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:

