the foregoing, and all of the pleadings, materials, and argument herein, it is hereby ordered:

1. The Plaintiffs' Motion for Summary Judgment is denied.

2. The Defendants' Motion for Summary Judgment is granted, as to the issue of the consistency of the October and January Referendum Ordinances with the Bylaws of the Shakopee Mdewakanton Community; and

3. The Defendants' Motion for Summary Judgement is denied, as to the portions of the Plaintiffs' Complaint that relate to the consistency of Section 7(b) of the October Referendum Ordinance, and Section 8(a) of the January Referendum Ordinance, with other applicable law.

Date: 4/13/89

Kent P. Lupper
Chief Judge Kent P. Lupper

Henry M. Buffalo, Jr. By JEJ
Associate Judge Henry M. Buffalo, Jr.

John E. Jacobson
Associate Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

COUNTY OF SCOTT		STATE OF MINNESOTA
Anita Barrientez, Plaintiff, vs. The Shakopee Mdwewakanton, Sioux Community, Defendant.	)	No. 007-88

MEMORANDUM OPINION ON
DEFENDANT'S MOTIONS TO AMEND COUNTERCLAIM AND
FOR PARTIAL SUMMARY JUDGMENT, AND ON PLAINTIFF'S
MOTION TO FILE AMENDED COMPLAINT

Before Chief Judge Kent P. Tupper, Judge Henry M. Buffalo, Jr., and Judge John E. Jacobson. The opinion of the unanimous Court was delivered by Judge Jacobson.

On August 10, 1990, this Court heard argument on three motions: motions filed by the Defendant on June 21, 1990 to amend its Counterclaim and for Partial Summary Judgmenta, and a motion filed by the Plaintiff on August 1, 1990 to re-file her Complaint and to amend that Complaint. At the conclusion of the hearing, the Court granted the Defendant's motion to amend its Counterclaim, and today the Court has denied the Defendant's motion for Partial Summary Judgment and granted in part and denied in part the Plaintiff's motion with respect to her Complaint. This Memorandum is filed in support of these rulings.

Procedural History

In fits and starts, the procedural history of this matter has become complex, and an analysis of the Court's rulings on the motions today will be assisted by an initial summary of the proceedings to date.

Early in 1988, the Plaintiff was one of several persons who alleged causes of action against the government of the Shakopee Mdewakanton Sioux Community, in a single large and broad-ranging Complaint filed with the Court under the caption Stade v. Hove, No. 002-88 (Shak. Ct., filed June 20, 1988). After ruling upon motions for preliminary relief (see July 15, 1988 Memorandum Opinion on Motions for Preliminary Injunctions, Hove v. Stade, [Shak. Ct. filed May 18, 1988] and Stade v. Shakopee Mdwakanton Sioux Community, supra), the Court urged the various Plaintiffs in File No. 002-88 to separate their causes of action, to permit manageable proceedings. As a result, the Plaintiff's causes of action were removed from Stade v. Shakopee Mdewakanton Sioux Community, and were filed in this separate action, in September, 1988.

In the amended Complaint which commenced this action, the Plaintiff alleged that the she was lawfully occupying the land which now is at issue in this matter, she alleged that the Community did not recognize her rights in this regard, and she sought declaratory and injunctive relief against the Community's alleged attempts to interfere with her rights to the land.

After the filing of the Plaintiff's amended Complaint, little happened until June 5, 1989. On that date, two documents were filed with the Court: the Plaintiff filed a Notice of Dismissal of her Complaint, which the Court subsequently granted, and the Defendant filed an Answer and Counterclaim. The Defendant's Counterclaim alleged that Ms. Barrientez was improperly occuping the land on which she had alleged she possessed a land assignment, that she had constructed improvements on that land, and that she was trespassing. The Community sought an order directing Ms.

Barrientez to remove from the land, as well as injunctive relief against further occupancy by her and damages for her alleged trespass.

The Plaintiff filed her Reply to the Community's Counterclaim on June 23, 1989. The Reply took the form of a general denial, coupled with a suggestion, not made as a motion, that the Minnesota Dakota Indian Housing Authority possessed an interest in the disputed land which made that entity an indispensable party to the adjudication of the Counterclaim.

Shortly thereafter, Ms. Barrientez's counsel moved the Court for leave to withdraw, on the grounds that she could not pay their fees and that, being unable to find other counsel, she desired to proceed pro se. That motion was granted.

Following that action, there were no formal developments in this matter until July 21, 1990, when the Community filed two of the motions which are the subject of this Memorandum. The Community moved to amend its Counterclaim to include a cause of action to recover possession of the lands at issue in this litigation under the Community's newly enacted Real Estate and Secured Financing Ordinance; and the Community moved for Partial Summary Judgment, under Rule 28 of this Court's Rules of Civil Procedure, with respect to the portions of its Counterclaim that related to the possession of the property here at issue.

At a hearing of the Court on July 3, 1990, the Court directed the Plaintiff to file its responses to the Defendant's motions by August 1, and gave the Community until August 8 to reply. On August 1, the Plaintiff filed memoranda responsive to the Defendant's motions, and also filed the third motion which is the subject of this Memorandum--a motion to re-file her Complaint as it was amended in September, 1988, and to add thereto certain additional claims against the Defendant.

Discussion

1. The Defendant's Motion to Amend its Counterclaim.

During oral argument, the Community's counsel stated that the sole purpose of the proposed amendment to the Community's Complaint was to state a statutory basis for its claim to possession of the diputed land, under the Community's Real Estate and Secured Financing Ordinance, to supplement the common law cause of action already before the Court. On this basis, Ms. Barrientez's counsel indicated that he had no objection to the amendment. The Court therefore granted the Community's motion at the conclusion of oral argument.

2. The Plaintiff's Motion to File an Amended Complaint.

The Community has raised two objections to the Plaintiff's motion for leave to re-file and to amend her Complaint. First, the Community asserted that it would be unfair to grant the Plaintiff's motion at this time, because the effect of such action would be to add additional issues to this litigation, with and consequent additional delays attending the proceedings. Second, the Community argued that at least some of the relief which the Plaintiff's amended Complaint would seek might be outside the jurisdiction of this Court to grant; and on that basis the Community argued that to permit the amendment would be inappropriate.

The Court agrees with the Defendant that this matter has dragged on for an unusual period of time; and in the Court's view the Plaintiff has not been notably active in defending or protecting her asserted rights. The Court is sympathetic with the fact that the Plaintiff has limited resources, but even persons with limited resources are obliged to use due diligence to defend the rights which they assert.

Hence, insofar as the Plaintiff's motion might raise new factual or legal issues, the Court believes it would be inappropriate to grant it. Fischer & Porter Co. v. Haskett, 287 F. Supp. 831 (E.D.Pa., 1968). However, to the extent that the Plaintiff's motion can be granted without imposing new

factual or legal issues on the parties, then to that extent--though the grant of the motion would not be completely costless--it would appear to be an appropriate exercise judicial economy. Foman v. Davis, 371 U.S. 178, 182 (1962).

Under this analysis, the Court believes it is appropriate to grant that portion of the Plaintiff's motion which relates to the re-filing of her Complaint as it was amended in September, 1988. As the Court reads that Complaint, it simply puts at issue the Plaintiff's right to occupy the lands involved in this matter, and prays for relief from alleged attempts by the Community to interfere with that right. In other words, the Complaint, as it was amended in September, 1988 does nothing more than present the mirror image of the litigation which the Court presently has before it; and contesting the issues in that Complaint should impose no new burdens upon any party.

The same cannot be said for the amendments to the Complaint which the Plaintiff proposes. (Although the Plaintiff's Memorandum submitted in support of its motion described the new allegations and prayers she seeks to make, the motion was not accompanied by a copy of its proposed Amended Complaint; however, from the description which the Memorandum provided, the Court is comfortable with the conclusions it has reached on this point.) As the Plaintiff described them, her amendments would put at issue her entitlement to share in per capita payments from the Community and to vote in the Community's General Council--matters which are not now at issue in these proceedings.

Hence, the Court denies the Plaintiff's motion to amend the Complaint that was filed in September, 1988. It must be understood, however, that the Court's partial denial of the Plaintiff's motion to amend her pleadings is based only on considerations of judicial economy, as they operate on this particular litigation. Nothing in this Court's opinion should be taken as a bar to the Plaintiff's commencing an independent action before this Court, and in that litigation making her

she has sought to import into this matter. The suggestion by the Community's counsel, to the effect that some matters which the Plaintiff sought to raise might be beyond this Court's jurisdiction, must be answered with the observation that any issue concerning this Court's jurisdiction is a matter for this Court to determine when it is squarely raised by pleadings and motions, accompanied by necessary supporting materials and argument.

3. The Community's Motion for Partial Summary Judgment.

In its motion for Partial Summary Judgment, the Community has sought relief only as to its claim for possession of the land involved here, and not as to any issue concerning monetary damages. It is hornbook law that, when considering a motion for summary judgment it is the duty of the Court to view the case in the light most favorable to the non-moving party, and to give that party the benefit of all inferences that reasonably can be drawn from the evidence. Watts v. Brewer, 588 F.2d 646 (8th Cir., 1978); Giordano v. Lee, 434 F.2d 1227 (8th Cir., 1970), cert. denied 403 U.S. 931 (1971); Cohen v. Curtis Publishing Co., 31 F.R.D. 569 (D. Minn. 1962), aff'd. 312 F.2d 747 (8th Cir. 1963), cert. denied 375 U.S. 850 (1963).

a. The Facts Before the Court.

The basis for the Community's motion is contained in a series of exhibits which accompanied its Memorandum in support of the Motion. The Plaintiff's Reply Memorandum also attached several exhibits, including affidavits executed by the Plaintiff and by the present Director of the Minnesota Dakota Indian Housing Authority.

The matters which are disclosed by these materials are as follows: The lands at issue are described as Lot 16, Block 2 on the General Development Plan in the North Half of the Sothwest Quarter (N/2, SW/4), Section 22, Range 155 North, Range 22 West of the Fith Principal Meridian, Scott County, Minnesota. They lie within the Shakopee Mdewakanton Sioux Community's reservation, and are held in trust for the

Minnesota. They lie within the Shakopee Mdewakanton Sioux Community's reservation, and are held in trust for the Community by the United States of America.

On August 29, 1980, the Bureau of Indian Affairs issued an Indian Land Certificate for these lands, authorizing a Ms. Ramona Jones to occupy the land under the Certificate's terms. Shortly thereafter, on October 9, 1980 the Bureau of Indian Affairs and Ms. Jones entered into a twenty-five year lease for the lands, and by the terms of the lease the Indian Land Certificate was cancelled. Thereafter, the provisions of Public Law No. 96-557, 94 Stat. 3262 (Dec. 19, 1980), were signed into law, specifying that the United States of America held the Community's lands in trust, that Community owned the beneficial rights for the lands on its reservation, and that no valid pre-existing rights were affected thereby.

On October 1, 1981, Ms. Jones and the Community executed a second lease for the disputed lands, which subsequently was approved by the Bureau of Indian Affairs. The second lease form provided that it was made for the "express purpose" of enabling Ms. Jones to obtain a loan from the Minnesota Dakota Indian Housing Authority, in order that Ms. Jones could make improvement to the leased premises. It provided that if she failed to obtain such a loan, the lease could be terminated. It provided that the Community consented to the granting of the loan and the mortgage, and granted permission to Ms. Jones "to execute and deliver to the Mortgagee a real estate mortgage covering the Tenant's leasehold interest..." The lease also required Ms. Jones to continue to occupy the property; it gave the Community the right to purchase the leasehold; and it stated that this right could be exercised within thirty days from the receipt of written notice of the default.

On November 4, 1981, Ms. Jones executed a standard-form real estate mortgage in favor of the Minnesota Dakota Indian Housing Authority. The mortgage form does not indicate the identity of its draftsperson. On its face, the mortgage form purported to convey a mortgage for the entirety of the disputed

lands, not merely Ms. Jones' leasehold. The form provided--

> This Mortgage shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision...
>
> Nov. 4, 1981 Mortgage, at §15.

There is no indication on the face of the mortgage or in the record presently before the Court as to whether or not the mortgage was presented to the Bureau of Indian Affairs, or whether the Bureau of Indian Affairs considered it necessary to review such a document, given the terms of Ms. Jones' lease and the Bureau of Indian Affairs' approval thereof.

Ms. Jones executed Notes in favor of the Minnesota Dakota Indian Housing Authority in 1981, 1983, and 1984, in increasing amounts. Although no copy of the 1984 Note has been located by the parties, it apparently was in the amount of forty-five thousand dollars.

At some time after the events described above, Ms. Jones failed to make the payments contemplated by the various documents she had executed, and left the premises.

In May, 1987, the Plaintiff and the disputed lands were the object of a resolution adopted by a group of persons who purported to constitute the Community's General Council. The Community now vehemently disputes both that this body actually was a functioning General Council and that it had any authority to effect any Community business. The document executed by this body stated that--

> "...on January 14, 1987, Ms. Anita Barrientez has been accepted by the Shakopee Mdewakanton Sioux Community for [a land] assignment as described on the attached sheet; and ... BE IT FURTHER RESOLVED that the Bureau of Indian Affairs be directed to authorize the land certificate to Ms. Barrientez ... as soon as possible."

The record before the Court does not contain a copy of any sheet which might have been attached to the above-described

document, and the parties apparently agree that no Indian Land Certificate was issued as a result of the foregoing document. However, on September 10, 1987, Ms. Barrientez accepted a loan from the Minnesota Dakota Indian Housing Authority, in the principal amount of forty thousand dollars, to improve the premises on the disputed lands. In turn she executed a real estate mortgage form in favor of the Minnesota Dakota Indian Housing Authority. Again, the mortgage form purported to create an interest in the entirety of the land at issue, not merely in a leasehold or an assignment; and again, the record does not indicate who drafted the mortgage, or whether the mortgage form was presented to the Bureau of Indian Affairs, or whether in the view of that agency it should have been thus presented.

Ms. Barrientez gave the Court an affidavit signed by the present Executive Director of the Minnesota Dakota Indian Housing Authority, stating the view of that officer that in 1987 the Authority thought it had been assigned Ms. Jones' interest in her leasehold; that it had the right to further assign that interest to Ms. Barrientez; and that it in fact did assign the interest when it accepted Ms. Barrientez's mortgage and provided her with her loan. The affidavit stated that, when the Authority entered into its arrangement with Ms. Barrientez, it believed that it was acting in accordance with the wishes of the Community's General Council.

On May 8, 1990, the Minneapolis Area Office of the Bureau of Indian Affairs sent a letter to Ms. Jones notifying her that her 1980 lease had been cancelled for non-payment of rent. The letter contained no reference to Ms. Jones' 1981 lease which the Bureau of Indian Affairs had approved, or to any of the subsequent transactions and documents described above.

b. <u>The facts, viewed in the light most favorable to the Plaintiff.</u>

The Community contends that on these facts there can be no doubt--

(1) that Ms. Jones second lease was void, or at a minimum was voided when the Bureau of Indian Affairs cancelled the first lease;

(2) that Ms. Barrientez could take nothing from the Minnesota Dakota Housing Authority since--

(a) Ms. Jones' purported mortgage of the entirety of the disputed land could not possibly be effective, inasmuch as all Ms. Jones possessed was a leasehold;

(b) even if the mortgage were somehow partially valid, the Community was never notified in writing of its default and therefore could not exercise its right of first refusal to purchase Ms. Jones' interest; and

(3) Ms. Barrientez could take nothing from the purported actions of the General Council since--

(a) the body which claimed to be the General Council was a rump group with no power or claim of right; and

(b) no assignment ever was issued by virtue of the General Council's resolution.

The facts recited in this Memorandum present a forceful case for the Community; but when the Court views all of the facts in the light most favorable to Ms. Barrientez, and gives her the benefit of all inferences which can be made from them, we cannot say that as a matter of law the Community is entitled to summary judgment.

The Community was a party to Ms. Jones' second lease, and the Bureau of Indian Affairs approved the lease after its execution--and that lease not only permitted but required Ms. Jones to mortgage her interest. Certainly, the Community participated in the transaction with the knowledge that the validity of the transaction would be relied upon, not only by Ms. Jones but by persons who would derive from Ms. Jones. It seems possible, from the evidence presently before us, that Ms. Barrientez could present evidence at trial to the effect that the practice and policy of the Bureau of Indian Affairs at the time of Ms. Jones' transactions was merely to review leases, and not to review encumbrances executed subsequent to the

leases' approval. And although Ms. Jones patently was unable to mortgage anything more than her leasehold interest--and if the Authority purported to obtain a greater interest from Ms. Jones and to convey a greater interest to Ms. Barrientez, such attempts would be nullities--still we think it is possible that the Plaintiff at trial could produce evidence to the effect that the Authority commonly used mortgage forms of the type present in this case, that the Community and the Bureau of Indian Affairs were generally aware of that fact, that all parties understood that the interest conveyed thereby was nothing more than the leasehold interest which each individual mortgagor possessed. Under such circumstances, Ms. Jones mortgage instrument could perhaps be read merely to convey a lien on her leasehold. See generally, 73 A.L.R.4th, at 482, et seq..

With respect to the Community's right of first refusal, in the event of Ms. Jones' default, Ms. Barrientez furnished the Court with documents indicating that several members of the Community's government were aware of Ms. Jones' default. She contended that therefore, although no written notice of that default and of the Community's consequent right to purchase Ms. Jones' interest was given to the Community, still the Community had actual knowledge of these facts sufficient to preclude their being argued against Ms. Barrientez here. We cannot say, based on the record, that such arguments would fail as a matter of law.

So far as we are aware, the issue of estoppel has never been argued against the Community, and any person seeking to enforce an estoppel against any government has a heavy burden to carry; but under the proper circumstances we cannot say that an estoppel would not lie against the Community to the same extent, and for the same cause, as it would against the United States Government. See e.g. United States v. Lazy FC Ranch, 481 F.2d 985 (9th Cir., 1973). Hence, although Ms. Barrientez may have a very difficult time in attempting to carry her burdent, the facts presently before the Court at this point do

not preclude Ms. Barrientez from arguing that the Community is estopped from denying the validity of the action of the putative General Council in 1987, given Ms. Barrientez's alleged detrimental reliance thereon.

For all of the foregoing reasons, we are today denying the Community's motion for summary judgment.

September 7, 1990

Judge John E. Jacobson for the Court

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Anita Barrientez, Plaintiff, vs. The Shakopee Mdwewakanton, Sioux Community, Defendant.	No. 007-88

MEMORANDUM OPINION

Summary

During a telephone pre-trial conference in this matter on September 20, 1990, the Court on its own motion raised the question of whether, under Rule 18 of this Court's Rules of Civil Procedure, the Minnesota-Dakota Indian Housing Authority ("MDIHA") is a necessary and indispensable party in these procedings. The Court requested the parties to provide the Court with their views. By written memoranda, they did so; and by this Memorandum Opinion the Court now states its position.

For the reasons set forth in more detail below, it is the view of this Court that as matters presently stand, the MDIHA clearly is a necessary party to these procedings. MDIHA claims an interest in property, the title to which is at issue here; and as matters stand that interest could be jeopardized if the Defendant Shakopee Mdewakanton Sioux Community ("the Community") were to prevail. Therefore, we are today ordering

that, unless the status quo changes in a manner we describe below, the MDIHA must be joined as a party in this matter.

In its memorandum on this issue, the Community asserted that it would consent to assume all of the obligations that the Plaintiff, Anita Barrientez, has to MDIHA, should the Community prevail. Without more, this representation would not seem to create an obligation that MDIHA clearly could enforce. However, if the Community were either to execute a hold-harmless agreement with the MDIHA, or post a bond with the Court in the amount of Ms. Barrientez's obligation to MDIHA, then the intersts of MDIHA no longer be in jeopardy in this action, and its joinder no longer would be required.

Discussion

Rule 18 of the Rules of Civil Procedure of this Court is identical to Rule 19 of the Federal Rules of Civil Procedure. Both Rules provide:

> (a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. ...
>
> (b) If a person, as described in subdivision (a)(10 - (2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the

person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In this litigation, the MDIHA claims a mortgage interest in the residence being occupied by the Plaintiff; and the Community claims that the Plaintiff has no right to occupy the residence. Clearly, then, the MDIHA both claims an interest in the subject matter of this litigation, and is so situated that, if the Community's position were to prevail, MDIHA's interest would be jeopardized. Routinely, where the adjudication of a case will affect the validity of an interest in property, United States Courts have held that an entity claiming such an interest is a necessary party. See e.g., Naartex Consulting Corp. v. Watt, 722 F.2d (D.C. Cir. 1983), cert. denied 467 U.S. 1210 (1984); Vasser v. Shilling, 91 F.R.D. 146 (E.D. La., 1982); and Local 670, United Rubber, Cork, Linoleum and Plastic Workers of America v. United Rubber, Cork, Linoleum and Plastic Workers of America, 822 F.2d 613 (6th Cir. 1987), cert. denied __ U.S. __, 108 S.Ct. 731 (1988). We concur with those holdings.

Therefore, in this case, the Community will be obliged either to join the MDIHA or to effectively eliminate the jeopardy that this litigation creates for MDIHA's claimed rights. In pretrial proceedings on October 17, 1990, counsel for MDIHA indicated that that entity probably would not willingly enter this litigation; so, unless that position were to change, the Community will be obliged to attempt to join MDIHA as an involuntary Plaintiff.

However, as we have said, the need to join the MDIHA would vanish, under our Rules, if MDIHA's interest clearly cannot be damaged by any outcome of this litigation. We do not believe that a statement in the Community's Memorandum, standing alone, does cause that jeopardy to vanish: it is not clear to us that such a statement creates a binding obligation which MDIHA could enforce. However, either a written agreement between MDIHA and the Community, under which the Community guarantees the payment

of MDIHA's loan to the Plaintiff, or a bond posted with the Court, in similar terms, would in our view eliminate the need of joinder.

October 31, 1990

Chief Judge Kent P. Tupper for the Court

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Anita Barrientez, Plaintiff, vs. The Shakopee Mdwewakanton, Sioux Community, Defendant.	No. 007-88

ORDER

Based on the Memorandum Opinion accompanying this Order, and upon all the pleadings and materials herein, it is hereby ORDERED:

1. That the Defendant Shakopee Mdewakanton Sioux Community of Minnesota join the Minnesota-Dakota Indian Housing Authority as an involuntary Plaintiff in these proceedings, or

2. That by agreement between the Shakopee Mdewakanton Sioux Community, or by the posting of a bond with the Court, the Shakopee Mdewakanton Sioux Community eliminate the possibility that the Minnesota Dakota Indian Housing Authority may experience monetary loss from the adjudication of this matter.

October 31, 1990

Kent P. Tupper
Chief Judge

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Anita Barrientez, Plaintiff, vs. The Shakopee Mdwewakanton, Sioux Community, Defendant.	No. 007-88

MEMORANDUM AND ORDER

Before Kent P. Tupper, Chief Judge; Henry M. Buffalo, Jr., Associate Judge; and John E. Jacobson, Associate Judge.

Per Curiam.

Summary

The undisputed facts in this matter were summarized by the Court in its September 9, 1990 Memorandum Opinion, and they will not be reviewed again here. On November 20, 1990 the Plaintiff in this matter filed a Motion to Dismiss or for Other Relief, urging that one entity and two persons--the United States of America, and Ms. Ramona Lee Childs-Jones and Mr. John Barrientez--were necessary and indispensable parties, and that the Amended Counterclaim of the Shakopee Mdewakanton Sioux

Community ((herafter, "the Community") should be dismissed.

Thereafter, on February 5, 1991, appearing specially to contest this Court's jurisdiction, the Third-Party Defendant Minnesota Dakota Indian Housing Authority (hereafter, "MDIHA") moved to dismiss the Community's Third-Party Complaint against it. The Community had served the MDIHA with the Third-Party Complaint in response to this Court's October 31, 1990 Memorandum Opinion, holding that MDIHA was a necessary party to this action under the terms of Rule 18 of Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community. In support of its Motion to Dismiss, the MDIHA has argued that it is immune from suit; that the Community in 1980 specifically legislated in such a fashion as to make all laws of the Community inapplicable to the actions of the MDIHA on the Community's reservation; and that, even if the MDIHA is not immune from suit, still there is no grant to this Court either of subject matter or of personal jurisdiction over the MDIHA, and no law to apply to the MDIHA.

For the reasons set forth below, the Court herewith denies all of the foregoing motions, and directs counsel for the parties to make themselves available for a pre-trial conference.

Discussion

1. The United States of America, Ramona Lee Childs-Jones and John Barrientez are not necessary parties in this action.

a. The United States of America. Ms. Barrientez's

contention that the United States is a necessary party is based on several undisputed facts respecting the lands, the right to possession here at issue. (The lands involved in this matter are described as Lot 16, Block 2, on the General Development Plan in the North Half of the Southwest Quarter (N/2 SW/4), Section 22, Township 155 North, Range 22 West of the Fifth Principal Meridian, Scott County, Minnesota [hereafter, "the Lands"]). Ms. Barrientez argues that the United States is a necessary party in this action, first, because fee title to the Lands is in the United States of America; and second, because Ms. Barrientez's claim of title to the Lands originates in a lease between the Community and Ms. Ramona Jones (now Ms. Childs-Jones), which was approved by the Bureau of Indian Affairs of the United States Department of the Interior. And Ms. Barrientez argues that the United States of America is not amenable to this Court's jurisdiction, and therefore this matter should be dismissed for want of an indispensable party.

In our view, however, Ms. Barrientez's arguments in support of the contention that the United States is a necessary party are misplaced, and we therefore are not obliged to reach the indispensability question.

It is clear that the mere fact that the United States of America holds lands, or is alleged to hold lands, in trust for an Indian tribe does not mean that the United States is a necessary or an indispensable party to an action by the tribe to establish its rights in the lands. See generally, Red Lake Band of Chippewas v. City of Baudette, Minnesota, 730 F. Supp.

972 (D. Minn. 1990); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied 465 U.S. 1049 (1984).

In this action, the connection between the United States of America and the issues before the Court is vanishingly small. In its Amended Counterclaim, the Community seeks possession of the Lands, and contends that Ms. Barrientez received no rights from Ms. Childs-Jones. In response, Ms. Barrientez does not contend that the United States has granted or formally approved Ms. Barrientez's claim to the lands. The parties agree that the United States of America neither approved nor disapproved the instruments by which Ms. Barrientez claims her interest to the Lands. They also aagree that the United States took action to cancel the lease between the Community and Ms. Childs-Jones in 1989--although they dispute the effect of that action.

So, as the Community observed in its December 5, 1990 Memorandum, the United States will hold beneficial title to the Lands no matter how the dispute between the parties before Court is resolved, and no interest of the United States will be impaired by any conceivable outcome of this matter. Under these circumstances, the United States simply is not a necessary party.

b. Ramona Lee Childs-Jones. Ms. Barrientez contends that she is the successor to certain rights of Ramona Lee Childs-Jones. In order to succeed in this action, therefore, Ms. Barrientez must demonstrate that Ms. Childs-Jones no longer

has any interest in the Lands. On its side of things, the Community contends that neither Ms. Childs-Jones nor Ms. Barrientez has any rights in the Lands. Neither Ms. Barrientez nor the Community seeks anything from Ms. Childs-Jones in this action; so it is apparent that, like the United States of America, Ms. Childs-Jones has no interest which can be affected in this action, and she, too, is not a necessary party.

c. John Barrientez. Ms. Barrientez has represented to the Court, and the Community has not disputed, that John Barrientez is her husband, and that the parties are separated and that he is not living on the Lands or on the Community's reservation. He is, however, a co-signer on a mortgage instrument which Ms. Barrientez maintains incumbers the Lands, and also is a co-signer with her on a promissory note running to the MDIHA.

The Court notes that Mr. Barrientez attended one pre-trial conference in this action. It therefore is clear that he is aware of the existence of the matter; but the Court has received no indication from him that he has any continuing interest in these proceedings. Ms. Barrientez's counsel quite properly has represented to the Court that he does not and cannot represent Mr. Barrientez.

As with Ms. Childs-Jones, the dispositive factor in this Court's consideration of Mr. Barrientez's status is simply that we cannot conceive that any action which we might take here could affect Mr. Barrientez's interests. This is an action for the possession of Indian lands, and for trespass damanges. Ms.

Barrientez does not contende that Mr. Barrientez had any interest in the Lands. Her contention has been that, by virtue of actions of the Community and MDIHA, she has received the right to occupy the Lands. And, of course, the Community contends that it has that right. In any case, since the Lands are Indian lands, so between these marital partners it is only Ms. Barrientez, not her estranged husband, who under any circumsances could properly possess this property in dispute.

It is true that, if Ms. Barrientez does not prevail, Mr. Barrientez, as a joint obligor on a promissory note, may face attempts at recourse from the MDIHA. But the instant case is not such an action. The decision in this case will determine only whether Ms. Barrientez has the right to possess the Lands, and whether she has any liability for trespass damanges. Like Ms. Childs-Jones and the United States, therefore, Mr. Barrientez is not a necessary party.

2. The MDIHA is properly before this Court.

a. The MDIHA is not shielded by sovereign immunity from suit. In support of its Motion to Dismiss, the MDIHA has argued that it cannot be brought before this Court because it is the creation of four Indian tribal governments--including the government of the Shakopee Mdewakanton Sioux Community--and it partakes of the sovereign immunity from suit which each of those governments possesses.

The materials submitted to the Court by the MDIHA--the correctness of which, again, are not disputed by the Community--indicate that the MDIHA was created when each of the

Federally recognized Sioux tribal governments in Minnesota adopted an identical ordinance (hereafter, "the MDIHA Ordinance"). The effect of the Community's action in adopting the MDIHA Ordinance was to establish a joint housing authority, authorized to accept and administer funds from the United States Department of Housing and Urban Development under the regulations appearing in Title 24, Part 900, of the Code of Federal Regulations.

The MDIHA correctly argues that an agency or corporate arm of an Indian tribal government may possess the same immunity from suit that is enjoyed by the government itself. See generally, F. Cohen, Handbook of Federal Indian Law, 324-7 (1982). And the MDIHA accurately states the law when it observes that an express waiver of immunity is required before a tribal entity which otherwise is cloaked with immunity will be deemed to have shed that cloak. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

But these arguments do not lead to the conclusion that the MDIHA is immune from suit, because Article V, section 2 of the MDIHA Ordinance provides:

> Each of the Local Councils [that is, the governing councils of the Minnesota Sioux Communities] hereby gives its irrevocable consent to allowing the Joint Authority [that is, MDIHA] to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Joint Authority to agree by contract to waive any immunity from suit which it might otherwise have; but none of the Communities shall be liable for the debts or obligations of the Joint Authority.

The United States Court of Appeals for the Eighth Circuit has

interpreted virtually identical language in the charter of the Oglala Sioux Housing Authority to constitute the sort of express waiver which makes a tribal government or an agency created by a tribal government susceptible of suit. Weeks Construction, Inc. v. Oglala Sioux Housing Authority, 797 F.2d 668 (8th Cir. 1986). See also, Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975).

The MDIHA has argued--without specifying any salient differences--that the waiver language in Weeks and Namekagon are distinguishable from the language at issue here; but this Court does not see it so. The language here is virtually identical to the language discussed in each of those two cases, and the apparent intent of the Communities in adopting the language was to create an agency which would be answerable before a judicial tribunal. A sound policy supports such an approach: because the MDIHA is thus answerable, it can operate in the open market, unhindered by any apprehensions, on the part of persons and entities with which it deals, that its obligatinos and undertaking cannot be enforced.

b. The Third-Party Complaint can be maintained against the MDIHA despite the terms of Article V, Section 5 of the MDIHA Ordinance. The MDIHA argues that, when the General Council of the Shakopee Mdewakanton Sioux Community adopted the MDIHA Ordinance by General Council Resolution No. 00081 on May 22, 1980, and the Community thereby agreed to participate in the MDIHA, the Community also legislated in such a fashion

as to mandate the dismissal of the MDIHA in this action. The MDIHA relies on the following language in the MDIHA Ordinance:

> No ordinance or other enactment of any of the Local Communities with respect to the acquisition, operation, or disposition of Local Community property shall be applicable to the [MDIHA] in its operations pursuant to this ordinance.
>
> MDIHA Ordinance, Art. V, sec. 5

The MDIHA argues that, in view of this language, the Community has made itself unable to create a Court with authority to hear any action where the MDIHA is a party.

In our view, this argument reads the reach of the MDIHA Ordinance far too broadly. The MDIHA Ordinance was intended to give a measure of independence to the joint powers housing agency it was creating. It was intended to prevent the Community, or the other participating tribal governments, from adopting substantive or procedural barriers to the MDIHA's accomplishment of its tasks. But it was not intended to neutralize all <u>other</u> law, or to prevent the establishment, by a participating tribal government, of a forum where the MDIHA's compliance with such other applicable law could be heard. Article V, Section 5 speaks to an "ordinance or other enactment of any of the Local Communities <u>with respect to the acquisition, operation, or disposition of Local Community property</u>". In this case, the Community has not adopted, and does not invoke, any provision that pertains in any way to the acquisition, operation, or disposition of property. The Community's claims in this matter appear to be based on Federal statutes and regulations, pertaining the assignment of leases

of Indian trust lands, and on Minnesota law.

If the MDIHA's argument were to prevail--if neutral Federal law and state law could not be applied to the MDIHA in a court created by a tribal ordinance--it would appear that no Indian tribal court ever could hear any case involving a tribal housing authority if the housing authority's ordinance contained language like that in Article V, Section 5. And inasmuch as the MDIHA Ordinance, including Article V, Section 5, is based on a model supplied by the United States Department of Housing and Urban Development, we cannot read the section to have that meaning. Federal policy favors the use of tribal courts to resolve disputes involving Indian lands and property, cf. Weeks Construction, Inc. v. Ohlala Sioux Housing Authority, 797 F.2d, at 673 (8th Cir. 1986), and we cannot assume that a Federal regulation would establish a policy that would run directly contrary to that policy.

c. This Court has personal and subject matter jurisdiction over the MIDHA. There is a relation between MDIHA's arguments concerning Article V, Section 5 of the MDIHA Ordinance and its argument with respect to this Court's personal and subject matter jurisdiction. And in making each argument, the MDIHA has misapprehended the nature of the law that confers jurisdiction on this Court and that this Court will apply in this case.

The MDIHA correctly notes that the mere fact that an entity does not have immunity from suit will not suffice to confer judicial jurisdiction over that entity. Personal

jurisdiction over a party, subject matter jurisdiction, and law to apply, all clearly are also requisite.

But the MDIHA does not correctly read the ordinances which give this Court its jurisdiction, nor the nature of the claim in the Third-Party Complaint. The ordinance which created this Court originally granted it the jurisdiction to decide cases relating to the membership of the Community, the rights of Community members, and the actions of the Community's government. See Hove v. Stade, Shak. Mdw. Comm. Ct. No. 001-88 (Memorandum Opinion on Motions for Preliminary Injunctions, filed July 13, 1988), at 5. Subsequently, by adopting Ordinance 3-27-90-003 the Community's General Council has given this Court--

> Personal jurisdiction over all persons, to the maximum extent permitted by law, including, but not limited to, lessees, occupants, guests, and persons in possession of, and all persons having or claiming any interest in or right to, Reservation lnads, whether Indian or non-Indian...

Clearly, the MDIHA has done business on the Community's Reservation; and in this matter it claims to own a mortgage interest in a leasehold on lands within the Reservation. THese are sufficient contacts with the Community to permit the Community's Court to exercise personal jurisdiction over the agency. Calder v. Jones, 465 U.S. 783 (1984).

As to subject matter jurisdiction, the Community's General Council has given this Court--

> [s]ubject matter jurisdiction over all cases, controversies and proceedings to the maximum extent permitted by law, including, but not limited to those

> involving the ownership, possession, use or occupancy of Reservation lands...
>
> Ibid., §10(a).

The Community's claims against the MDIHA in this case are that the interest in the Lands which MDIHA claims were not properly created under Federal law, and that Ms. Barrientez should be removed from the premises and subjected to trespass damanges under State law. The Community's claims against the MDIHA are that its claimsed interest in the Lands, like Ms. Barrientez's, are not cognizable under Federal law. These claims fall within the foregoing grant of subject mattter jurisdiction, and give the Court law to apply to this case--law which does not in any way contravene the provisions of the MDIHA Ordinance.

Before leaving this subject we feel obliged to note that we agree with the Defendant that one session of the Community's General Council cannot pass legislation which eliminates the ability of future sessions of the General Council to legislate in a different manner. But, given our analysis of the issues before us, we do not find it necessary here to consider whether General Council actions subsequent to the adoption of the MDIHA ordinance have changed or contravened that ordinance. The issues that pertain to the MDIHA's rights in this action appear simply to be issues of Federal law.

Based on the Memorandum Opinion accompanying this Order, and upon all the pleadings and materials herein, it is hereby ORDERED:

1. That the Motion to Dismiss and for Other Relief of the Plaintiff is denied; and

2. That the Motion to Dismiss of the Third Party Defendant Minnesota Dakota Indian Housing Authority is denied; and

3. A telephonic pre-trial conference shall be held at 10:00 a.m., Monday, June 24, 1991 to establish trial dates for this matter. The Court will initiate the conference, and in advance of the conference counsel for the parties shall inform the Court as to the telephone number at which they should be called.

June 12, 1991

Kent P. Tupper
Chief Judge

Henry M. Buffalo
Associate Judge

John E. Jacobson
Associate Judge

filed
1-9-92

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Kathy Welch, Ron Welch, Pat Welch and other persons similarly situated,	)	
Plaintiffs,	)	
vs.	)	Case No. 019-91
Enrollment Committee of the Shakopee Mdewakanton Sioux Community,	)	
Defendants.	)	

MEMORANDUM AND ORDER FOR PRELIMINARY INJUNCTION

Before Associate Judge John E. Jacobson

This matter came on for hearing at 1:30 p.m. on January 3, 1992, on motions by the Plaintiffs and the Plaintiff-Intervenors for a Preliminary Injunction. Herbert A. Becker, Esq. and Dorothy M. Firecloud, Esq., appeared representing the Plaintiffs; Kurt V. Bluedog, Esq., appeared on behalf of Plaintiff Intervenors; and Terry L. Janis, Esq., appeared on behalf of the Defendant Enrollment Committee of the Shakopee Mdewakanton Sioux Community. At the conclusion of the hearing, the Court read into the record an order, preliminarily enjoining the Defendants from taking certain actions. This Memorandum and Order reflect and memorialize that oral Order.

Based upon the testimony and exhibits presented during the January 3, 1992 hearing, the Court found that there was

insufficient evidence to justify the grant of any preliminary injunctive relief with respect to the so-called "per capita payments" which are made on a periodic basis by the Shakopee Mdewakanton Sioux Community to various persons. The Court noted that the record did not reflect what, if any, role the Defendant Enrollment Committee plays in the distribution of such payments. The Court also noted that it was apparent, from the limited amount of material presented to the Court respecting per capita payments, that the distribution of such payments was based on a system of some intricacy, the nature of which has not been the subject of evidence sufficient to justify the extraordinary remedy of a preliminary injunction.

However, the Court ruled that the evidence presented during the hearing did warrant the grant of a preliminary injunction, during pre-trial proceedings, to protect certain groups of the Plaintiffs from prejudicial action by the Enrollment Committee, both as to the groups' right to participate and vote in the Community's political affairs, and to receive payments made under Docket No. 363 of the Indian Claims Commission.

The groups of persons who are the subject of the Court's protection are determined by the appearance of their names on one or more lists. The first such list is attached to Resolution No. 4-30-90-006 of the General Council of the Shakopee Mdewakanton Sioux Community. The Court determined that the probability was great that the Plaintiffs would be able to establish, at trial, that Resolution 4-30-90-006 is

part of the governing law of the Community, and that therefore the seventy-five persons listed thereon would be determined to be members of the Community.

The second list was a Reconstructed Base Roll of the Shakopee Mdewakanton Sioux Community, which was the subject of a May 27, 1983 letter of approval by the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs (admitted as Plaintiff's Exhibit A during the January 3, 1992 hearing). The Court noted that there were a number of unusual, and perhaps suspicious, circumstances concerning that Roll in the record of the General Council of the Shakopee Mdewakanton Sioux Community. For example, the numbering of the Resolution which approves the Roll is not obviously consistent with the enumeration contained in the Minumtes of the General Council meeting where the it was supposed to have been passed. And the Enrollment Ordinance, which apparently was passed at the same meeting, makes no reference to an existing Roll, but instead directs the Enrollment Committee to construct one. Still, the undisputed fact is that the Area Director of the Minneapolis Area Office of the Bureau of Indian Affairs approved that Roll nearly nine years ago and, despite the fact that the approval has been commonly known for many years, no appeal from it was filed under the provisions of Title 25 of the Code of Federal Regulations. Therefore, the Court believes it is very probable that, at trial, the Roll will be held to be effective, and that the persons listed thereon will be held to be members of the Community.

Next there is the list of persons who received payment under Docket 363, by virtue of the provisions of the Act of October 25, 1972, 86 Stat. 1168. Under that statute, a Roll was prepared of the members of the Shakopee Mdewakanton Sioux Community who were lineal descendants of the Mdewakanton and Wahpakoota Tribes. The Enrollment Committee argued, during the hearing on this matter, that that Roll was prepared by the Bureau of Indian Affairs, and that therefore it had never been formally adopted or accepted by the Shakopee Mdewakanton Sioux Community. But the plain language of the statute makes it clear that the truth is otherwise: Section 101(a) of the statute provides that--

> The Lower Sioux Indian Community at Morton, Minnesota, the Prairie Island Indian Community at Welch, Minnesota, and the Shakopee Mdewakanton Sioux Community of Minnesota shall prepare rolls of their members...and such rolls shall be subject to approval of the Secretary of the Interior.

In other words, the Roll that was prepared under this provision clearly was a statement, by the Shakopee Mdewakanton Sioux Community to the United States government, of the Community's view of its membership. Therefore, in the view of the Court, it is altogether likely that once that Roll was approved by the Secretary of the Interior--as it clearly was, inasmuch as payments were made under it--the persons whose names appeared on the Roll became vested with the rights of members of the Community, if they had not been thus vested before.

The Enrollment Committee argued, however, that whatever the effect of the Act of October 25, 1972, might otherwise have

been, and whatever rights might otherwise have been vested under it, everything was changed by the passage of the Act of October 28, 1985, 99 Stat. 549. The Enrollment Committee contended that that statute required the Community to examine anew all persons within the Community, to determine whether each qualified as a member, to receive the final payment under Docket 363.

The Court finds this reading of the Act of October 28, 1985, unpersuasive. Section 6 of the Act merely states:

> The [remaining unpaid] share [of Docket 363] of the Shakopee Mdewakanton Sioux Community shall be used and distributed as follows:
>
> (a) Eighty per centum of the funds shall be invested by the Secretary for a Tribal Investment Fund designed to yield periodic dividend payments to all tribal members born on or prior to and living on the dates such dividend payments are declared...

Nothing in this language suggests that the Community or the Bureau of Indian Affairs were mandated or authorized to revisit their earlier membership determinations. The Court was confirmed in its belief, in this regard, by a passage in a letter sent from the Minneapolis Area Office of the Bureau of Indian Affairs to the Chairman of the Community on March 12, 1991 (which letter was Plaintiff's Exhibit C at the hearing). The letter reviewed various correspondence which the Bureau of Indian Affairs had received from the Enrollment Committee respecting persons seeking eligibility for Docket 363 payments, and it noted:

> The applications of individuals listed on the Shakopee Mdewakanton Membership/Per Capita Payment Roll, prepared pursuant to the Act of October 25, 1972, as of April 23, 1981, were not reviewed since

> it was previously determined that the individuals whose names appeared on that roll met the criteria for enrollment to share in the distribution of judgment funds as members of the Shakopee Mdewakanton Sioux Community. Other than the effective date for eligibility, the enrollment criteria is the same.

Accordingly, the Court believes it is altogether likely at trial that all persons who received initial payments under Docket 363 will be held to be entitled to receive ongoing payments under the foregoing section.

Finally, there is the group of persons who, in 1991, were added to the pre-existing lists of persons eligible to receive Docket 363 payments. The above-quoted March 12, 1991 letter from the Minneapolis Area Office of the Bureau of Indian Affairs went on to state that--

> Our office has completed the review of the Shakopee Mdewakanton Roll which will be used to determine the proportionate share of Docket 363 funds to which the Shakopee Mdewakanton Community is entitled. A copy of this listing is enclosed, which consists of 92 persons eligible to share in the distribution of Docket 363 funds to the Shakopee Mdewakanton Sioux Tribe.
>
> It is our understanding that you notified Central Office, Tribal Enrollment Services to hold up on the determination of the pending appeals in their office until further notice. We note that the boxes contain files for some of the appellants. It is our recommendation that you forward this information to Central Office for inclusion in the appellant's file.

From this, the Court concluded that as of March 12, 1991, the Minneapolis Area Office had made a final determination as to the Shakopee Community members eligible to receive Docket 363 funds, subject only to appeals that had been timely filed with the Central Office of the Bureau of Indian Affairs. And at the hearing, the evidence was uncontroverted that the only

appeals which had been filed were appeals of persons who had been excluded, not appeals aiming to remove persons who had been determined to be eligible. Therefore, the Court concluded that, at the trial in this matter, the likelihood would be that any person whose name appeared on the list of persons referred to in the March 12, 1991 letter from the Minneapolis Area Office had been, at that time, the subject of a final determination, which had not been the subject of a timely appeal, and therefore such persons would have acquired a vested right to participate in Docket 363.

The Court reviewed the other factors which, under its Rules, must be weighed in considering a motion for a preliminary injunction. Those factors--irreparable injury to the movant, absent the relief; the injury which the relief, if granted, would work to the Defendants; and the public interest--all operate in a straightforward fasion here. The denial of voting rights, and the denial of access to payments from the sort of fund that Docket 363 presents, clearly are irreparable injury. And, given the foregoing discussion of the probability of success on the merits, the Enrollment Committee suffers little injury by the grant of preliminary relief, particularly if this matter is tried in an expeditious manner. The public interest is simply in having justice done, in an expeditious a manner possible.

Therefore, based on the pleadings and files herein, and the evidence and argument of the parties during the January 3, 1992 hearing, it is hereby ORDERED that until the trial of this

matter is complete, or until further order of this Court:

1. The Enrollment Committee of the Shakopee Mdewakanton Sioux Community shall not take any action to interfere with the rights to vote of those Plaintiffs who either (a) appear on the list of persons attached to Resolution No. 4-30-90-006 of the General Council of the Shakopee Mdewakanton Sioux Community, and/or (b) appear on the Reconstructed Base Roll of the Shakopee Mdewakanton Sioux Community that was approved by the Bureau of Indian Affairs, U.S. Department of the Interior on May 27, 1983; and

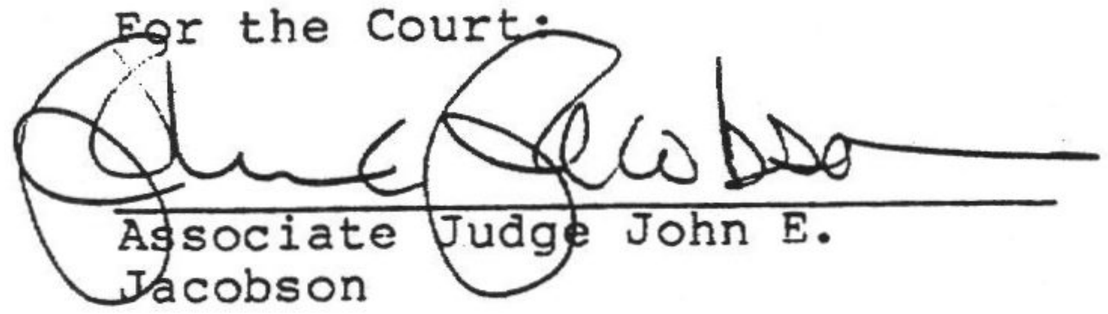
2. The Enrollment Committee of the Shakopee Mdewakanton Sioux Community shall not take any action to interfere with the right to participate in payments, under Indian Claims Commissin Docket No. 363, of any person who either (a) received payments as members of the Shakopee Mdewakanton Sioux Community under the provisions of the Act of October 25, 1972, 86 Stat. 1168, or (b) was listed as eligible to receive such payments by the March 12, 1991 letter of the Area Director, Minneapolis Area Office, Bureau of Indian Affairs to the Chairman of the Shakopee Mdewakanton Sioux Community; and

3. Counsel for all parties will participate in a pre-hearing telephone scheduling conference, to be initiated by the Court at 10:30 a.m. CST on Friday, January 17, 1992. In advance of such conference, counsel will confer among themselves with respect to the possibility of settlement in this matter, and with respect to the matters which they expect

can be the subject of a stipulation, if trial is necessary.

January 7, 1992

For the Court:



Associate Judge John E. Jacobson

COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Anita Barrientez, Plaintiff, v. The Shakopee Mdewakanton Sioux Community, Defendant, v. Minnesota Dakota Indian Housing Authority, Third-Party Defendant.	MEMORANDUM AND ORDER No. 007-88

Memorandum

On March 26, 1992, the parties in this action jointly moved for a Stipulated Judgment with respect to a portion of the matters at issue. The parties filed a Joint Motion, which attached an Affidavit of the Chairman of the Shakopee Mdewakanton Sioux Community ("the Community"), Stanley R. Crooks, and an affidavit of the Executive Director of the Minnesota Dakota Housing Authority ("the MDIHA"), Dale R. Childs, together with a certified copy of Resolution No. 3-12-92-009 ("the Resolution") of the General Council of the Community.

The Resolution authorized Chairman Crooks to execute a lease to the Plaintiff, Anita Barrientez, for the lands

("the Lands") which are at issue in this matter, a description of which is attached hereto as Exhibit 1. The affidavits of Chairman Crooks and Executive Director Childs acknowledge that the Bluedog Law Office presently represents both the Community and the MDIHA, and state that the Community and the MDIHA waive the conflict of interest that exists because of this dual representation. The Joint Motion indicates that all parties agree that it would be appropriate for this Court to resolve the issue of the Plaintiff's right to occupy the lands at issue by entering an order directing the implementation of their settlement. The settlement agreement described by the Joint Motion, and authorized by the Resolution contemplates the execution, by the Community, of a lease to the Plaintiff, for a period of twenty-five years, "with a right to renew".

This matter is by far the oldest matter pending before the Court. It has been the subject of extensive proceedings, and a difficult trial. Throughout, it has been the perception of the Court that a settlement would serve all parties well, if it could be reached; and the Court is aware that all parties, and all counsel, earnestly have sought such a resolution. It therefore is particularly gratifying that, at the end, at least a partial agreement has been reached. The Court commends the parties and all counsel, past and present, for the result.

It therefore is ORDERED:

1. That the partial settlement described in the Joint Motion of the parties is approved; and

2. That the parties are directed to enter into the lease contemplated by the Joint Motion within sixty days from the date hereof; and

3. That, within thirty days after the lease contemplated by the Joint Motion has been entered into, the parties are directed to report to the Court, jointly or severally, and to identify the issues which remain unresolved in this matter, and to suggest to the Court a manner in which resolution should be obtained.

For the Court:

March 31, 1992

John E. Jacobson, Associate Judge

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In this case, the Court is called upon to consider the validity of an ordinance which, from the record before us, has formed the basis for relative stability within the Shakopee Mdewakanton Sioux Community for a period of nearly four years, in light of Article VI of the Community's Constitution. Because we are asked to overturn an action of the Community's General Council, the question presented is perhaps the most difficult that this Court has faced.

It is made more difficult because of the factual background which underlies the challenged action. For a number of years, before and including 1988, the Community lived in nearly constant turmoil. In no small part this turmoil was a product of three facts: the Community's businesses were generating substantial

monies; a significant share of those monies were being distributed "per capita" to the Community's membership; and the right of various persons to participate in these "per capita" payments repeatedly was disputed by other persons within the Community.

No useful purpose would be served by a recitation of the specifics of that history. Suffice it to say that the files of the Federal courts and Federal agencies, not to mention the file cabinets of many attorneys, are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.

During the period from 1983 to 1988, the Community operated under an Ordinance which mandated that all persons receiving "per capita" payments be residents of the Community's reservation, and that any member who had left the Reservation and returned not receive such payments for a period of one year following their return. In 1988, the Community's General Council took two actions aimed at stilling the fears of persons receiving per capita payments: In the late winter of 1988, it created this Court. And on December 29, 1988, it passed Ordinance No. 12-29-88-002. That ordinance listed the persons who on that date were receiving "per capita" payments, and it stated that, barring two separate affirmative votes of two-thirds of the Community's membership, those would continue to receive such payments. Ordinance No. 12-29-88-002 also stated that, barring two separate affirmative votes

of two-thirds of the Community's membership, no other persons (except certain minors), regardless of their membership in the Community, would in the future be eligible to receive payments.

In this case, this Court--one of the two structures that was established to bring stability to the Community--has been asked to declare that a portion of Ordinance No. 12-29-88-002, the second such structure, violates Article VI of the Constitution of the Shakopee Mdewakanton Sioux Community. In one of the ironies that characterizes much of life, we find that we must do so.

Our holding is narrow, and at least pending further proceedings, it is only prospective in its effect. Specifically, our holding is that, while the Shakopee Mdewakanton Sioux Community could, consistent with Article VI of its Constitution, establish Reservation residency requirements which members would be required to meet before they could receive "per capita" payments, it could not, consistent with Article VI, remove those residency requirements and still deny per capita payments to the members to whom payments were not being made because of their prior absence from the Community's Reservation. Therefore, we today direct the Community to commence making per capita payments to Ross.

We believe that we do not now have before us a record sufficient to decide whether the effect of this order either can or should be made retroactive. We therefore also direct the parties to discuss with the Court a briefing schedule on this issue.

Discussion

The parties agree that there are no disputes with respect to

any material facts, and have placed this matter before us on cross motions for summary judgment.

The facts are these: The Plaintiff, Lanny Ross, is a member of the Community. (He notes that he is a "charter member", which is true enough because his name does appear on the roll of the Community developed in 1969, but no consequence flows from this fact because nothing in the Community's governing documents distinguishes the rights of "charter members" from those of other members). When the Community adopted its residency requirements in 1983, Ross did not reside on the Reservation. Therefore, his name did not appear on a list of persons whom the Community deemed to be eligible to receive "per capita" payments at that time. Ross returned to the Community in 1988, but on December 29, 1988, when Ordinance No. 12-29-88-002 was adopted, he had not yet been a resident for twelve months, and therefore was not receiving payments.

With respect to residency and "per capita" payments, Ordinance No. 12-29-88-002 provides:

> Section 4- Reservation Residency Not Required- There shall be no requirement that recipients of per capita payments otherwise qualified shall maintain their residence on the Shakopee Mdewakanton Sioux Community Reservation. Payments and program benefits shall be available to community members and persons otherwise qualified whether or not those persons actually reside on the Shakoopee Mdewakanton Sioux Community Reservation.

As to the persons who are to eligible to receive such payments, the Ordinance states:

> Section 8- Final and Exclusive List of Eligible Recipients-

> The list of persons on the Roll of Adults, and the Roll of Minors and their descendants, shall comprise the final and exclusive list of persons entitled to receive payments and other benefits from the prsent and future businesses of the Shakopee Mdewakanton Sioux Community. Excepting only those described in Section 6 [which section pertains to certain trusts for minors], no further additions shall be made . No person listed on the Roll of Adults, and no minor child of those persons, now named on the Roll of Minors, and those who may subsequently be certified as qualifying for for [sic] addition to the Rolls pursuant to Section 6 of this Ordinance, shal ever be denied payments or benefits, and the value of the property right of each person on the Roll of Adults and the Roll of Minors shall be maintained at an equal level with the value of the property rights of the others named on those Rolls.

The Roll of Adults included all members of the Community (and some other persons)--save only for four persons whose names appeared on a separate list, denominated "List C - Persons eligible or enrolled for voting membership not now receiving benefits". Those four people were Ross, Charlie Vig, Pat Welch, and Dave Blue. Following the adopting of Ordinance 12-29-88-002, the General Council voted on the question of whether the names on List C should be added to the Roll of Adults. The vote was 21 for, 29 against, with 5 abstaining. Since December 12, 1988, Ross has lived on the Reservation and has been permitted to vote in the General Council and in the Community's elections; but he has not received "per capita" payments.

Article VI of the Community's Constitution provides:

> All members of the community shall be accorded equal opportunities to participate in the economic resources and activities of the community.

The parties have disputed at great length the effect of this

provision; but neither party really has provided a defining explanation for its position. Ross' principal contention is that "per capita" payments are economic resources of the Community, and that the effect of Article VI is to require that he receive an equal distribution of those resources. The difficulty with this argument is that it begs the question. On occasion, in the materials submitted to the Court, Ross appears to assert that under all circumstances Article VI establishes a right to equal distributions among all voting members, with no distinctions being permissible among such members. And he makes variations on this argument, asserting that the Community's denial of payments to him is a denial of a property right without due process of law, in violation of the due process and equal protection guarantees of the Indian Civil Rights Act of 1968. 25 U.S.C. 1302. But those arguments stand or fall on the resolution of the fundamental question. He has a right to protect only if Article VI gives him a right to receive payments.

The Community's arguments also miss the mark to some extent. The Community correctly notes that Article V of the Constitution gives the General Council the authority to "manage all economic affairs and enterprises of the community". But the provisions of Article V do not negate the effect, whatever it may be, of Article VI. The Community stresses the fact that one of the most fundamental powers of an Indian tribe is the power to determine its own membership. But the Community has decided its own membership, and Ross is a member. The question is: what does Article VI mean

for members. The Community asserts that the acceptance of Ross' arguments would mean that each member would be guaranteed an equal share of all Community resources--that the Community could never establish programs, such as education and health care programs, which would distinguish between members based on their need. Ross rejects that argument as a "straw man" (or, in oral argument, as a "straw horse"); but he does not explain what exactly Article VI does mean.

In the view of the Court, however, at least three things are clear.

First, Article VI clearly was not intended to, and does not, preclude the Community from establishing programs based on members' need or on circumstances, or establishing appropriate standards for the dispostion of the Community's resources. Far more specific language would be required than that used in Article VI, to reach such a result. It is our view that the equal protection analysis generally employed in interpreting the Fourteenth Amendment to the United States Constitution, imposed upon the Community's actions by the Indian Civil Rights Act of 1968, in most cases is probably the appropriate one for interpreting Article VI. The manner in which the "rational relationship" and "strict scrutiny" formulae that traditionally are applied in Fourteenth Amendment cases may change in the context of the Community and its circumstances; but at least the Community's government is not required to be merely a vessel to pass along all Community property in equal shares to all members.

This leads us to our second conclusion, which is that the

Community did not violate either the provisions of Article VI or of the Indian Civil Rights Act when, in 1983, it established both the requirements that a person be a resident of the Reservation in order to receive "per capita" payments, and that members who returned to the Reservation then reside thereon for twelve months before becoming eligible for payments. The Community is tiny, both in terms of its membership and its land base. In 1983, it also was tiny in terms of its resources. It was not an unreasonable choice for the Community to hold its "per capita" payments within the boundaries of the Reservation, where the General Council could reasonably conclude they were most needed. Also, when money suddenly was appearing where it had not been before, it was not unreasonable for the General Council to require members who had left the Reservation to demonstrate a commitment to the Community, in the form of a one-year waiting period, before permitting them to partake of the Community's resources. Therefore, insofar as Ross claims per capita payments from 1983 through December 29, 1988, his claim must fail.

But third, under Article VI, the decision of the General Council on December 29, 1992 to eliminate the residency requirement for most members (to permit them to leave the Reservation and retain their rights to payment), but to retain forever the effect of the residency requirement on Ross (so that only by two affirmative votes of two-thirds of the Community's entire membership could he participate in payments, regardless of where he lives) is impermissible. It did not have the effect of holding

vital monies on the Reservation. To the contrary, since Ross is a resident and is not receiving payments, while many other members who are receiving payments presumably may have left, the effect may well have been the reverse. It also did not have the effect of eliciting a demonstration from anyone to the Community. Indeed, the only apparent effect is to penalize members who happen to have failed to return to the Reservation in time to be eligible to leave again with payments in hand.

No purpose permissible under the "equal opportunities" language of Article VI can possibly be served by such a result. The Court is fully cognizant of the fact that members of the Community may well feel as though their residence on the Reservation during the troubled times preceding December 29, 1988 entitles them to special consideration, as against members who were not on the Reservation at that time. And indeed, they might be correct--<u>if the same residency requirements applied to all members.</u> But when the requirements have been lifted for some, in the view of the Court they must be lifted as to all.

Therefore, it is clear to us that we must order that Ross be given "per capita" payments, commencing immediately. Whether, however, this Court has the authority to order that Ross be compensated for payments he did not receive from December 29, 1988 to the present, and whether--whatever our authority--it is appropriate for us to enter such an order, is a matter we do not now decide. The parties have not briefed this issue, and in our view, considering the amounts that may be at issue, the Court must

have the benefit of the parties' views.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made during the period prior to December 29, 1988; and

2. That the Plaintiff's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made following the date of this Order; and

3. That on or before July 24, 1992, counsel for the parties are directed to inform the Court of their schedule, to permit the Court to establish a briefing schedule with respect to the matters that remain undecided in this litigation.

July 17, 1992

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

No. 025-92

Shakopee Mdewakanton
Sioux (Dakaota) Community

ORDER OF THE
SHAKOPEE MDEWAKANTON SIOUX
COMMUNITY COURT

After due consideration of the full record before the Court in the matter of Petition for Declaratory Judgment by the Shakopee Mdewakanton Sioux (Dakota) Community regarding the amendment to the Shakopee Mdewakanton Sioux Community Corporation Ordinance, which amendment is identified as Resolution No. 11-05-92-001, ;

IT IS HEREBY DECLARED: that the amendment to the Shakopee Mdewakanton Sioux Community Corporation Ordinance is in the best interests of the Community.

BY THE COURT:

Dated: 12/7/92, 1992.

Judge of the Court of the Shakopee
Mdewakanton Sioux Community

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In the Order entered in this matter on July 17, 1992, we left open the question of whether our Order, granting the Plaintiff the right to participate in the "per capita" payments made by the Defendant Shakopee Mdewakanton Sioux Community ("the Community") to various persons, could and should be retroactive to some date. We established a briefing schedule on those questions, and now have reviewed the written materials submitted in response and heard the argument of the parties.

We today hold that this Court does have the authority to make a retroactive award of per capita payments, and that while it is not appropriate to exercise that authority to the full extent sought by the Plaintiff--that is, it is not appropriate to award

the Plaintiff payments retroactive to December 29, 1988, the date that Ordinance No. 12-29-88-002 was adopted by the Community--it is appropriate to award payments retroactive to the date upon which this action was filed.

Discussion

In response to the Court's request for the parties' views, excellent briefs were filed by both counsel. The parties agreed that this Court has the inherent authority to make retroactive awards of damages, and we concur.

The Community suggested, however, that given the terms of Ordinance No. 12-29-88-002, the Court might lack the authority to fashion a remedy that would implement a retroactive award in this case. Specifically, the Community expressed doubt that monies legally could be found, under Ordinance No. 12-29-88-002, to make a retroactive payment. The Community observed that the Ordinance establishes a Development Reserve, where presumably monies exist, but correctly noted that the Ordinance prohibits the use of those monies for per capita payments. And the Community noted that, absent the adoption of welfare programs, and save for another reserve account which could be established to permit payments at a previously budgeted level, the remaining amount of net proceeds must be distributed in equal payments to the persons entitled to receive them.

In short, the Community argued that to accomplish a retroactive payment to the Plaintiff, the Court would be obliged to direct the General Council of the Community to adopt amendatory legislation--a power which the Community asserted this Court lacks.

In the Court's view, however, it will not be necessary for the Court to direct that any Ordinance or Resolution of the Community be amended, in order to provide for a retroactive award. If the Community had made an administrative mistake in the distribution of its proceeds in a given month, it unquestionably could correct that mistake in a future month without violating the Business Proceeds Distribution Ordinance. For example, if the Community failed to issue a per capita distribution check to a person who should have received it in a given month, as a result of a bookkeeping or computer error, and if in that month all proceeds available for per capita payments were paid out to the other eligible recipients and therefore none remained to pay the injured person, the Community would have the authority to correct that error in the future. The persons who received payments in the previous month actually would have received more than their share, because some part of their checks reflected an amount which should have gone to the injured person. Therefore, an adjustment to correct mistakes would be an implementation of Ordinance 12-29-88-002, not a violation of it. Similarly, here, to make a retroactive award to Mr. Ross would require not an amendment of the Business Proceeds Distribution Ordinance, but merely its correct implementation.

But this analysis goes only to the Court's power to order that Mr. Ross receive retroactive payments. It does not decide the appropriateness of such an order in this case.

As to that, we believe it is appropriate to look to the law pertaining to retroactivity of Constitutional decisions as it generally is applied in non-Indian contexts. The Community

correctly noted in its brief that the law in this area is murky, and that the United States Supreme Court, in James B. Beam Distilling Co. v. Georgia, 115 L.Ed.2d 481 (1991), recently failed to illuminate the case law in any significant way.

Clearly, though, a decision based on Constitutional grounds need not always be retroactive in its effect, Chevron Oil Co. v. Hudson, 30 L.Ed.2d 296 (1971). And a three part test as to when non-retroactivity apparently should obtain. Established in Chevron, it appears to be as follows:

> 1. The decision to be applied non-retroactively, i.e. prospectively, must establish a new principle of law, either by overruling a past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> 2. The court must examine the prior history, purpose, and effect of the rule in question to determine whether retrospective operation will further or retard its operation; and
>
> 3. The court must determine whether retroactive application would impose inequitable results or substantial injustice.
>
> 30 L.Ed.2d, at 306.

The Community has argued that, as to the first part of this test, our July 17, 1992 decision was one of first impression, and that it was not foreshadowed by other actions of the Court. The argument is that the Community had no way to know what was in store for it.

As to the second part of the test, the Community notes that Mr. Ross now is receiving per capita payments, and that the Community has no reserves in the amount of $250,000.00--which is the amount the Community asserts would be owing to Mr. Ross, should our decision be made retroactive to December 29, 1988, the date on

which Ordinance No. 12-29-88-002 was adopted.

As to the third part of the test, the Community argues that retroactive application of our decision would take resources from the Community government which otherwise would be used to benefit the Community as a whole.

To the Court, however, the second and third factors in the Chevron test do not operate in the manner suggested by the Community. The point of our July 17, 1992 decision was that when the Community removed its residency requirements for persons who had been receiving the payments in the past, but permitted the effect of the residency requirements to continue for persons who had not been receiving them, and in so doing the Community acted inconsistently with Article VI of its Constitution. So, for the period from December 29, 1988 to the present, the persons who were receiving payments were benefitting at Mr. Ross' expense, in a manner that was inconsistent with Article VI. The fact that Mr. Ross now is receiving payments does not eliminate that injury; and if the Community receives somewhat less, for a period of time, and Mr. Ross receives somewhat more, in our view that does not impose inequitable results, but instead eliminates them.

The first Chevron factor--which essentially goes to the predictability of the result in this case--is another matter. The Community is correct in observing that this case was one of first impression, and that before it was filed there was nothing which foreshadowed its outcome. This Court had been created, and its doors were open to Mr. Ross or to any others who believed they were similarly situated; but until someone raised the issue presented by

List C of Ordinance No. 12-29-88-002, the Community can truly be said to have been without warning. Until this case was filed, on January 3, 1991, the Community had not been put on notice that there might be a flaw in the manner in which per capita payments were being made.

Therefore, we decline to award Mr. Ross any payments for the period from December 29, 1988 through January 3, 1991, when this case was filed. However, in our view matters were different, once Mr. Ross formally made his claim. The Community at that point could not reasonably suggest that it was not on notice that Mr. Ross believed he was being treated in a manner that was consistent with the Community's Constitution; and although the manner in which Mr. Ross pleaded his case was not precisely the manner in which this Court decided it, in our view the simple pendency of the case, and the absence of any strong argument to justify the distinction made between Mr. Ross and persons who were receiving per capita payments, provided sufficient foreshadowing to justify an award retroactive to the initiation of the case.

We are fully aware that, even though the retroactivity we are giving the award here is limited, it still must be dealt with carefully; and we note that it may be appropriate to extend the payment of the award over a period of time. We therefore direct that counsel for the parties arrange with the Clerk of Court for a conference--preferably, a conference that is simultaneous with the one we are today directing in Welch and Vig v Shakopee Mdewakanton Sioux Community, No. 022-92--to discuss the most appropriate manner for the implementation of the award.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant Shakopee Mdewakanton Sioux Community shall pay to the Plaintiff an amount equal to the per capita payments the Plaintiff would have received, had he been receiving such payments from January 3, 1991 to the date in 1992 that he began to receive payments. Such amount shall include interest at the rate of 3.25% compounded monthly, and shall be paid in accordance with a schedule to be established by the Court after consultation with the parties.

2. Counsel for the parties are directed to contact the Clerk of Court, to establish a date for a conference with the Court, to facilitate the establishment of a schedule for the payment of the award.

Date: June 3, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

086-13

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

PATRICK H. WELCH, and CHARLES VIG, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 022-92

MEMORANDUM OPINION AND ORDER

Summary of Procedural History

This case was generated by the July 17, 1992 decision of this Court in Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91, which held that a portion of Ordinance No. 12-29-88-002 of the Shakopee Mdewakanton Sioux Community ("the Community") was inconsistent with Article VI of the Community's Constitution.

In Ross, we held that although the Community could properly establish residency requirements (or other requirements which have a rational relationship to a legitimate governmental purpose) for the receipt of "per capita" payments made by the Community to various persons, the Community could not--as it attempted to do in Ordinance No. 12-29-88-002--later do away with those residency requirements, for persons who had been receiving payments in the

past, and still continue to deny payments to persons who had previously been excluded solely because of the residency requirement.

The three persons who had been so excluded appeared on "List C" of Ordinance No. 12-29-88-002. The Plaintiff in Ross was one of those persons; the Plaintiffs in this matter, Patrick Welch and Charles Vig, are the other two.

After this Court's July 17, 1992 decision in Ross, Mr. Welch and Mr. Vig moved to intervene in that case, and when their motion was denied they filed this action, on August 20, 1992. They have named as Defendants the Shakopee Mdewakanton Sioux Community, and Stanley Crooks, Kenneth Anderson and Darlene Matta, respectively the Community's Chairman, Vice-Chairman and Secretary-Treasurer. Their Complaint alleges that Mr. Welch and Mr. Vig are members of the Community, that they vote in the Community's General Council, that they appear on List C of Ordinance 12-29-88-002, and that they do not receive per capita payments. They contend that the officers of the Community have acted in violation of the Community's Constitution by failing to place them on the list of persons who receive such payments, and they seek damages for that failure both from the Community and from the officers individually.

The joint Answer of the Defendants admits that the Plaintiffs are members of the Community, that they appear on List C of Ordinance 12-29-88-002, and that they do not receive per capita payments. The Answer denies, however, that the officers of the Community had any power or authority to place the Plaintiffs on the list of persons eligible to receive such payments. And as an

Affirmative Defense, the Community has asserted that the Plaintiffs have failed to exhaust the non-judicial remedies which the Community avails them.

In accordance with a schedule established by the Court, depositions of the Plaintiffs, and of the three officers of the Community, were taken in October, 1992. In those depositions, the Plaintiffs stated that each had formally requested the General Council of the Community to place his name on the list of persons eligible to receive per capita payments, and that the General Council had refused each. This assertion appears to the Court to be confirmed by the depositions of the officers.

The matter now is before the Court on cross motions for summary judgment. The Defendants' motion was filed on December 5, 1992. Its basis is the fact that, although the Complaint in this matter does name the Shakopee Mdewakanton Sioux Community as a Defendant, the bulk of the allegations in the Complaint are directed at Mr. Stanley Crooks, Mr. Kenneth Anderson, and Ms. Darlene Matta, the Community's officers. The Defendants assert that is no ground whatever for granting relief against the officers, in their official or individual capacity, and that the Plaintiffs in depositions in fact admitted that they had not been wronged by the Community's officers. The Defendants do not discuss the non-judicial remedies which their Answer contends have been available to the Plaintiffs and have been ignored.

The Plaintiffs filed a response to the Defendants' motion for summary judgment on December 28, 1992, with "Errata" filed on March 8, 1993. A hearing was held on the Defendants' motion on January

8, 1993.

In the Plaintiffs' response, they appear to argue that, after the July 17, 1992 decision in Ross, the officers of the Community had a ministerial duty to add Mr. Welch and Mr. Vig to the list of persons eligible to receive per capita payments. The Plaintiffs also contend, in their response, that material issues of fact exist in this case. The facts which they cite principally are legal conclusions--that the Plaintiffs had been denied the "equal opportunities" guaranteed to all members of the Community by Article VI of the Community's Constitution, for example, and that the Community's officers had acted arbitrarily and capriciously in failing to place the Plaintiffs on the list of persons eligible to receive per capita payments.

On March 30, 1993, the Plaintiffs also moved for summary judgment, contending that actually no material facts are at issue in this matter. In their supporting materials they argue that they are members of the Community, that they are eligible to vote in the Community's General Council, and that for all legal purposes their situation is identical to that of Mr. Ross.

In their written response to the Plaintiffs' motion, and at the hearing which was held on May 10, 1993, the Defendants again argued that the Complaint this matter is defective because it is directed at the Community's officers. The Defendants also informed the Court that the Community has instituted a process to review, and perhaps amend, its per capita distribution system; and they urged the Court to refrain from taking action in this case until that process was complete.

Discussion

In the view of the Court, it is clear that no cause of action has been stated against the officers of the Community, in either their official or individual capacities: absent direction from the Community's General Council, or an order of this Court entered pursuant to the authority which the General Council has vested in us, the officers of the Community have no independent authority to add or delete persons from the lists of persons eligible to receive per capita payments. Therefore, as to the officers, summary judgment against the Plaintiffs must be granted.

But the Community itself also is a named Defendant in this action; and although the Complaint, and the Plaintiffs' other pleadings and papers, spend what appears to be an inordinate amount of time discussing the actions of the officers, the essence of Plaintiffs' grievance is clear enough. In their prayer for relief, the Plaintiffs say:

> WHEREFORE, Plaintiffs pray for judgement against the officers in their official capacity and individually and the Community as follows:
>
> 1. That Patrick H. Welch be placed on the list of person [sic] eligible to receive per capita payments.
> ...
> 5. That Charles Vig be placed on the list of person [sic] eligible to receive per capita payments.
>
> (Emphasis supplied).

The Plaintiffs contend that they are situated exactly as was the Plaintiff in Ross; and they seek a remedy against the government of the Community, the same Defendant that was before the Court in Ross. In our view, therefore, the pleadings sufficiently engage the Community that it would be inappropriate to oblige the

Plaintiffs to re-plead.

Also in our view, the material facts necessary to decide this matter are not in dispute. The Community has admitted that the Plaintiffs appear on List C of Ordinance No. 12-29-88-002, and that the Plaintiffs are members of the Community. The Community has offered no suggestion as to any salient factor which would distinguish the Plaintiffs from Mr. Ross. Further, and very significantly from the Court's point of view, the Plaintiffs have established that they have attempted to take their case to the General Council of the Community: both Plaintiffs, in their depositions, indicated that they have sought on more than one occasion to have the General Council add their names to the list of persons eligible to receive per capita payments, and have been unsuccessful in their efforts. This testimony was confirmed by the depositions of the Community's officers, who stated that they did place the Plaintiffs' request for per capita eligibility on the agenda of at least one General Council meeting.

In the view of the Court, therefore, the Plaintiffs have established not only that they should receive per capita payments from the Community, since they are identically situated to Mr. Ross, but also that they have sought to avail themselves of the single nonjudicial remedy--General Council action--which appears to be available to them. This stands in marked contrast to the Plaintiffs in Barry Welch, et al. v. Shakopee Mdewakanton Sioux Community, et al., No. 023-92, who, as the Court notes in a decision today, have not established either that they are identically situated to Mr. Ross or that they have attempted to

avail themselves of any non-judicial remedies available from the Community's government.

Therefore, it is our opinion that the Plaintiffs should immediately be placed on the list of persons eligible to receive per capita payments, and we today are entering an Order to that effect.

As with the Ross case, this Order leaves open the question as to the extent and the manner in which it is appropriate for the Court to make the effect of its Order retroactive. We today are issuing an Order in Ross, holding that there it would be inappropriate to award the Plaintiff retroactive per capita payments to any date prior to the filing of his litigation, but also holding that by filing his litigation he provided sufficient notice to the Community of his position to make appropriate an award retroactive to that date.

We are directing the parties in Ross to confer with the Court as to the manner in which the retroactive payment should be made, so as to minimize its effect on other Community members.

We think a similar resolution is appropriate here: in addition to directing the Community to place Mr. Welch and Mr. Vig on the list of persons eligible for per capita payments, we are ordering the Community to make per capita payments to the Plaintiffs retroactive from the date that this litigation was filed. But we are staying the effect of the latter part of this Order, pending a conference between the parties and the Court as to the most appropriate manner. We encourage counsel in this case and counsel in the Ross case to attempt to coordinate their conferences

with the Court.

In entering these Orders, the Court is mindful of the fact that the Community is deliberating on changes to its per capita distribution system. Nothing which the Court has said, in this opinion or in Ross, should be taken as prohibiting any changes which are consistent with the Community's Constitution. Nothing we have said eliminates the Community's ability to recognize legitimate differences among the circumstances of its members, or to establish and enforce reasonable procedures to establish eligibility for per capita payments.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That Summary Judgment be and hereby is granted in favor of the Defendants Stanley Crooks, Kenneth Anderson, and Darlene Matta.

2. That Summary Judgment be and hereby is granted in favor of the Plaintiffs Patrick H. Welch and Charles Vig, as follows:

A. The Defendant Shakopee Mdewakanton Sioux Community, and its officers and employees, shall place Patrick H. Welch and Charles Vig on the list of persons eligible to receive per capita payments; and

B. The Defendant Shakopee Mdewakanton Sioux Community, and its officers and employees, shall pay to Patrick H. Welch and Charles Vig amounts equal to the per capita payments they would have received, had they been receiving such payments from August 20, 1992 to the date when they first receive payments under paragraph 2.A. of this Order, with interest at 3.25% compounded monthly.

3. The effect of paragraph 2.B. of this Order is stayed pending the establishment of a schedule for the award. Counsel for the parties are directed to contact the Clerk of Court, to establish a date for a conference with the Court, to facilitate the establishment of the schedule for payment.

Dated: June 3, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

086-22A

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

BARRY WELCH, STACIE D. WELCH, STEPHANIE SIOUX WELCH, BRENDA (WELCH) WILT, STEPHEN P. (WELCH) WILT, THOMAS W. (WELCH) WILT, AND VIOLET A. (WELCH) WILT, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, STANLEY CROOKS, CHAIRMAN, KENNETH ANDERSON, VICE CHAIRMAN, AND DARLENE MATTA, SECRETARY TREASURER, Defendants.	Court File No. 023-92

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Plaintiffs' Motions for Partial Summary Judgment and for Declaratory Judgment.

The Plaintiffs each allege that they are members of the Shakopee Mdewakanton Sioux Community ("the Community"), and are entitled to receive the benefit of various programs provided by the Community, including particularly the program under which per capita payments are made by the Community to various persons. The Plaintiffs contend that this Court's July 17, 1992 decision in Ross

v. Shakopee Mdewakanton Sioux Community, No. 013-91, mandates their eligibility, and requires that we hold the Community's Business Proceeds Distribution Ordinance, Ordinance No. 12-29-88-002, to be inconsistent with the Community's Constitution, insofar as it requires that certain procedures be followed, in order for a person to establish his or her eligibility for such programs.

The Community has responded by vigorously denying that any of the Plaintiffs presently are eligible to receive per capita payments, and asserting that, unlike the Plaintiff Ross--and, we may note, also unlike the Plaintiffs in Welch and Vig v. Shakopee Mdewakanton Sioux Community, No. 022-92, which we have decided today--the names of none of the Plaintiffs appear on List C of Ordinance 12-29-88-002. The Community also asserts that none of the Plaintiffs have attempted to follow the procedures mandated by Ordinance 12-29-88-002 to establish eligibility for per capita payments.

The Community also strongly argues that the decision of this Court in Ross was a narrow one, limited strictly to the circumstances of the Plaintiff.

We agree with the Community. We did not hold in Ross that Ordinance No. 12-29-88-002 was invalid in its entirety. Rather, we held that when the Community eliminated the residency requirements for per capita payments--which, we said, had been altogether permissible under the circumstances as we understood them--it could not thereafter continue to withhold per capita payments from Mr. Ross, who previously had been denied payments solely because of the residency requirement. Today we are expanding that holding to the

two Plaintiffs in Welch and Vig, because we find that there is no material disputed fact which distinguishes them from Mr. Ross. We have done so after a particularized analysis of the specific way in which Ordinance 12-29-88-002 has operated with respect to those Plaintiffs, based on undisputed facts in the record.

Here, in contrast, it is clear that many material facts are in dispute, which might distinguish these Plaintiffs from Messrs. Ross, Welch, and Vig. Clearly then, granting any of these Plaintiffs partial summary judgment on the basis of the Ross or Welch and Vig would be inappropriate.

So, too, would be the entering a Declaratory Judgment to the effect that all of the procedural requirements of Ordinance No. 12-29-88-002 are invalid under the Community's Constitution. In Ross, and again today in Welch and Vig, we have taken care to make it clear that the Community can establish reasonable procedures, and make reasonable distinctions, with respect to eligibility for its various programs, including its per capita program. And we think it is clear that the Community is entitled to insist that persons who seek to become eligible for its programs utilize the procedures it has established, before seeking the review of this Court.

It may be that, at trial, one or more of these Plaintiffs can establish that he or she is entitled to some relief. But clearly, none now have established by undisputed facts any entitlement either to Summary Judgment, as to their eligibility for programs, or to a Declaratory Judgment that the Community's per capita eligibility procedures are invalid as to them.

During the hearing that was held on the Plaintiffs' motion, on

May 10, 1993, Plaintiffs' counsel suggested that the requirements of section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2710 (1988) ("the IGRA")may have some bearing on this case--that an action may lie against the Community under the IGRA if the Plaintiffs do not prevail here. But the only issues that are before this Court are those raised in the Plaintiffs' Complaint, relating to the Community's Constitution and the effect of our decision in Ross. Therefore, in our view the Plaintiffs' suggestions are simply immaterial.

During the hearing, there also was colloquy between the Plaintiffs' counsel and the Community's counsel with respect to the validity and effect of certain membership cards bearing certain numbers, copies of which were attached to affidavits filed on behalf of the Plaintiffs. Given our holding today, these issues also are not material. But it seems clear that, as the Community's counsel asserted in a memorandum, the membership documents of the Community are "messy". Many of the cases which have come before this Court in the last five years have turned on issues involving enrollment, heritage, and entitlement, and have had confusing factual histories. Therefore, recognizing the difficulties involved, the Court encourages the Community in any and all efforts to regularize these matters; and, within the limits imposed by its role, the Court will be pleased to assist in such efforts.

ORDER

For all the foregoing reasons, it is hereby ORDERED:

That the Plaintiffs Motions for Partial Summary Judgment and for Declaratory Judgment are DENIED.

Date: June 3, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

086-23

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Shakopee Mdewakanton Sioux (Dakota) Community	Court File No. 025-92

MEMORANDUM AND ORDER

Summary of Procedural History

This matter arises under Section 63 of the Shakopee Mdewakanton Sioux Community Corporation Ordinance, Ordinance No. 2-27-91-004 ("the Ordinance"). Under that section, the General Council of the Shakopee Mdewakanton Sioux Community ("the Community") has provided that, before any actions to amend or repeal the Ordinance are effective, this Court must issue a declaratory judgment that such action "is in the best interests of the Community".

On November 5, 1992, the General Council of the Community passed Resolution No. 11-05-92-001 ("the Resolution"). The effect of the Resolution would be to amend the Ordinance. On November 20, 1992, the Community, through its counsel, petitioned this Court for the declaratory judgment called for in the Ordinance. The Community filed with the Court the text of the Resolution, together with a copy of the transcript of the November 5, 1992 meeting of the Community's General Council at which the Resolution was passed. On December 7, 1992, Judge Buffalo of this Court issued an Order

declaring that the amendments were in the best interests of the Community.

Thereafter, Little Six, Inc., ("Little Six") a corporation chartered by the Community under the Ordinance, moved to Intervene in this action, to vacate the Court's December 7, 1992 Order, and to dismiss the Community's petition for a declaratory judgment. Both Little Six and the Community filed memoranda and supporting materials, and a hearing was held. Subsequently, the Community moved to supplement the record with materials relating to actions of the Bureau of Indian Affairs concerning the Ordinance, and Little Six filed objections thereto.

Today, we deny Little Six's motions to interevene, to vacate, and to dismiss; and we deny the Community's motion to supplement the record. The effect of our action is to permit the December 7, 1992 Order of this Court to stand.

Discussion

To our knowledge, the provisions of section 63 of the Ordinance are unique. Under those provisions, this Court is given a singularly unjudicial function. We are called upon not to apply the law to a particular set of facts, or to review the act of the Community's government to ascertain whether it is consistent with the Community's Constitution or overriding Federal law, but to decide whether the actions of the Community are in the Community's own best interests.

Each of the judges on this Court is an attorney who has worked for some years with Indian tribal governments; and each of us has repeatedly been frustrated by the paternalism imposed upon tribal

governments by their supposed "friends" in Federal and State government, and in the private sector. In an era when tribal governments and the businesses which they own have immense possibilities, and confront powerful competitors and adversaries, the delay, confusion, and difficulty imposed on tribes by entities acting in loco parentis may, in our opinion, be the single most damning problem that tribes face.

So, our duty in this proceeding--to review on policy grounds the actions of the Community's General Council--is disturbing to us. We have approached our duty carefully; and our opinions are colored with the experience and concern we have just described. We have concluded that the Court's role under Section 63 of the Ordinance should be very limited. We will review amendments or repealers to ensure that no fraud, overreaching, or coercion was evident in the proceedings which led to their adoption; that all appropriate procedures were observed during the consideration and adoption of the provisions; and that all persons and entities who legitimately can claim an interest in the deliberations were given a fair chance to be heard in the Community's deliberations. If we are satisfied as to those matters, we will declare that an action of the General Council is in the Community's best interests.

We understand and have some sympathy for the concerns of those who would wish us to take a more active role--who would have us act as a sort of benevolent governor with a veto power over the actions of the Community. And perhaps, if we were to do so, the Community might be steered clear of some actions that could prove to be costly mistakes. But it is our view that the true best interests

of the Community lie along the path of self-determination, where the Community itself, after open debate and fair proceedings, is permitted to make its own mistakes, and achieve its own triumphs.

We have reviewed the Resolution. It clearly is designed to permit the General Council of the Community to assert somewhat more control over the activities of Little Six that the Ordinance previously allowed. This may lead to additional turmoil and uncertainty for Little Six, and that could be damaging to a spectacularly successful and well run corporation; but the Resolution also may ultimately purchase Little Six a broader base of support within the Community, and thereby redound to the benefit of both. Time will decide; we will not.

We have reviewed the materials submitted and discussed by both parties that illuminate the procedures by which the Resolution was adopted. They demonstrate that passage of the Resolution was the culminated extensive deliberation among various interests in the Community. Previous resolutions which would have had a more drastic effect on Little Six had been rejected, and the Resolution was modified to meet certain concerns within the Community. During this extended debate, all parties, including the Chairman of Little Six, were allowed to argue their case without restraint or hinderance.

Under these circumstances, we think it is clear that Judge Buffalo was right when, on December 7, 1992, after reviewing the record of the proceedings, he declared that the Resolution was in the best interests of the Community.

Two final points should be made. First, the Court frankly did

not foresee the difficulties and questions that Section 63 of the Ordinance would pose for persons and entities who might have something to say, during any deliberations we might have on amendments or repealers to the Ordinance. Our rules, governing judicial procedure, do not neatly fit the sort of proceeding contemplated by Section 63; and the parties to this proceedings have done an admirable job struggling with this fact. We have approached the matter ad hoc, and have not held the parties to our rules. Clearly, in the future it would be of assistance if we have provided more specific guidance to the Community, and to others who find themselves in the situation of Little Six, as to these matters; and it is our intent to do so. Second, we deem the actions of the Bureau of Indian Affairs with respect to the Resolution--be those actions approving or disapproving--to be utterly irrelevant to our inquiry, and we therefore have declined to consider them.

ORDER

For the foregoing reasons, it is hereby ORDERED:

1. That the motion of Little Six, Inc. to intervene, to vacate this Court's December 7, 1992 Order, and to dismiss the Community's Petition for Declaratory Judgment is DENIED; and

2. The motion of the Community to supplement the record is hereby DENIED.

Dated: June 3, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 013-91
PATRICK H. WELCH, and CHARLES VIG, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 022-92

MEMORANDUM OPINION AND ORDER
ON MOTIONS FOR RECONSIDERATION

Summary of Procedural History

On June 3, 1993, the Court in Ross v. Shakopee Mdewakanton Sioux Community held that it had the authority to apply retroactively its July 22, 1992 decision in the case, and that it was legally and equitably appropriate to do so in, a limited fashion. Specifically, we held that, for Ross, our July 22, 1992 decision would be retroactive to January 13, 1991, the date on which Ross filed his Complaint.

Also on June 3, 1993, we held that the Plaintiffs in Welch and Vig v. Shakopee Mdewakanton Sioux Community were identically situated to Ross, and that they, too, were entitled to relief retroactive to the date upon which they filed their Complaint.

In both cases, we stayed the effect of our Order to permit the parties to confer with the Court with the aim of establishing an appropriate schedule for paying the amounts which were awarded.

Thereafter, the Shakopee Mdewakanton Sioux Community moved for reconsideration of, and for relief from, our June 3, 1993 Orders, under the provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure, and Rule 40 of the Federal Rules of Appellate Procedure. The Plaintiffs in Welch and Vig filed a Response to that motion; counsel for Ross communicated with the Court by letter, expressing opposition to the motion; and the Community filed a Reply on July 14, 1993.

To date, the Court has not adopted the Federal Rules of Appellate Procedure, but we will consider the Community's motion for Relief from Judgment under the provisions of Rule 28 of this Court.

The principal points urged by the Community in support of its motion was that we incorrectly applied the test for determining whether a decision is appropriately made retroactive that was established by the United States Supreme Court in Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971).

As we noted in our June 3, 1993, Memorandum Opinion in Ross, the Chevron case sets out three factors that should be considered in cases where retroactivity is at issue:

1. The decision to be applied non-retroactively, i.e. prospectively, must establish a new principle of law, either by overruling a past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

2. The court must examine the prior history, purpose, and effect of the rule in question to determine whether retrospective operation will further or retard its operation; and

3. The court must determine whether retroactive application would impose inequitable results or substantial injustice.

Ross, at 4 (June 3, 1993), citing 30 L.Ed.2d, at 306 (1971)(emphasis added).

We held that when Ross, Welch, and Vig filed their Complaints with this Court, "the simple pendency of the case, and the absence of any strong argument to justify the distinction" which the Community had made, in List C of Ordinance 12-29-88-002 of the Shakopee Mdewakanton Sioux Community, provided sufficient foreshadowing of the ultimate result in Ross, and in Welch and Vig, to justify retroactive application of the decisions to the dates on which the Complaints were filed. Ross, at 6 (June 3, 1993) (emphasis added).

In the memoranda supporting its Motion, the Community has argued, correctly, that in none of the cases decided by Federal Courts since Chevron has the mere filing of a Complaint been considered an appropriate triggering event for a retroactive award in a case involving Constitutional issues. And the Community has asserted that if our June 3, 1993 holding is allowed to stand, the Community will have been obliged to accept at face value the "allegations in unproven complaints and change its laws accordingly or face retroactive application of decisions later declaring the

laws unconstitutional to the date a complaint is filed." (July 14, 1993 Reply Memorandum of the Community, at 5).

The Community also has argued that, in their Response to the Community's Motion, Welch and Vig misstated Federal case law, and this Court's June 3, 1993 holding, and the Community's position.

With these latter contentions, we agree. The Community's statements of Federal law, the Court's holding, and the Community's summary of its own ongoing position all are correct--save only for the Community's argument that it would be appropriate here to penalize Ross, Welch, and Vig by denying them a measure of retroactive relief.

We consider that the situation of Ross, Welch and Vig, and of the Community in these matters, is highly unusual. While the principles of Chevron and other Federal cases can inform this Court's deliberations, in our view the unique circumstances of the Community require us to apply those principles and shape relief in ways that may have no applicability to governments that exercise jurisdiction over millions of persons, whose status is not intimately known to the governors. The Shakopee Mdewakanton Sioux Community is composed of a relatively small group of persons, almost all of whom know each other. Ross, Welch and Vig were identified by name in List C of Ordinance 12-29-88-002. Their situation was commonly known in the Community, as was the fact that, save for their appearance on List C, they were situated identically to other persons in the Community who were entitled to receive per capita payments, once the Community removed the residency requirements for per capita payments. At no time after

the Complaints in the two cases were filed were these facts contested by the Community.

So, each of the three Plaintiffs could make a plausible argument that he should have been entitled to an award dating to the removal of the residency requirement for per capita payments. But it was and is our view that something more than merely standing by and silently waiting should be required of one who seeks to establish his rights. Unambiguous notice to the Community, as well as facts which clearly establish an identity of situation, are what we consider to be the essentials of a retroactive award, consistent with the foreshadowing requirement of Chevron. Here, the point where we believe that notice was provided was the point at which the Plaintiffs formally made their claims before this Court.

To have given relief pre-dating the filing of their claims would have placed too great a burden on the Community, and too little on Ross, Welch, and Vig, in our judgment; and to have required the Plaintiffs to forego the benefits of per capita payments during the period of litigation, with all of the delays which attend that process--delays which in no way may have been the fault of the parties--would have been unfair, given the facts surrounding their situation.

We must stress again that the situation of these litigants is unique. They, alone, appeared on List C.

We also must stress that the Community clearly can establish appropriate conditions, restrictions, and procedural requirements as prerequisites for the receipt of per capita payments, and that this Court will not permit itself to serve as a short-circuit for

those efforts.

ORDER

For the foregoing reason, the Community's motion for Relief from this Court's June 3, 1993 Order is denied. The parties are directed to proceed to comply therewith.

Dated: July 19, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

086-22A

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 013-91
PATRICK H. WELCH, and CHARLES VIG, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 022-92

SUPPLEMENTAL MEMORANDUM AND ORDER

During a telephone conference in the referenced matter held on August 11, 1993, counsel for the parties indicated that it would be helpful if clarification were provided as to two aspects of the Orders entered on June 3, 1993. They advised the Court that a payment schedule, to implement the June 3 Orders with respect to retroactive per capita payments, had generally been agreed to by parties. But they advised the Court that they disagreed as to whether it was appropriate for the Community to deduct from the retroactive payments amounts which had been paid by the Community

as welfare or general assistance to the Plaintiffs during the period covered by the June 3 Order. (There was no disagreement expressed as to the amounts which were paid by the Community, but only as to whether the Community can use those amounts as an offset at this late date in the litigation.) They also advised the Court that they disagreed as to whether the Plaintiffs should be considered to have simply become eligible for per capita payments on the dates specified by the Court (January 3, 1992, for Mr. Ross, and August 20, 1992, for Mr. Welch and Mr. Vig), or whether they should be deemed to be entitled on that date to receive a full share of per capita, as if they had become eligible weeks or months earlier. The dispute arises from the fact that the Community pays out per capita for any particular time period on a delayed basis, with the effect that a person who becomes eligible for per capita payments by the action of the General Council on any particular date do not actually begin receiving a full share until a number of weeks thereafter.

Counsel indicated that all parties would be well served if the Court acted promptly to clarify these point, so this Memorandum is necessarily brief. It was the intent of the Court, in its June 3 Orders, to put the Plaintiffs in the position they would have enjoyed had the General Council of the Shakopee Mdewakanton Sioux Community acted to make them eligible for per capita payments on the dates they filed their respective cases. Had the Plaintiffs been receiving per capita payments during the period of their litigation, they would not have been eligible to receive monies from the Community's general assistance program; so in our view it

is appropriate for the Community to deduct those monies from the retroactive per capita payments amounts under the Court's order. Similarly, had Mr. Ross been made eligible for per capita payments on January 3, 1992, and Mr. Welch and Mr. Vig on August 20, 1992, they would not have received an immediate full share of per capita with the next schedule payment, but only at a later date. The retroactive award should reflect that structure, and should not be structured to assume that the Plaintiffs had become eligible for per capita at some earlier date.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That in establishing the schedule for the retroactive payment awards to the Plaintiffs, the Community shall be entitled to deduct amounts to reflect the general assistance payments made by the Community to the Plaintiffs during the period covered by the award; and

2. That in establishing the schedule for the retroactive payment awards to the Plaintiffs, the Community shall calculate the awards as if the General Council of the Community had voted to make the Plaintiff Ross eligible for per capita payments on January 3, 1992, and the Plaintiffs Welch and Vig on August 20, 1992.

Dated: August 12, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

086-13C

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

BARRY WELCH, STACIE D. WELCH, STEPHANIE SIOUX WELCH, BRENDA (WELCH) WILT, STEPHEN P. (WELCH) WILT, THOMAS W. (WELCH) WILT, AND VIOLET A. (WELCH) WILT, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, STANLEY CROOKS, CHAIRMAN, KENNETH ANDERSON, VICE CHAIRMAN, AND DARLENE MATTA, SECRETARY TREASURER, Defendants.	Court File No. 023-92

MEMORANDUM AND ORDER

This matter came on for hearing, by telephone conference on February 4, 1994, on Plaintiffs' Motion for Leave to Amend their Complaint.

Having considered the arguments of the parties, the Court is of the view that the Defendants' objections to paragraphs 16, 21, and 25 of the Plaintiffs' proposed Amended Complaint are well-founded, inasmuch as those paragraphs attempt to state causes of action against officers of the Shakopee Mdewakanton Sioux Community which this Court has previously rejected as being insufficient as a matter of law.

The Court is of the view, however, that the remainder of the

Plaintiff's proposed Amended Complaint should be permitted.

The Community has strongly objected to the entirety of the proposed amendments, expressing the view that no factual basis exists for the allegations contained in the amendment; and the Community may well ultimately be correct in its view. But in the Court's view, read liberally, the allegations if proved could state a cause of action; and the Plaintiffs should be permitted an opportunity to attempt to prove them.

The Court is mindful, however, of the burden that its decision places on the Defendants. Liberality in amending and interpreting pleadings must ultimately be balanced by a concern for other parties. Therefore, all parties should be advised that in the Court's view this matter should proceed expeditiously to a decision, and that the Court will not look favorably upon any further attempts to amend or re-state the Complaint in this matter.

ORDER

For the foregoing reasons, and based upon all of the pleadings and arguments herein, it is ordered that the Plaintiffs' motion to amend their Complaint is granted, except that their motion to include the allegations contained in paragraphs 16, 21 and 25 of the proposed Amended Complaint is denied.

Date: February 4, 1994

FILED

FEB 04 1994

John E. Jacobson
Associate Judge

FILED

FEB 04 1994

IN THE COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNTIY

COUNTY OF SCOTT STATE OF MINNESOTA

Sunny Day Welch, Plaintiff, vs. Shakopee Mdewakanton Sioux Community; Stanley Crooks, Chairman; Kenneth Anderson, Vice-Chairman; and Darlene Matta, Secretary-Treasurer. Defendants.	Court File No. 036-94

MEMORANDUM AND ORDER

Before Associate Judge John E. Jacobson.

This matter came on for hearing by telephone conference call on February 4, 1994, on the Plaintiff's motion for "temporary relief". The Court interpreted the motion as one for a Temporary Restraining Order. The Plaintiff was represented by Herbert A. Becker, Esq.; the Defendants were represented by Vanya Hogen-Kind, Esq. and Andrew Small, Esq..

At the conclusion of the hearing, the Court denied the Plaintiff's Motion. This Memorandum and Order memorializes that decision.

In his Complaint, Plaintiff maintains that he was disenrolled

from the Shakopee Mdewakanton Sioux Community ("the Community"), without notice and in violation of the Constitution and laws of the Community, and in contravention of the Indian Civil Rights Act of 1968. He sought preliminary relief to permit him to participate in the Community's distribution of gaming revenues. In support of his Motion, he submitted a Memorandum but only one document--the agenda for a meeting of the Community's General Council held on January 11, 1994--and no supporting affidavits.

The Community responded by arguing that although the Plaintiff in the past has participated in the distribution of gaming revenues, he has never been an enrolled member of the Community--that his eligibility to thus participate ended not because of any disenrollment but because of a change in the Community's gaming revenue allocation ordinance, effected in late 1993.

The Court denied the Plaintiff's motion on the grounds that, whatever may be the Plaintiff's likely success on the merits, he has not demonstrated that irreparable harm will be worked upon him absent preliminary relief. This Court consistently has adopted the generally accepted view that in most cases the mere payment or non-payment of money generally does not create the possibility of irreparable harm. In cases where we have concluded, upon hearing the merits of a case, that gaming revenue should in fact have been paid in the past to litigants, we have fashioned relief that has made the litigants whole. Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91 (Decided June 3, 1993).

This matter is not different: if the Plaintiff prevails, he can be recompensed for any monies which should have been paid to him.

ORDER

For the foregoing reasons, the Plaintiff's Motion for a Temporary Restraining Order is denied.

February 4, 1994

John E. Jacobson
Associate Judge

086-36

FILED

FEB 07 1994

IN THE COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Louise B. Smith, Winifred S. Feezor, Leonard L. Prescott, and Patricia A. Prescott, Plaintiffs, vs. Shakopee Mdewakanton Dakota (Sioux) Community Business Council; Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and jointly, Defendants.	Court File No. 038-94

MEMORANDUM AND ORDER

Before Associate Judge John E. Jacobson.

This matter came on for hearing by telephone conference call on February 4, 1994, on the Plaintiffs' motion for a Temporary Restraining Order. The Plaintiffs were represented by James H. Cohen, Esq. and Leif E. Rasmussen, Esq.; the Defendants were represented by Kurt V. Bluedog, Esq. and Andrew Small, Esq..

At the conclusion of the hearing, the Court denied the Plaintiffs' Motion. This Memorandum and Order memorializes that decision.

In their Complaint, the Plaintiffs assert that over a period of years the Defendants have ignored the Constitution and Bylaws of the Shakopee Mdewakanton Sioux Community ("the Community"), the Indian Civil Rights Act of 1968, 25 U.S.C. §1302 (1988), and various other laws of the Community and of the United States, by allowing persons to participate in the Community's governmental and business affairs who are, the Plaintiffs allege, not qualified by their ancestry to be members of the Community. The Plaintiffs allege that such persons have been permitted to vote in the Community's General Council, serve in the Community's government, vote and participate in the affairs of the Community's businesses, and receive the so-called "per capita" payments which the Community makes from its business revenues to its members. The Plaintiffs sought an Order restraining all such activity by "any and all unqualified persons".

Counsel for the Community responded by noting that although they had received copies of the Plaintiffs' pleadings and supporting materials late on February 3, 1994, the Community had not, at the time of the hearing, been served with process; and counsel argued that the Plaintiffs' supporting materials were sketchy, conclusory, and lacked the force that would be required to justify an Temporary Restraining Order which would have vast consequences to the Community.

During the course of the hearing, it developed that counsel for neither party was aware of any scheduled meetings of the Community's General Council in the next week, and that no action would be taken to make either "per capita" payments or payments

into the minors' trust before February 12, 1994 (when the list would be finalized for the payments to be made on February 15, 1994). Plaintiffs' counsel called the Court's attention to the fact that a list has been posted at the Community's government center, and that the list contains some seventy names of minors who may be added on February 15, 1994 to the children for whom funds are held in trust by the Community. The Community's counsel responded by arguing that the posting of a list is part of a process whereby comments are solicited as to a child's eligibility to participate as a beneficiary of the trust, and that that process should be permitted to run its course. The Community's counsel also stated that the amount paid to the minors' trust is constant--that it does not change from month to month depending upon the number of children who are eligible to participate therein, so the addition of a child, or seventy children, to the list would make a difference to the trust only if and when an added child becomes eighteen years of age and is eligible to withdraw funds from the trust; and in any case, no action on the posted list would take place before February 14, 1994.

In Ronald Welch v. Norman Crooks, No. 003-88 (Shak. Mdw. Comm. Ct., decided December 16, 1988), this Court adopted the test, for preliminary relief, established by the United States Court of Appeals for the Eighth Circuit in Dataphase Systems, Inc. v. C.L. Systems, Inc., 640 F.2d 109, 114 (8th Cir., 1981). Under that test, the absence of irreparable harm to the moving party makes the grant of a Temporary Restraining Order inappropriate.

On the basis of the pleadings and the argument during the

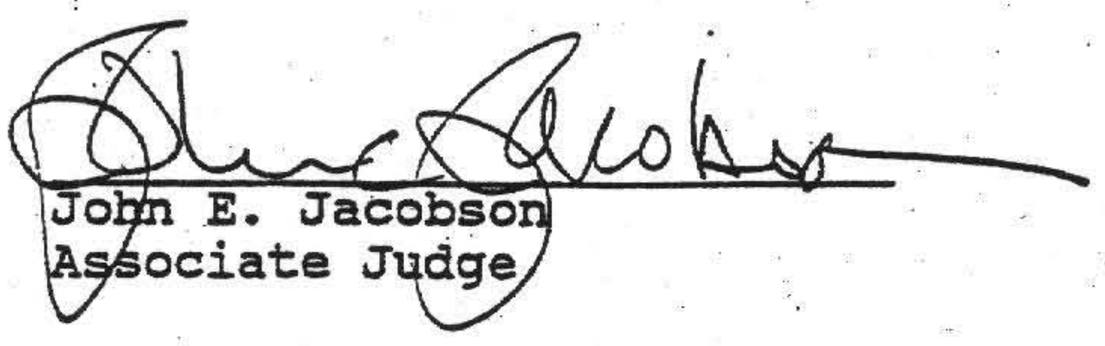
hearing, the Court denied the Plaintiff's motion on the grounds that, whatever may be the Plaintiffs' likely success on the merits, they had not demonstrated that any irreparable harm would be worked if the requested Order were not granted. Specifically, the Court found that no votes of the General Council--the law-making body of the Community--were scheduled during the ten-day period that the Order would be effective, no payments would be made during that period, and no commitments to make payments would be made during that period. Hence, even if the Plaintiffs were correct in all their claims, there was no indication that they would be harmed by the absence of a Temporary Restraining Order.

The Court then scheduled a hearing on February 10, 1994, on the Plaintiffs' request for preliminary injunctive relief.

ORDER

For the foregoing reasons, the Plaintiff's Motion for a Temporary Restraining Order is denied; and a hearing on the Plaintiff's request for preliminary injunctive relief shall commence at 9:30 a.m., February 10, 1994, at the Courtroom of the Shakopee Mdewakanton Sioux Community.

February 4, 1994



John E. Jacobson
Associate Judge

086-38

FILED

FEB 11 1994

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: ADVISORY FROM THE BUSINESS COUNCIL -- PAYMENT OF REVENUE ALLOCATION TO THIRTY-ONE MEMBERS	))))	Court File 037-94

ADVISORY OPINION

On February 3, 1994, the Business Council of the Shakopee Mdewakanton Sioux Community filed with this Court what the Business Council termed "extraordinary relief": In a pleading which it termed "Request for Advisory Opinion", the Business Council sought the Court's guidance with respect to the manner in which it could deal with a dilemma caused, on the one hand, by the Constitution of the Shakopee Mdewakanton Sioux Community and certain actions of Federal officials, and on the other hand by actions of the General Council of the Community.

The materials accompanying the Business Council's Request illustrate the dilemma. For many years, the Community had made payments from its gaming revenues to a list of persons that included individuals that were not members of the Community. This arrangement, which was the result of painstaking negotiations among various groups within the Community over many years, was utterly disrupted in 1993 when the Bureau of Indian Affairs, implementing guidance from Assistant Secretary of the Interior for Indian Affairs Eddie Brown, required the Community to amend its ordinances, and refused to approve the Community's payment of

gaming revenues to non-members. Thereafter, in late 1993, seeking to implement the provisions of Article II, section 2 of the Community's Constitution, the Community's General Council twice approved adoption ordinances that would have permitted the Community to accept into membership the persons who had lost their eligibility to receive payments; and the Bureau of Indian Affairs twice disapproved those ordinances. Then, on January 11, 1994, in evident frustration, even desperation, the Community's General Council voted to adopt into membership some (though apparently not all) of the persons who had lost their eligibility to receive gaming revenue payments.

From the minutes of the General Council meeting supplied to the Community by the Business Council, it is clear that the General Council took the position that its action was consistent with procedures which had been employed many times in earlier years. The persons were being adopted or "recognized" as members--a procedure which the Bureau of Indian Affairs had sanctioned in writing as long ago as 1971.

The Business Council's dilemma, however, arises from the fact that the Community's Constitution expressly requires that ordinances relating to membership must be approved by the Secretary of the Interior or his designee. The vote to adopt or "recognize", which the General Council took on January 11, 1994, clearly did not follow the procedure of the Enrollment Ordinance which the Bureau of Indian Affairs has approved; it could not comport with any adoption ordinance, since none has been approved by the Bureau of Indian Affairs; and the vote itself has not been approved by the

Bureau of Indian Affairs.

Hence, until some Bureau of Indian Affairs approval is obtained, or until the Community's Constitution is amended, it would appear that the January 11, 1994 vote is not consistent with the Constitution. Under Article III of the Community's Constitution, the Business Council must perform such duties as may be authorized by the General Council. But under section 14.9 of the Community's Amended Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002, if the Business Council wrongfully pays the proceeds of a Community Business to any person the Council is subject to penalties of up to three times the amount thus paid.

This is the problem that has caused the Business Council to take the extraordinary step of requesting an Advisory Opinion from this Court.

In the past, this Court has resisted all efforts to obtain advisory opinions. It has been our view that the Court's function is to hear cases and controversies--that justiciability, and the adversarial process, alone produce the sort of complete record which permits sound decisions. But the Business Council submits that the Community faces a Constitutional crisis; and it points out that all of the restrictions which are imposed on courts in the Federal and State processes do not necessarily apply here. And the Court notes that the General Council has given, and the Court in a grudging and limited manner has accepted, certain functions which would be utterly inappropriate for a Federal Court under Article III of the United States Constitution. See section 63 of the Shakopee Mdewakanton Sioux Community Corporation Ordinance, No. 2-

27-91-004; and see Shakopee Mdewakanton Sioux (Dakota) Community, Court File No. 025-92 (Decided June 3, 1993). The Business Council has pointed out, also, that even courts which operate under strict case and controversy requirements have observed that governmental crises of Constitutional proportions may make advisory opinions appropriate. Advisory from the Governor, 633 A.2d 664 (R.I. 1993).

With trepidation, therefore, the Court believes that it should respond to the Business Council's request.

Given the clear requirement of Article II, section 2 of the Community's Constitution that ordinances relating to membership must be approved by the Secretary of the Interior, and given the fact that the Secretary's delegee has to date disapproved the Community's adoption ordinances and has not approved the January 11, 1994 vote, it seems very possible that a payment of gaming revenues to the persons who were voted into membership on that date would not be consistent with the Community's Constitution or with the Amended Business Proceeds Distribution Ordinance. On the other hand, if an adoption ordinance is approved which sanctions the January 11, 1994 vote, or if the vote itself (or the resolution which accomplished it) is approved by the Bureau of Indian Affairs, or if the Constitution of the Community is amended appropriately, or if some other event occurs which resolves the Business Council's dilemma, then payments clearly can and should be made to the affected persons. Therefore, in the Court's view, the most prudent action for the Business Council to take, until a resolution of the dilemma is achieved, is to (1) pay into an escrow account the gaming revenue payments which the persons who were voted into

membership on January 11, 1994 would receive, (2) pay to those persons any amounts they would otherwise be eligible to receive, (3) release the escrowed amounts to the affected persons (less the payments they have received from non-gaming revenues), if the dilemma is resolved in a manner which clearly permits the payments, and (4) return the escrowed amounts to the Community's accounts if the dilemma is resolved in a way which forbids the payments.

In the Court's view, the Business Council's dilemna exists principally because the January 11, 1994 vote was taken after the Community's adoption ordinances were explicitly disapproved by the Bureau of Indian Affairs, and because the January 11 vote has not itself been approved by that agency. It exists, in other words, as to the persons who were voted upon on January 11, 1994, and not as to persons who in years past were voted into membership under the provisions Article II, section 2, and since that time have openly and regularly participated in the governing and economic processes of the Community without complaint or objection from the Bureau of Indian Affairs.

The Court wishes to stress that the foregoing opinion is offered with great reluctance. It is the Court's deepest wish that all officers and members of the Community can succeed in their efforts to extricate themselves from their dilemma, in a way that protects the expectations of all of the persons who have been burdened by the events of recent months. And it is the Court's commitment to assist the Community in any manner, in those efforts.

February 11, 1994

John E. Jacobson
Associate Judge

IN THE COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Louise B. Smith, Winifred S. Feezor, Leonard L. Prescott, and Patricia A. Prescott, Plaintiffs, vs. Shakopee Mdewakanton Dakota (Sioux) Community Business Council; Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and jointly, Defendants.	Court File No. 038-94

ORDER

In accordance with the decision of the Court, the grounds for which are set forth in the transcript of the hearing proceedings of even date, the Court herewith enters the following Orders. It is the Court's intent to supplement the record with an explanatory Memorandum, restating an amplifying the remarks made from the bench, as soon as is reasonably practicable.

1. Pending further proceedings, the Defendants are herewith preliminarily enjoined from permitting any person who purportedly

FILED

MAR 147 994

was voted into membership of the Shakopee Mdewakanton Dakota (Sioux) Community ("the Community") by the actions of the Community's General Council on January 11, 1994 from voting in meetings of the Community's General Council, or otherwise participating as members of the Community in the Community's affairs.

2. Pending further proceedings, the Defendants are herewith preliminarily enjoined from paying to any person who purportedly was voted into membership of the Shakopee Mdewakanton Dakota (Sioux) Community ("the Community") by the actions of the Community's General Council on January 11, 1994 any monies generated, from the date of this Order forward, by the gaming enterprises of the Community.

3. Pending further proceedings, for each person that is the subject of paragraphs 1 and 2 of this Order, the Defendants are herewith directed to pay into one or more interest-bearing escrow or trust accounts at a Federally insured savings institution the share of revenues generated, from the date of this Order forward, by the gaming enterprises of the Community that each such prson would have received, absent this Order. Such account or accounts shall permit the Community to withdraw some or all such monies at any time, upon the further Order of this Court; and the records of such accounts shall permit the Community to determine the amounts paid in, and the amounts of interest earned, in the name of each person that is the subject of paragraphs 1 and 2 of this Order.

4. Pending further proceedings, the Defendants are herewith preliminarily enjoined from paying to the children of any person

who purportedly was voted into membership of the Shakopee Mdewakanton Dakota (Sioux) Community ("the Community") by the actions of the Community's General Council on January 11, 1994 any monies from any trust funds for children of members of the Community; and for each child that is the subject of this paragraph, the Defendants are herewith directed to pay into one or more interest-bearing escrow or trust accounts at a Federally insured savings institution any monies which such child would otherwise have received, absent this Order. Such account or accounts shall contain provisions identical to those contemplated by paragraph 3 of this Order.

5. Except as it may be reflected in paragraphs 1, 2, 3, and 4 of this Order, the Plaintiffs March 2, 1994 Motion for Temporary Stay of Certain Proceedings is denied.

6. The Plaintiffs' March 2, 1994 Motion for Attorneys' fees pending the litigation of this matter is denied.

7. The Defendants' March 10, 1994 Motion for Extension of Time in Which to Answer is granted.

8. The Defendants' February 23, 1994 Motion to Stay Proceedings pending the exhaustion of tribal remedies is granted, as to all persons whom the Plaintiffs contend are not properly members of the Community, and who are not the subject of paragraphs 1, 2, 3, and 4 of this Order.

9. The Plaintiffs' March 2, 1994 Motion to Add Party Defendants is taken under advisement, pending the exhaustion of tribal remedies contemplated by paragraph 7 of this Order.

10. The pro se Motion to Dismiss on the grounds that the

Defendants are immune from suit, filed by Mr. Joseph Brewer, is denied.

March 15, 1994

John E. Jacobson
Associate Judge

086-38

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

BARRY WELCH, STACIE D. WELCH, STEPHANIE SIOUX WELCH, BRENDA (WELCH) WILT, STEPHEN P. (WELCH) WILT, THOMAS W. (WELCH) WILT, AND VIOLET A. (WELCH) WILT, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, STANLEY CROOKS, CHAIRMAN, KENNETH ANDERSON, VICE CHAIRMAN, AND DARLENE MATTA, SECRETARY TREASURER, Defendants.	Court File No. 023-92

MEMORANDUM AND ORDER

On April 18, 1994, the Defendants moved me to recuse myself, on the grounds that in 1987, during a time that I served as an attorney for three persons--Kathy Welch, Ronald Welch, and Jim Welch--I took positions in proceedings before the United States Department of the Interior which are directly contradictory to positions taken by the Community in this litigation. I have reviewed the materials presented by the Community, and have decided to recuse myself, not on the Community's motion but on my own. In this manner, the parties are spared the necessity of responding to a briefing schedule, and the Court is spared the necessity of reviewing the attending paperwork.

I was unaware, until the materials presented by the Defendants were called to my attention, that I had taken the positions to which they object; and those positions have not influenced my participation in this matter to date. Nor would they influence my participation in the future, I believe. But, as I stated on the record in case number 038-94 on April 14, 1994, the value of this Court to the Community and its members is entirely dependent on the continued perception, by the Community and its members, that the Court is utterly without bias. Accordingly, the possibility that a contrary perception might arise from the positions I took in 1987 clearly requires that I recuse myself.

ORDER

For the foregoing reasons, the undersigned does herewith recuse himself from further participation in this matter.

Date: April 19, 1994

John E. Jacobson
Associate Judge

FILED

MAY 17 1994

cls

COURT OF THE SHAKOPEE MDEWAKANTON
DAKOTA (SIOUX) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Leonard L. Prescott and
Frank William Johnson,

Plaintiffs,

vs. No. 040-94

Shakopee Mdewakanton Sioux
(Dakota) Community Business
Council, Stanley Crooks, and
Shakopee Mdewakanton Sioux
(Dakota) Gaming Commission,

Defendants.

MEMORANDUM AND ORDER

In this matter, which was filed with the Court on May 16, 1994, the Plaintiffs seek declaratory and injunctive relief against actions of the Gaming Commission ("the Gaming Commission") of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"). The Plaintiffs are officers of Little Six, Inc. ("LSI"), a corporation chartered by the Community. LSI owns and operates the gaming enterprises of the Community.

The Plaintiffs allege that the Gaming Ordinance, under which LSI has functioned since April, 1993, was not properly adopted by the Community; and they assert that the Gaming Commission, which has suspended gaming licenses which the Plaintiffs hold, acted improperly because it purported to be implementing the allegedly inoperative ordinance. The Plaintiffs also allege that the Gaming

Commission has scheduled a hearing on May 19, 1994, on the issue of whether the licenses should be repealed, again under the allegedly non-existent ordinance; and they allege that the Defendant Stanley Crooks, the Chairman of the Community, has signed a "Trespass Order", forbidding the Plaintiffs from entering the premises of the gaming enterprises owned and operated by LSI, pending the results of that hearing.

With the filing of their Complaint, the Plaintiffs moved for a Temporary Restraining Order, asking the Court to restrain the Defendants from taking any action to enforce the Gaming Commission's license suspension or Mr. Crooks' Order. A hearing on the Plaintiffs' motion, by telephone conference call not on the record, was held on May 17, 1994. The Plaintiffs were represented by Douglas A. Kelley, Esq., John M. Lee, Esq., and Steven E. Wolter, Esq.; the Defendants were represented by Kurt Bluedog, Esq., and Andrew Small, Esq..

At the conclusion of the hearing, the undersigned denied the Plaintiffs' motion, on the grounds that the record before the Court did not justify the extraordinary relief of a Temporary Restraining Order. Specifically, when the harm that might be worked to the public interest if the Order were granted is weighed against the harm that may be worked to the Plaintiffs if it is denied, the balance requires denial.

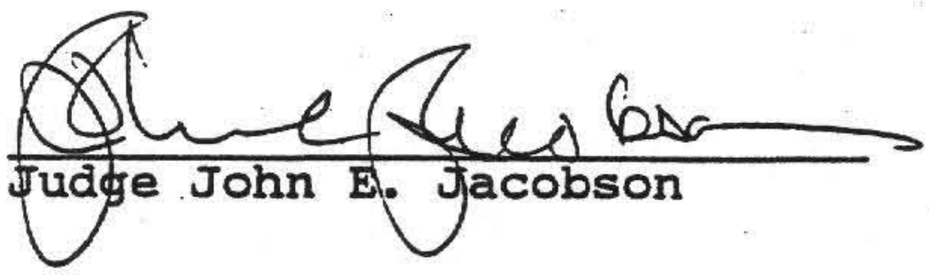
One significant factor in the Court's decision concerns the timing of the Plaintiffs' request. The ordinance at issue was twice voted on by the General Council of the Community, in March and April, 1993. It subsequently was sent to the National Indian

Gaming Commission for review and, Defendants' counsel asserted during the hearing, was approved by that entity. The Plaintiffs apparently have applied for and received licenses under the ordinance. Apparently at no time prior to the filing of this litigation did the Plaintiffs take formal steps to challenge the ordinance's validity. With this history, although the Plaintiffs may not be foreclosed from raising the question of the ordinance's effectiveness, they bear an extremely heavy burden in attempting to convince the Court that the extraordinary remedy of preliminary relief is appropriate.

The Plaintiffs maintain that reputations--theirs and the Community's--may be damaged by adverse publicity, if the Gaming Commission is permitted to proceed. But if such harm occurs, and if it is not justified by the law, then at least to some extent it can be mitigated by subsequent proceedings. On the other hand, if the Court were to issue an Order that restrained the Community from operating under the single legislative act that, under section 11 of the Indian Gaming Regulatory Act of 1988, permits its gaming to take place, the consequences to the Community's businesses, its members, its employees, and the public at large would be difficult to calculate.

Accordingly, since at least three of the factors which are required for the issuance of a temporary restraining order are not present at this time in this matter, the Plaintiffs' motion is DENIED.

May 17, 1994



Judge John E. Jacobson

JUDICIAL COURT

of the

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Culver Security Systems, Inc.,
a Minnesota corporation,

Plaintiff,

v.

Little Six, Inc., a corporation,
and Kraus-Anderson Construction
Company, a Minnesota corporation,

Defendants.

Court File 026-92

MEMORANDUM

I.

INTRODUCTION AND SUMMARY

This case is before the Court on a motion to dismiss brought by the Defendant, Little Six, Inc. (LSI). LSI asserts that it has not waived its sovereign immunity in any dealings with the Plaintiff, Culver Security Systems (Culver) and, therefore, is not subject to suit. The Court agrees with LSI and, therefore, LSI's motion to dismiss with prejudice has been granted.

Further, the Court finds that it does not have subject matter jurisdiction to hear the remaining contract dispute between Culver and Kraus-Anderson (KA). Therefore, the Plaintiff's remaining claims against the KA have been dismissed without prejudice.

II.

STATEMENT OF FACTS

This case arises out of two contracts between the Defendants and the Plaintiff. The first was an oral contract between Culver and LSI (a corporate arm of the Shakopee Mdewakanton Sioux Community (the Community), a federally recognized Indian tribe), occurring in approximately January 1991, whereby Culver agreed to provide various security services to LSI at its bingo hall and casino. The second was a written contract between LSI and KA concerning construction services at the Community's bingo hall and casino. The LSI/KA written contract provided that Culver would be a preferred subcontractor for security systems. Preferred subcontractor status means that the subcontractor so designated would not have to participate in the bidding process. LSI and KA were the only parties to the written contract. That contract contains a clause which waives LSI's sovereign immunity and subjects it to suit with regard to contractual disputes arising between LSI and KA.

In conjunction with the casino development, LSI Chief Executive Officer, Leonard Prescott, signed a real estate note with the Prior Lake State Bank. That note contains a waiver of immunity clause which subjects LSI to suit thereon.

On or about January 8, 1992 Culver was terminated from the bingo hall and casino projects based on claims that their work was preformed in a defective and inadequate fashion. KA finished the projects with a new subcontractor.

The Plaintiff originally brought this breach of contract action in State District Court in Scott County in May 1992, and then voluntarily dismissed the case in September 1992. The Plaintiff then brought this claim in Tribal Court against LSI, and later amended its complaint

to add KA as a party defendant. LSI now moves for dismissal of Culver's claims against it based on a claim of sovereign immunity.

III.

DISCUSSION

1. Sovereign Immunity

In order for Culver to maintain an action against LSI, it must demonstrate that LSI expressly and unequivocally waived its sovereign immunity. The Court finds that Culver has failed to demonstrate such a waiver.

The nature and importance of the sovereign immunity doctrine as applied to Indian tribes was aptly explained by the United States Court of Appeals for the Eighth Circuit in the 1985 case of American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1985) in which the Court stated that

> The principle that Indian nations possess sovereign immunity has long been part of our jurisprudence [citations omitted]. Indian tribes enjoy immunity because they are sovereigns predating the Constitution [citations omitted] and because immunity is thought necessary to promote the federal policies of tribal self determination, economic development, and cultural development [citations omitted].
>
> Ibid. at 1378.

This doctrine is uncomplicated. As Chief Justice William Rehnquist recently noted "Suits against Indian tribes are thus barred by sovereign immunity absent clear waiver by the tribe or congressional abrogation." Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 509. This Court has adopted this view and, accordingly, the Community, its elected officials, and employees acting in their official capacity, all possess sovereign immunity and, absent an express waiver of that immunity, are not subject to suit. Barrientez v. The Shakopee Mdewakanton, Sioux Community, No. 007-88, Ct of the Shakopee Mdewakanton Sioux

Community (June 17, 1991), citing, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978), **See also,** Duluth Lumber & Plywood v. Delta Development Inc., 281 N.W.2d 377, 383-384 (Minn. 1979). This Court in the Barrientez case further held that an agency or corporate arm of the Tribal government may possess the same immunity from suit that is enjoyed by the government itself, and that an express waiver of immunity is also required before such and arm or agency will be subject to suit. Barrientez, at p.46, **See also,** Shakopee Mdewakanton Sioux Community Corporate Ordinance 2-27-91-004, Section 4.11. This Court has also held that the Community and its agencies and arms have the same immunity from suit in Tribal Court as they do in State or Federal Courts. Hove v. Stade, No. 001-88, Ct. of the Shakopee Mdewakanton Sioux Community (July 15, 1988). The Court finds that LSI as a corporate arm of the tribal government enjoys the same sovereign immunity as does the Community and, accordingly, must expressly waive its immunity before it will be subject to suit.

The Court further finds that LSI has not expressly waived its immunity from suit relative to its transactions with Culver. The Court narrowly construes questions of waiver of sovereign immunity. As noted by the Court in Barrientez, "an express waiver of immunity is required before a tribal entity which otherwise is cloaked with immunity will be deemed to have shed that cloak." Id. at p.46. The Court's position in this regard is consistent with the Community's Corporate Charter which provides that "...such corporation...must explicitly consent to be sued in a contract or other commercial document which specifies the terms and conditions of such consent". LSI's Articles of Incorporation contain the identical language at Article 3.2. Accordingly, the Court will not find LSI to have waived its immunity by implication or inference. Rather, LSI must be found to have expressly and unequivocally waived its immunity before it will be subject to suit. See, Ramey Construction v. Apache Tribe of Mescalero

Reservation, 673 F.2d 315, 319 (10th Cir. 1982), citing, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Culver claims LSI waived its sovereign immunity in a number of ways including: 1) an oral agreement and unspoken understanding between Culver and LSI; 2) a written waiver included in LSI's contract with Kraus-Anderson; and 3) written waiver included in the note provided to the Prior Lake State Bank. The Court is not persuaded that any of these actions constitutes an express waiver of LSI's immunity with regard to its transactions with Culver.

First, a waiver of LSI's immunity by way of an oral agreement is in direct conflict with the above cited law and this Court's consistent position that a waiver of immunity must be express and unequivocal. The cases cited by Culver conflict with its position in that they involve instances where a Tribe expressly waived its immunity by a written document. This Court has held that a written waiver of immunity may be sufficient to overcome a defense of sovereign immunity. See, Barrientez v. The Shakopee Mdewakanton, Sioux Community, No. 007-88, Court of the Shakopee Mdewakanton Sioux Community (June 17, 1991). However, Culver's argument is based on an oral agreement, and by definition, excludes such a written waiver. Culver, in its argument to the Court, conceded that they did not have an explicit waiver from LSI. At the hearing held before this Court on September 13, 1993, the Plaintiff specifically admitted its lack of an explicit waiver in the following exchange:

> Judge Buffalo: Did you have anything that explicitly stated that LSI was waiving its immunity relative to whatever oral agreement it had with Culver?
>
> Mr. Buxton: No, Sir, Your Honor. We do believe that the construction agreement, the general contract between Kraus-Anderson and LSI, does apply to that . . .
>
> Transcript of Proceedings at p. 17, 11, 9-16.

Culver later in that same proceeding acknowledge the importance of a written waiver when its attorney stated

> And, unfortunately, there was never a writing evidencing the contract between Little Six and Culver Security or the things not covered in the subcontract.
>
> Ibid. at p. 25, 11, 1-6.

Based on the authority discussed above, these admissions are fatal to Culver's position because absent proof of a written waiver, the case law cited by Culver in support of its contention are simply not applicable.

Culver contends, and this Court does not dispute, that oral contracts may be binding on the parties thereto. However, this proposition does not lead, as urged by Culver, to the conclusion that a binding oral agreement, if one existed between LSI and Culver, is a proper legal substitute for a written waiver of LSI's sovereign immunity. LSI's Articles of Incorporation, the Community's charter and case law on the issue require an unequivocal written waiver of immunity. No such waiver exists here. Therefore the fact that an oral contract may be binding on the parties is not germane to the question of whether LSI expressly waived its immunity from suit. The Court finds that the alleged oral agreement between Culver and LSI is insufficient to demonstrate an express waiver of LSI's immunity from suit.

Culver next contends that LSI's written contract with KA provides a written waiver of LSI's immunity relative to Culver. Culver never has contended that it participated in the contract between LSI and KA. Rather, Culver contends that its contract with KA incorporates the LSI/KA contract by reference and, therefore, LSI's waiver of immunity was included in the KA/Culver contract. Culver's argument urges a waiver of LSI's immunity by implication. For the reasons noted above, the Court does not recognize a waiver of immunity by implication and, accordingly, this argument fails.

Further, it is Hornbook law that two contracting parties may not limit or in any way affect the rights of a third party not participating in the contract. Neither will a person not a party to the contract be bound by its terms, Johnson v. Coleman, 288 S.W.2d 348 (KY 1956); Burdeu v. Elling State Bank, 76 Mont. 24, 245 P 958 (1926); New York Tel. Co. v. Teichner, 69 Misc.2d 135, 329 N.Y.S.2d 689 (1972), nor may a person not a party to a contract attempt to enforce the terms thereof. Williams v. Eggleston, 170 U.S. 340, 42 L.Ed. 1047, 18 S.Ct. 617 (1898); Corp. of Washington v. Young, 23 U.S. 406, 6 L.Ed. 352; Eastern States Electrical Contractors, Inc. v. William L. Crow Constr. Co., 544 N.Y.S.2d 600 (A.D. 1 Dept. 1989). Culver's position that an incorporation of the LSI/KA contract constitutes a waiver of LSI's immunity is antithetical to this contract tenet, and is, therefore, not supported by law. LSI did not participate in the KA/Culver contract and absent its participation the parties had no authority to limit or in any way affect LSI's rights and immunities. The Community's Corporate Charter and Articles of Incorporation specifically state that the corporation must consent to be sued in a contract or commercial document. These documents leave no question but that the corporation must participate in any contract which purports to waive its immunity. Therefore, any incorporation of the LSI/KA contract as it relates to a waiver of LSI's immunity is void.

Culver also contends that LSI waived its immunity relative to a subcontractor based on its contract with the prime contractor is rebutted by LSI's Articles of Incorporation and case law on the issue. First, the Articles clearly provide for a reservation of waiver on a contract by contract basis. The argument that LSI waived its immunity in all subcontracts based on its waiver in the prime contract is in direct conflict with the clear language of the Articles. Second, Federal and State Court case law provides that absent privity of contract with a sovereign entity there can be no express waiver of immunity. **See** Erickson Aircrane Co. v. United States, 731

F.2d 810, 813 (Fed.Cir. 1984); Pan Arctic Corp. v. United States, 8 Cl. Ct. 546 (1985); APAC-Virginia v. Dept. of Hwys. & Transp., 388 S.E.2d 841 (Va.App. 1990). LSI correctly notes that as an entity possessing immunity co-extensive with that of the United States government it must be in privity of contract with Culver before a valid waiver of immunity will be found. Culver has not demonstrated that it was in privity of contract with LSI. Accordingly, it cannot demonstrate that LSI expressly waived its immunity.

Finally, Culver argues that a waiver clause found in a note executed by CEO Prescott with the Prior Lake State Bank constitutes a waiver of LSI's immunity with respect to Culver. The Court is uncertain as to the connection between the note and Culver's security services, but finds the argument too remote to be relevant. To find a waiver from such a transaction would require the highest degree of implication, and is outside the express waiver requirements found in LSI's Articles, and the law. See, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); Barrientez v. The Shakopee Mdewakanton Sioux Community, No.007-88, Ct. of the Shakopee Mdewakanton Sioux Community (June 17, 1991); Feldman v. Little Six, Inc., Minn.Dist.Ct., Scott Co. Court File No. 93-06036 at p.6 (July 29, 1993).

Culver's reliance on McCarthy & Associates v. Jackpot Junction, 490 N.W.2d 156 (Minn.Ct.App. 1992) is misplaced. The Court in McCarthy found that the Lower Sioux corporate charter contained a general waiver of its sovereign immunity relative to its gaming operation and that the community did not reserve its submission to suit on a contract by contract basis. The Court misinterpreted the authority under which the Lower Sioux Community created its enterprises. The Enterprises were created under the authority of Section 16 of the Indian Reorganization Act of 1934. The Corporate Charter was created under Section 17 of the IRA and by its term applied only to activities carried out under the Charter. In the case at bar the

Community also elected to operate the enterprise under Section 16 and not under its Corporate Charter and, indeed, the language in LSI's Articles of Incorporation expressly state the waiver reservation that was lacking in the Lower Sioux Charter. Accordingly, the McCarthy case is inapposite to the case at bar.

2. Subject Matter Jurisdiction

At the time of the hearing on this matter the Court expressed doubt that it would continue to have subject matter jurisdiction over the case if LSI were dismissed. Now that LSI is, indeed, dismissed the question is magnified.

> The Community's General Council has granted this Court subject matter jurisdiction
>
> > to decide cases relating to the membership of the community, the rights of Community members, including the right to vote in Community elections and proceedings, the procedures employed by the General Council, the Business Council, the Committees of the Community or the officers of the Community . . . and . . . all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C., Section 1301, et. seq.
>
> Community Ordinance 02-13-88-01.

By enacting Ordinance 03-27-90-003 the Council further granted this Court

> > [s]ubject matter jurisdiction over all cases, controversies and proceedings to the maximum extent permitted by law, including, but not limited to those involving the ownership possession, use or occupancy of Reservation lands.
>
> Id. Section 10(a).

With LSI dismissed from this action, the remaining dispute is no longer within this Court's prescribed jurisdiction. In short, the remaining dispute is an action on a contract involving two non-Indian parties. The contract was neither executed on Indian land, nor affects the rights or interests of the Community or its individual members. As such it is a dispute

outside the Courts jurisdiction and, therefore, the Court must dismiss the plaintiff's remaining claims without prejudice.

HMB

FILED

JUN 14 1994

CLS

JUDICIAL COURT

of the

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Culver Security Systems, Inc.,
a Minnesota corporation,

Plaintiff,

v.

Little Six, Inc., a corporation,
and Kraus-Anderson Construction
Company, a Minnesota corporation,

Defendants.

Court File 026-92

ORDER

The above entitled matter came on for hearing before the undersigned Judge of Tribal Court on the 13th day of September, 1993, at 2330 Sioux Trail Northwest in the city of Prior Lake, County of Scott, State of Minnesota, on the defendant, Little Six, Inc.'s, motion to dismiss.

Peter Lancaster, Esquire appeared on behalf of the defendant, Little Six Inc. Rex Buxton, Esquire appeared on behalf of the plaintiff, Culver Security Systems, Inc.

The Court being fully advised of the premises and based on the files, records and evidence herein, as well as the arguments of counsel,

IT IS HEREBY ORDERED,

1. That the Defendant, Little Six Inc.'s motion to dismiss with prejudice be, and hereby is, GRANTED;

2. That the Plaintiff's remaining claims against the defendant Kraus-Anderson be, and hereby are, DISMISSED, without prejudice;

3. That the attached memorandum of law is hereby incorporated by reference.

BY THE COURT:

Dated: 6/14/94

Henry M. Buffalo, Jr.

FILED

JUL 08 1994

Cls

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT | STATE OF MINNESOTA

Louise B. Smith, Winifred S. Feezor, Leonard L. Prescott, and Patricia A. Prescott, and others similarly situated,

Plaintiffs,

vs.

The Shakopee Mdewakanton Sioux (Dakota) Community, the Shakopee Mdewakanton Sioux (Dakota) Business Council, Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and jointly, the Shakopee Mdewakanton Sioux Community Enrollment Committee, Anita Barrientez (Campbell), Susan Totenhagen, and Cherie Crooks-Bathel, individually and jointly,

Defendants.

Court File No. 038-94

MEMORANDUM AND ORDER

A complaint was filed with this Court in the above-captioned matter on February 3, 1994, and an amended complaint was filed on February 17, 1994. Claims regarding actions of the General Council on January 11, 1994 were included in both complaints. Specifically, Plaintiffs asked this Court to grant a preliminary injunction to prohibit the Shakopee Mdewakanton Sioux (Dakota) Community from treating as members thirty-one persons who were voted into membership by the

General Council of the Shakopee Mdewakanton Sioux (Dakota) Community on January 11, 1994. On March 15, 1994, this Court so enjoined the Community.

Defendants filed a "Motion to Modify/Dissolve Preliminary Injunction" with this Court on May 6, 1994, more than one month before the Memorandum opinion was issued in this case. The motion reflected that nine of the individuals who were enjoined from being treated as members of the Shakopee Mdewakanton Sioux (Dakota) Community had gone through the Community's enrollment process, pursuant to Ordinance No. 6-08-93-001. Plaintiffs challenged the enrollment of the nine persons who were the subject of the Defendants' motion, later withdrawing the challenge with regard to four of them, and the General Council formally rejected the remaining challenges at a validly called General Council meeting on April 27, 1994.

A conference call between the parties and the undersigned was held on June 2, 1994, at which time the undersigned informed the parties that no order modifying or dissolving the injunction would be issued until all of the parties were given the chance to examine the Memorandum and opinion issued by Judge Jacobson regarding the injunction. Supplemental briefs were filed by the parties on June 22, 1994, revisiting the motion in view of the Court's Memorandum and opinion issued June 10, 1994.

The issue before the court in Defendants' motion is whether the Community has taken action making the basis for the injunction disappear with regard to the

nine individuals named in the motion.[1] To resolve that issue, this Court is mindful that "one of an Indian tribe's most basic powers is the authority to determine questions of its own membership." Felix Cohen, Federal Indian Law, 20 (1982 ed.); *See also*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). "A tribe has power to grant, deny, revoke, and qualify membership." Federal Indian Law, *supra*, at 20. In the Shakopee Mdewakanton Sioux (Dakota) Community, the ultimate authority for membership determinations is vested with the Community's governing body, the General Council. Because membership determinations are to be made by the Community's governing body and *not by this Court*, unless something is out of the ordinary in manner in which the General Council makes its determinations, this Court will refrain from interfering with membership determinations of the General Council and the disenrollment process governed by the Community's Enrollment Ordinance.

The Community's records demonstrate that after notice and an opportunity for challenge by the Community members, the General Council certified the nine individuals who were the subject of the Defendants' Motion to Modify/Dissolve the injunction for enrollment in the Community.

The reason for the injunction with respect to the nine individuals named within the Defendants' motion has "disappeared" and this Court HEREBY ORDERS that the preliminary injunction issued March 15, 1994 is modified as follows:

---

[1]Alicia Barrientez, Genevieve Crooks, James O. Crooks, Nathan Crooks, Melinda Stade, Carrie Campbell, Alan Campbell, David Blue and Robert Blue.

1. The Community is no longer enjoined from permitting the nine individuals set forth in note one of this Memorandum and Order to vote in meetings of the Community's General Council or participate as members of the Community in the Community's affairs.

2. The Community is no longer enjoined from paying any monies generated by the gaming enterprises of the Community to the nine individuals set forth in note one of this Memorandum and Order.

Entered:

FILED

JUL 08 1994

cls

Robert Grey Eagle

Judge Robert A. Grey Eagle

FILED

SEP 23 1994

CLS

JUDICIAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Kenneth J. Thomas,

Plaintiff,

v.

Shakopee Mdewakanton Sioux Community,

Defendant.

Case No.: 027-93

Constance P. Borchert,

Plaintiff,

v.

Shakopee Mdewakanton Sioux Community,

Defendant.

Case No.: 028-93

Kimberly Ann Mullenberg,

Plaintiff,

v.

Shakopee Mdewakanton Sioux Community,

Defendant.

Case No.: 029-93

Delores E. Walker,

Plaintiff,

v.

Shakopee Mdewakanton Sioux Community,

Defendant.

Case No.: 030-93

AMENDED ORDER

The above-captioned matters, consolidated for the purposes of hearings on pending motions, came on for hearing before the Honorable Henry M. Buffalo, Jr., Judge of the Shakopee Mdewakanton Sioux (Dakota) Community, on September 7, 1994 at 10:00 a.m. Plaintiffs are each members of the Community, similarly situated. The Court heard argument of counsel upon Plaintiffs' Motion for Summary Judgment, and upon Defendants Motion for Dismissal on grounds asserting that the Court lacked jurisdiction. Plaintiffs were represented by Attorneys Larry B. Leventhal, Esquire, and Michael C. Hager, Esquire, Suite 420 - Sexton Building, 529 South 7th Street, Minneapolis, Minnesota 55415. Defendant was represented by Attorneys Vanya Hogen-Kind, Esquire, and Andrew Small, Esquire, BlueDog Law Office P.A., Suite 670 - Southgate Office Plaza, 5001 West 80th Street, Bloomington, Minnesota 55431.

On September 19, 1994, the Court issued its Findings of Fact, Conclusions of Law, and Order in this matter. The parties requested clarification as to the sum total of monies to be paid by Defendant to the respective Plaintiffs under said Order. The Court received submittals from each party on this issue, and reconvened the parties through a telephone conference call to receive limited argument by counsel. Said conference call was held on September 22, 1994, commencing at 10:15 a.m., with appearances being made by each of the aforementioned attorneys.

The Court having heard the argument of counsel and having considered the written submittals, and upon all the records and files submitted, and upon review of the Court's original Order in

this matter dated September 19, 1994, makes the following Amended Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. This case was filed by Plaintiffs on April 29, 1993.

2. The Plaintiffs, in these actions, are each enrolled adult members of the Shakopee Mdewakanton Sioux (Dakota) Community, whose membership each respectively predates the enactment of the Community's Business Proceeds Distribution Ordinance (Ordinance No. 12-29-88-002), on December 29, 1988.

3. None of the four Plaintiffs received per capita payments of business proceeds distribution until January 14, 1994, subsequent to the enactment by the Community on October 27, 1993 of the Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance (Ordinance No. 10-27-93-002). Each Plaintiff has since that time, received regular distributions of per capita business proceeds.

4. The Plaintiffs herein, submitted their Motion for Summary Judgment on September 29, 1993, seeking an expedited hearing on the basis that the Community was considering an Amendment to the jurisdiction of this Court which Plaintiffs feared the Defendant would argue divested this Court of jurisdiction. The Community in its partial response to Motions to Summary Judgment on October 5, 1993 assured this Court that "no such statement or intent is contained in any proposed amendment to the Business Proceeds Distribution Ordinance."

5. The Plaintiffs have respectively submitted their individual names to a referendum vote by the General Council of the Community for approval to be placed on the Roll of Adults authorized to receive per capita distributions. The General Council denied their respective petitions.

6. On January 5, 1993, the parties jointly submitted Stipulations to this Court providing, in part, that this Court has jurisdiction over the matters at issue pursuant to Community Ordinance No. 02-13-88-01, that Plaintiffs are eligible for distributions under the Amended Ordinance, that Plaintiffs are each respectively enrolled members of the Community and have held such membership since prior to December 29, 1988, that each Plaintiff is of Mdewakanton blood and has not at any time been a member of any other Indian tribe other than for the Shakopee Mdewakanton Sioux (Dakota) Community, that Plaintiffs names did not appear on the Roll of Adults of the 1988 Distribution Ordinance, and that the Amended Business Distribution Ordinance established and rendered moot the eligibility of Plaintiffs for current and future per capita payments. The respective Stipulations of the parties are accepted by this Court and are incorporated herein.

7. The parties within the aforementioned Stipulations provided at paragraph 7, that "the issue of Plaintiff's eligibility for retroactive per capita payments remains to be resolved by this court."

8. Along with the Stipulations of the parties submitted to the Court on January 5, 1994, the parties submitted a Motion that

this Court declare that actions by Tribal officials providing for future per capita payments to the Plaintiffs, while the Gaming Revenue Allocation Amendments to the Business Proceeds Distribution Act were on appeal, were reasonable and that such actions would not subject those serving on the Business Council to sanctions. The Honorable John E. Jacobson, Associate Judge of this Court, issued the Court's Order on January 9, 1993, accepting the Stipulations and providing the requested declaration.

9. Defendant on August 31, 1994, filed its Motion to Dismiss on the grounds of jurisdiction. Defendant acknowledged its previous position that the Court had jurisdiction to consider Plaintiffs' request for an Order that they be distributed per capita benefits retroactive to the date that distributions to them commenced, but presented the view that the language of Section 14.5(B) of the Amended Ordinance deprived this Court of jurisdiction to award anything other then prospective relief.

10. Plaintiff Delores Walker has received General Assistance monies in the amount of $6,000.00 from the Community, subject to repayment to the Community, upon receipt by Plaintiff Delores Walker of an award hereunder.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to consider an award of retroactive per capita payments as to each of the Plaintiffs, pursuant to their respective Complaints and Motions for Summary Judgement. The Community, in the passage of the Gaming Allocation Amendments to the Business Proceeds Distribution Act, must be

presumed to have been aware of the pendency of these cases, and did not expressly state in the amended ordinance whether the Amendments were or were not to have an effect on pending cases. In its silence it must presume the liability of these claims. Further, the Community expressed a contemporaneous representation to the Court that the Amendments did not limit the relief sought by Plaintiffs in these actions. Additionally, the Community stipulated to jurisdiction of these claims before the Court. These claims continue, in light of the fact that they were not resolved in the express language of the Community within the Gaming Revenue Allocation Amendments to the Business Proceeds Distribution Ordinance it adopted in October 1993.

2. As this Court does retain jurisdiction, this would necessarily then require the application of the rules as enunciated in Lanny Ross v. Shakopee Mdewakanton Sioux Community, Case No. 013-91; and in Welch and Vig v. Shakopee Mdewakanton Sioux Community, Case No. 022-92.

3. One of the purposes, and perhaps the fundamental purpose, for the adoption of the amendments of the Community Ordinances dealing with per capita distribution was to lay to rest, once and for all, questions brought forth by the instant cases and several other cases presented to the Court. The purpose was to stabilize this Community. A major step towards achieving that purpose of stability necessarily involves the creation of clear rules and standards under which the Community will treat all its members with

fairness, pursuant to the Constitution. The Amendments, by providing for prospective relief only, addresses this instability.

4. The specifics of these cases do vary from that presented by Ross, Welch and Vig, in that their individual names did not appear on the same list as Ross, Welch and Vig (List C to the 1988 Business Proceeds Distribution Ordinance).

5. This Court maintains discretion to fashion remedies that will be fair to all of the parties.

IT IS HEREBY ORDERED:

1. The Motion to Dismiss by Defendant is denied.

2. The respective Motions of each Plaintiff for Summary Judgment are granted in part, and denied in part.

3. Defendant Community is to pay each respective Plaintiff the sum of $54,269.00, each. Said monies shall be subject to interest as specified in paragraph 4, and in the case of Plaintiff Delores Walker, subject to repayment to the Community of General Assistance monies as specified within paragraph 5.

4. From the above specified monies to be paid by Defendant Community to Plaintiff Delores Walker, the Community is authorized to deduct the sum of $6,000.00 to repay the Community for General Assistance benefits provided by the Community to Plaintiff Delores Walker, thus submitting payment to Plaintiff Delores Walker in the sum of $48,269.00, plus applicable interest.

5. Plaintiffs shall receive interest upon the monies specified within paragraph 3 above, at the rate of 3.25% compounded monthly, for the period commencing October 27, 1993 to the date of

final disbursement of said monies. If payment is made by the Community on or before October 3, 1994, the additional interest payment to be paid to Plaintiffs Kenneth J. Thomas, Constance B. Borchert, and Kimberly Ann Mullenberg, each respectively, shall be $1,703.00. If payment is made by the Community on or before October 3, 1994, the additional interest payment to be paid to Plaintiff Delores E. Walker shall be $1,352.00.

6. No costs, disbursement or attorney fees are awarded as between the parties.

Dated: September 23rd, 1994

The Honorable Henry M. Buffalo, Jr.
Judge of the Shakopee Mdewakanton Sioux
(Dakota) Community Court

FILED

SEP 28 1994

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re: the Matter of Amendments to the Shakopee Mdewakanton Sioux (Dakota) Community Corporation Ordinance Passed on July 27, 1994

Court File No. 044-94

MEMORANDUM AND ORDER

On September 12, 1994, oral argument was heard on the record in this matter. At its conclusion, in a unanimous opinion the Court ruled from the bench that the requirements of section 63.0 of the Corporation Ordinance of the Shakopee Mdewakanton Sioux Community, Ordinance No. 2-27-91-004 ("the Corporation Ordinance") had been met, when amendments to the Corporation Ordinance had been passed by the General Council of the Shakopee Mdewakanton Sioux Community ("the General Council") on July 27, 1994. Specifically, in a unanimous opinion the Court held that, the July 27, 1994 amendments ("the Amendments") were "in the best interest of the Community", as that phrase is used in section 63.0 of the Corporation Ordinance, and as that phrase has been interpreted by this Court. See generally, Shakopee Mdewakanton Sioux Community, No. 025-92 (Shak. Mdw. Ct., June 3, 1993).

In arriving at this holding, the Court reviewed the pleadings in this matter, the transcript of the July 27, 1994 General Council meeting, the arguments of counsel, and also considered comments provided to the Court in an August 3, 1994 letter from the Vice Chair of the Board of Directors of Little Six, Incorporated ("LSI"), a corporation wholly owned by the Shakopee Mdewakanton Sioux (Dakota) Community and chartered under the Corporation Ordinance. Under the holding of Shakopee Mdewakanton Sioux Community, supra, the scope of the Court's review is very narrow:

> We will review amendments or repealers to ensure that no fraud, overreaching, or coercion was evident in the proceedings which led to their adoption; that all appropriate procedures were observed during the consideration and adoption of the provisions; and that all persons and entities who legitimately can claim an interest in the deliberations were given a fair chance to be heard in the Community's deliberations. If we are satisfied as to those matters, we will declare that an action of the General Council is in the Community's best interests.
>
> Id., at 3

In the view of the Court, nothing in the record indicates that under this narrow standard of review, the Court should hold that the amendments are void. The meeting of the General Council was well attended, and discussion of the proposed amendments during the General Council meeting was extensive. The Vice Chair of LSI was present during the discussion. There was no suggestion during the discussion that the proceedings were inappropriate or coercive. And the vote approving the amendments was nearly unanimous (thirty-seven votes to approve, no votes to disapprove, and one absentention).

Under these circumstances, it would be wholly inappropriate for this Court to insert itself into the proceedings, or substitute, even temporarily, its judgment for that of the General Council.

ORDER

For the foregoing reasons, the July 27, 1994 Amendments to the Corporation Ordinance shall be deemed approved by this Court effective September 12, 1994.

September 28, 1994

John E. Jacobson
Judge

Henry M. Buffalo, Jr.
Judge

Robert GreyEagle
Judge

FILED

NOV 11 1994

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Raymond L. Cermak, Sr., Stanley Cermak, Sr., Raymond L. Cermak, Jr., Stanley F. Musiak, Bradley W. Peterson, Stanley F. Peterson III, Eleanor F. Krohn, David J. Collins, Bernice T. Collins, Darlene M. Church, and Lorie Beerling,

Plaintiffs,

v.

Shakopee Mdewakanton Band of Sioux Indians, d/b/a "Mystic Lake Casino and Dakota Country Casino," Little Six, Inc., The Mdewakanton Band of Sioux Council and its former officers: Chairperson Leonard Prescott, its Vice-Chair Stanley Crooks, and its Secretary-Treasurer Allene Ross; and current officers: Chairperson Stanley Crooks, its Vice-Chair Kenneth Anderson, and its Secretary-Treasurer Darlene McNeal,

Defendants.

Court File No. 039-94

MEMORANDUM

I.

This lawsuit was initiated on April 28, 1994. The Plaintiffs seek damages claiming that the current system for per capita distribution of the tribal funds is improper. They also seek an injunction against any further distributions under the current system. The case presently is before the Court pursuant to the Plaintiffs' motion to remove the Judges of this Court, John E. Jacobson, Henry M. Buffalo, Jr., and Robert Grey Eagle ("the Judges"), for bias, prejudice, or appearance of impropriety.

VSMSC.006

II.

The Plaintiffs allege that the Judges' bias flows from its associations with counsel for the Defendants. Defendants' counsel are associated with the BlueDog law firm. Attorneys for the BlueDog firm have been appointed to serve as judges and clerk to the Tribal Courts of the Lower Sioux Community and the Prairie Island Community. Specifically, attorneys Andrew Small, Steven Olson, and Kurt BlueDog, serve as Judges on the Lower Sioux Community in Minnesota Tribal Court, and attorney Vanya Hogen-Kind serves as the Clerk of that Court. Judges Jacobson and Buffalo represent the Lower Sioux Indian Community in Minnesota and, accordingly on occasion appear before the Lower Sioux Court. Attorneys Small, Olson, and BlueDog also serve as Judges on the Tribal Court of the Prairie Island Indian Community and attorney Hogen-Kind serves as the Clerk of that Court. Judge Grey Eagle represents the Prairie Island Community and, accordingly, on occasion appears before the Prairie Island Court.

The Plaintiffs allege that the foregoing facts create "significant ties" resulting in a "a bona fide appearance of bias," on the part of Judges Jacobson, Buffalo and Grey Eagle which warrants their recusal and disqualification.

III.

The Tribal Court of the Shakopee Mdewakanton Sioux Community was created by and is governed in accordance with Ordinance Number 02-13-88-01 (the "Ordinance"). Section IV of the Ordinance provides that "there shall be three Judges on the Tribal Court" and that the "Judges of the . . . Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council. . . ." Id. The Ordinance further provides that the General Council may fill vacancies on the Court within ninety (90) days of the resignation, death, or recall of a judge

or judges.[1] If ninety (90) days passes without an appointment, the remaining judges may then exercise their power of extraordinary appointment under Section V(D). No other procedures exist for the removal or appointment of judges on the Shakopee Mdewakanton Sioux Community Tribal Court.

Section VII of the Ordinance provides that "cases shall be heard by one judge . . . " and that "a matter may be certified for appeal to a three-judge panel of the full Court. . . ." Id.

IV.

The Plaintiffs argue, and this Court does not dispute, that a judge should not hear a case where it appears that he or she is biased or prejudiced against either party. State and federal courts all recognize this principle; so, too, does this Court. In fact, Rules 32(a) and (b) of the Shakopee Tribal Court Rules of Civil Procedure specifically so provides.[2] However, in cases such as the one at bar, where recusal of an otherwise disqualified judge would destroy the jurisdiction of the only Court which could hear the matter, the rules regarding disqualification

---

[1] Judges are subject to recall only upon passage of a Resolution of Recall by absolute two-thirds majority of all enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Ordinance 02-13-88-01 at Section IV(A).

[2] Rules 32(a) and (b) provide as follows:

Rule 32. Disqualification of Judge.

(a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned,

(b) A judge of the Court of the Shakopee Mdewakanton Sioux Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where is private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

yield to the Rule of Necessity. State ex rel. Gardner v. Holm, 241 Minn. 125, ____, 62 N.W.2d 52, at 53-54 (1954); Atkins v. United States, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978); Pilla v. American Bar Assn., 542 F.2d 56 (8th Cir. 1976); Evans v. Gore, 253 U.S. 245 (1920); United States v. Will, 499 U.S. 200, at 213 (1980).

The United States Supreme Court has held that where disqualification would destroy the jurisdiction of a court of last resort, the rule of necessity requires the disqualified judge to hear the case. The Court specifically held that --

> The true rule unquestionably is that whenever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it might be.

United States v. Will, 499 U.S. at 214, citing Philadelphia v. Fox, 64 Pa. 169, 185 (1870).

This rule is an ancient one which has its roots in English common law as far back as 1430. United States v. Will, 499 U.S. at 213. See also Dimes v. Grand Junction Casualty Co., 10 Eng. Rep. 301, at 313 (1852), and Frank, "Disqualification of Judges," 56 Yale L.J. 605, at 609-610 (1947). It has been cited repeatedly throughout the century by both state and federal courts. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954); Ulson v. Cory, 609 P.2d 991, 994 (Ca. 1980); Schwab v. Ariyoshi, 555 P.2d 1329 (Ha. 1976); Dacey v. Connecticut Bar Assn., 368 A.2d 125 (Conn. 1976); Atkins v. United States, supra.; Pilla v. American Bar Assn., supra.; Brinkley v. Hussig, 83 F.2d 351 (10th Cir. 1936); Salisbury v. Housing Authority of City of Newport, 615 F.Supp. 1433 (D.C. Ky. 1985). It has been invoked repeatedly by the United States Supreme Court as well. United States v. Will, supra.; Evans v. Gore, supra.; Miles v. Graham, 268 U.S. 501 (1925); O'Malley v. Woodrough, 307 U.S. 277 (1939).

The common sense underpinnings of the rule are perhaps best stated by the Minnesota Supreme Court in State ex rel. Gardner v. Holm, supra, where the Court held that the necessities of the case will overcome disqualification. The Court specifically stated that--

> . . . we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case in which he is directly or indirectly interested [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of the courts may not be abdicated even on the grounds of interest when there is no other court that can act.

Holm, 62 N.W.2d at 53-54 (1954).

V.

In the present case the same holding must apply. Though there may exist sufficient grounds to disqualify the Judges--or there may not--the Court concludes that the Rule of Necessity imposes a duty on the Court to consider and decide this case. The Shakopee Mdewakanton Sioux Community Tribal Court likely is the only tribunal with jurisdiction over this suit. The Plaintiffs vaguely allege that there exists a federal forum for this dispute; however, they cite no law, and the Court is aware of none, which vests the federal judiciary with jurisdiction over such an inherently tribal matter. Rather, the United States Supreme Court has held that issues of tribal membership are specifically outside the jurisdiction of the federal courts. Santa Clara Pueblo v. Martinez, 436 U.S. 47, at 71 (1978). See also Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Vurney, 168 U.S. 218 (1897)

The Plaintiff's motion seeks the disqualification of all of the Judges. There is no procedure by which alternate judges substitute for disqualified judges. The Plaintiffs argue that

Minnesota law provides for prompt reassignment in cases of disqualified judges; however, this law is irrelevant because the Ordinance, not Minnesota common law, controls the appointment, recall, and replacement of Tribal Court Judges. So, if the Judges are disqualified, the Court could not fulfill the requirements of the Ordinance, effectively destroying the jurisdiction of the only tribunal qualified to hear this suit. The Plaintiffs then would be without a forum which has jurisdiction to consider their claim. This result is unacceptable. See, United States v. Will, 499 U.S. 200, at 214 (1980); Brinkley v. Hussig, 83 F.2d 351, at 357 (10th Cir. 1936); State ex rel. Holm v. Gardner, 241 Minn. 125, 62 N.W.2d 52 (1954); State ex rel. Null v. Polley, 34 S.D. 565, at 570, 138 N.W. 300, at 302 (1912); Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469 (1918), State ex rel. Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915).

The Court notes in passing that the Rule of Necessity has been invoked to overcome disqualification of judges even where their "interest" was financial or in some other way pecuniary. The situation alleged to exist in the present case represents a much more indirect and tenuous interest on the part of the Judges. If the Rule of Necessity overcomes disqualification based on direct financial interest, it surely overcomes disqualification here.

For the foregoing reasons, the Plaintiffs' motion to remove the Judges has been denied.

Dated: March 11, 1994

Henry M. Buffalo, Jr.
Judge of Tribal Court

FILED

NOV 11 199-

cls

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Raymond L. Cermak, Sr., Stanley Cermak, Sr., Raymond L. Cermak, Jr., Stanley F. Musiak, Bradley W. Peterson, Stanley F. Peterson III, Eleanor F. Krohn, David J. Collins, Bernice T. Collins, Darlene M. Church, and Lorie Beerling,

Plaintiffs,

v.

Shakopee Mdewakanton Band of Sioux Indians, d/b/a "Mystic Lake Casino and Dakota Country Casino," Little Six, Inc., The Mdewakanton Band of Sioux Council and its former officers: Chairperson Leonard Prescott, its Vice-Chair Stanley Crooks, and its Secretary-Treasurer Allene Ross; and current officers: Chairperson Stanley Crooks, its Vice-Chair Kenneth Anderson, and its Secretary-Treasurer Darlene McNeal,

Defendants.

Court File No. 039-94

ORDER

The above-entitled matter came before the Court on the Plaintiffs' Motion to Remove the Judges of this Court.

The Court being fully advised of the premises and based on all the records and files herein as well as the arguments of counsel,

IT IS HEREBY ORDERED:

1. That the Plaintiffs' Motion for Removal of the Judges of this Court be, and hereby is, in all things DENIED;

VSMSC.005

2. That the attached memorandum be, and hereby is, incorporated as part of this Order.

Dated: November 11, 1994

Henry M. Buffalo, Jr.
Judge of Tribal Court

FILED

DEC 08 1994
cls

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

In Re Leonard Louis Prescott
Appeal from July 1, 1994 Gaming
Commission Final Order

Court File No. 041-94

MEMORANDUM OF LAW

I.

This matter involves the appeal of Leonard Louis Prescott from a final order of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (Commission), dated July 1, 1994. In that order, the Commission revoked Mr. Prescott's Gaming License. The matter presently is before the Court pursuant to the Appellant's motion to remove the Judges of this Court, John E. Jacobson, Robert Grey Eagle, and the undersigned (the Judges), for bias, prejudice, or appearance of impropriety, and to disqualify counsel for the Commission.

II.

The Appellant alleges that the Judges' should be removed and the Commission's counsel disqualified by this court because of contact between the Judges and the Commission's counsel. The Commission's counsel is associated with the BlueDog law firm; and attorneys for the BlueDog firm have been appointed to serve as judges and clerk on the Tribal Courts of the Lower Sioux Community in Minnesota and the Prairie Island Indian Community. Specifically, attorneys Andrew Small, Steven Olson, and Kurt BlueDog, serve as Judges on the Lower Sioux Community in Minnesota Tribal Court, and attorney Vanya Hogen-Kind serves as the Clerk of that Court. Judges Jacobson and Buffalo represent the Lower Sioux Indian Community in

Minnesota and, accordingly, on occasion Judge Jacobson appears before the Lower Sioux Court. The undersigned has not appeared before the Lower Sioux Court. Attorneys Small, Olson, and BlueDog also serve as Judges on the Tribal Court of the Prairie Island Indian Community and attorney Hogen-Kind serves as the Clerk of that Court. Judge Grey Eagle represents the Prairie Island Community and, accordingly, on occasion appears before the Prairie Island Court.

The Appellant contends that the foregoing facts create an inherent conflict of interest in each of the Judges which warrants their removal, and also constitute violations of the Minnesota Rules of Professional Conduct which require the disqualification of counsel for the Commission.

III.

The Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community was created by, and is governed in accordance with, Ordinance Number 02-13-88-01 (the "Ordinance"). Section IV of the Ordinance provides that "there shall be three Judges on the Tribal Court" and that the "Judges of the . . . Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council. . . ." Id. The Ordinance further provides that the General Council may fill vacancies on the Court within ninety (90) days of the resignation, death, or recall of a judge or judges.[1] Section V(D) of the Ordinance authorizes judges to make appointments only under extraordinary circumstances. In fact Section V(D) is entitled "Extraordinary Appointment of Judges"[2] No other procedures exist for the appointment or removal of judges on the Shakopee Mdewakanton Sioux Community Tribal Court.

---

[1] Judges are subject to recall only upon passage of a Resolution of Recall by absolute two-thirds majority of all enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Ordinance 02-13-88-01 at Section IV(A).

[2] Section V(D) provides that if ninety days pass without an appointment by the Chairman with the advice and consent of the Council then the remaining judges may then exercise their power of extraordinary appointment.

Section VII of the Ordinance provides that "cases shall be heard by one judge . . . " and that "a matter may be certified for appeal to a three-judge panel of the full Court. . . ." Id.

IV.

The Appellant contends, and this Court does not dispute, that a judge should not hear a case where it appears that he or she is biased or prejudiced against either party. State and federal courts all recognize this principle; so too does this Court. In fact, Rules 32(a) and (b) of the Tribal Court Rules of Civil Procedure specifically so provide.[3] The Appellant contends that contact between the Judges and the Commission's counsel warrants disqualification under the Rules. However, in cases such as the one at bar, where recusal of an arguably disqualified judge would destroy the jurisdiction of the only Court which could hear the matter, the rules regarding disqualification yield to the Rule of Necessity. State ex rel. Gardner v. Holm, 241 Minn. 125, ____, 62 N.W.2d 52, at 53-54 (1954), Atkins v. United States, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978), Pilla v. American Bar Assn., 542 F.2d 56 (8th Cir. 1976), Evans v. Gore, 253 U.S. 245 (1920), United States v. Will, 499 U.S.

---

[3] Rules 32(a) and (b) provide as follows:

Rule 32. Disqualification of Judge.

(a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned,

(b) A judge of the Court of the Shakopee Mdewakanton Sioux Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where is private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

200, at 213 (1980).

The United States Supreme Court has held that where disqualification would destroy the jurisdiction of a court, the Rule of Necessity requires the disqualified judge or judges to hear the case. The Court specifically held that --

> The true rule unquestionably is that whenever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it might be.

United States v. Will, 499 U.S. at 214, citing Philadelphia v. Fox, 64 Pa. 169, at 185 (1870).

This rule is an ancient one which has its roots in English common law as far back as 1430. United States v. Will, 499 U.S. at 213. See also Dimes v. Grand Junction Casualty Co., 10 Eng. Rep. 301, at 313 (1852); Frank, "Disqualification of Judges," 56 Yale L.J. 605, at 609-610 (1947). It has been cited repeatedly throughout the century by both state and federal courts. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954); Ulson v. Cory, 609 P.2d 991, at 994 (Ca. 1980); Schwab v. Ariyoshi, 555 P.2d 1329 (Ha. 1976); Dacey v. Connecticut Bar Assn., 368 A.2d 125 (Conn. 1976); Atkins v. United States, supra.; Pilla v. American Bar Assn., supra.; Brinkley v. Hussig, 83 F.2d 351 (10th Cir. 1936); Salisbury v. Housing Authority of City of Newport, 615 F.Supp. 1433 (D.C. Ky. 1985). And it has been invoked repeatedly by the United States Supreme Court as well. United States v. Will, supra.; Evans v. Gore, supra.; Miles v. Graham, 268 U.S. 501 (1925); O'Malley v. Woodrough, 307 U.S. 277 (1939).

The common sense underpinnings of the Rule are perhaps best stated by the Minnesota Supreme Court in State ex rel. Gardner v. Holm, supra, where the Court held that the necessities of the case will overcome disqualification. The Court specifically stated that--

> . . . we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case in which he is directly or indirectly interested [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of the courts may not be abdicated even on the grounds of interest when there is no other court that can act.

Holm, 62 N.W.2d at 53-54 (1954).

V.

In the present case the same holding must apply. Though there may exist sufficient grounds to disqualify the Judges--or there may not--the Court concludes that the Rule of Necessity imposes a duty on the Court to consider and decide this case. The Shakopee Mdewakanton Sioux (Dakota) Community Tribal Court likely is the only tribunal with jurisdiction over this suit. So, the Appellant's motion, if granted, would destroy the jurisdiction of the only tribunal which could hear and decide this suit.[4] That is, the Ordinance requires that cases be heard by a Judge appointed pursuant to its provisions, and that a three-judge panel of the full court sit for appeals. The Ordinance alone controls the appointment, recall, and replacement of Tribal Court Judges, and it neither provides for reassignment of cases involving disqualified Judges, nor the appointment of substitute Judges. Rules 32(a) and (b) likewise provide no mechanism by which arguably disqualified judges might be replaced. So, if the Judges are disqualified, the Court could not fulfill the requirements of the Ordinance, and the

---

[4] This Court inquired of both counsel as to whether there is another forum with jurisdiction over this matter. Counsel for the Appellant did not provide an answer. Transcript, p.21, l.15 - p.22, l.20. Counsel for the Commission argued that the answer is a "resounding no". Transcript, p.35, l.15 - p.36, l.6. The Court agrees with Counsel for the Commission. Certainly there is no state court with jurisdiction over this matter. Further, there is no basis for federal court jurisdiction over such an inherently tribal matter.

Appellant would be without a forum which has jurisdiction to consider his claim. This result is unacceptable. See, United States v. Will, 499 U.S. 200, at 214 (1980); Brinkley v. Hussig, 83 F.2d 351, at 357 (10th Cir. 1936); State ex rel. Holm v. Gardner, 241 Minn. 125, 62 N.W.2d 52 (Minn. 1954); State ex rel. Null v. Polley, 34 S.D. 565, at 570, 138 N.W. 300, at 302 (1912); Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469 (1918); State ex rel. Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915). The Constitutional rights which Appellant's attorney vigorously asserts must include the right to a forum. Yet the Appellant's own motion, if granted, would deny him such a forum.

Appellant's Counsel contends that the Court could appoint substitute Judges by exercising its equitable powers granted under Section II of the Ordinance. However, the Ordinance clearly vests the Council with appointment authority--not the Court. The Court only can make appointments if the Council has failed to act for three months. If the Court were to exercise its equitable jurisdiction in the manner urged by the Appellant it would, in effect, be amending the Community's Ordinance and thereby usurping the Council's authority both to appoint judges and vote on amendments to its laws. This Court is unconvinced that its equitable powers grant it such authority, and is unwilling to exercise its equitable jurisdiction in such a fashion.

The Court notes in passing that the Rule of Necessity has been invoked to overcome disqualification of judges even where their "interest" was pecuniary. Counsel for the Appellant asserted that such an interest is "remote and indirect" and therefore inapposite to the present situation. Transcript, p.18, ll. 21-24. The Court does not share counsel's opinion that a Judge's pecuniary interest in the outcome of a case over which he or she presides is remote or indirect. To the contrary the Court finds that a pecuniary interest on the part of a Judge creates direct and

actual bias. The situation alleged to exist in the present case represents a much more indirect and tenuous interest on the part of the Judges, and is based on alleged rather than actual bias. If the Rule of Necessity overcomes disqualification based on direct financial interest, it surely overcomes disqualification here.

For the foregoing reasons, the Appellant's motion to remove the Judges is denied.

VI.

The Appellant also has moved the Court for an order disqualifying counsel for the Commission. This Court has no authority to interpret the Minnesota Rules of Professional Conduct or Canons of Ethics. The Appellant offers no law which purports to grant tribal courts that authority. There is none. Rather, that authority is left to the Minnesota Lawyers Board of Professional Responsibility, the Minnesota Supreme Court, and the attorney's own conscience.

The preamble to the Rules of Professional Conduct sets out the scope and the spirit of the rules. The Committee notes that

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies . . . the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

A motion to disqualify attorneys based on alleged violations of the Rules is not proper. The clear language in the preamble to the Rules warns against such use, and this Court will not entertain such use. If the Appellant feels a violation of the Rules has taken place the proper body with which to file a complaint is the Lawyer's Board and not a trial court--be it tribal,

state, or federal. Accordingly, the Appellant's motion to disqualify counsel for the Commission is denied.

The Court finds the Appellant's alleged Rules violations are tenuous; the appearance of the Commission's counsel before this tribunal certainly is not "brazen" conduct. To suggest that their appearance in this case assists the Court in violating the Rules of Judicial Conduct strains credibility. The Court cautions the parties to use restraint in their factual and legal allegations as that conduct also is governed by the Rules of Professional Conduct. See Rules 3.1, 3.3, 3.4 and comments thereto.

Finally, the Court notes in passing that Mr. Hoover, counsel for the Appellant, stated in argument that he felt self-conscious in making the arguments in this, his first appearance before this tribunal. This Court is indeed in its infancy as compared to the status of similar institutions in our society. This fact, however, should not inhibit any counsel from making any and all arguments supported by law or facts. This Community, similar to hundreds of Indian nations across the land, has only recently begun the process of developing its governmental institutions, including, and especially, its court. The development of the court and other governmental institutions has been accomplished through the good faith and committed efforts of all members of the Community, and is a great source of pride to the Community as a whole.

This Court will continue its development as time marches on. The development of the Court is aided by the Counselors at Bar aggressively pursuing the advocacy of their respective

clients. This particular motion and its arguments are but one part of this on-going development. The Court would suggest that foregoing these arguments would have been of no assistance to this tribunal, the parties, and, most importantly, the Shakopee people and their government.

Dated: 4/8/97

Henry M. Buffalo, Jr.

FILED

DEC 08 1994

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re Leonard Louis Prescott
Appeal from July 1, 1994 Gaming
Commission Final Order

Court File No. 041-94

ORDER

The above-entitled matter came on for hearing before the undersigned Judge of Tribal Court on the 29th day of November, 1994, at 2330 Sioux Trial Northwest, in the city of Prior Lake, County of Scott, State of Minnesota, on the Appellant's Motion to Disqualify Counsel for the Gaming Commission and for the recusal and disqualification of the Tribal Court Judges.

Douglas A. Kelly, Esquire, Steven E. Wolter, Esquire and Michael Hoover, Esquire appeared on behalf of the Appellant Leonard Prescott. Andrew Small, Esquire and Steven F. Olson, Esquire, appeared on behalf of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission.

The Court being fully advised of the premises and based on the files, records and evidence herein, as well as the arguments of counsel,

IT IS HEREBY ORDERED,

1. That the Appellant's motion to recuse and disqualify the Tribal Court Judges be, and hereby is, in all things DENIED;

2. That the Appellant's motion to disqualify counsel for the Gaming Commission be, and hereby is, in all things DENIED;

VSMSC.013

3. That Appellee's motion to deny receipt by the Court of the Affidavit of Rodney M. Haggard be, and hereby is, GRANTED;

4. That this matter be, and hereby is, REMANDED to the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission for further proceedings;

5. That the attached Memorandum of Law be, and hereby is, incorporated into this Order.

Dated: 11/8/94

Henry M. Buffalo, Jr.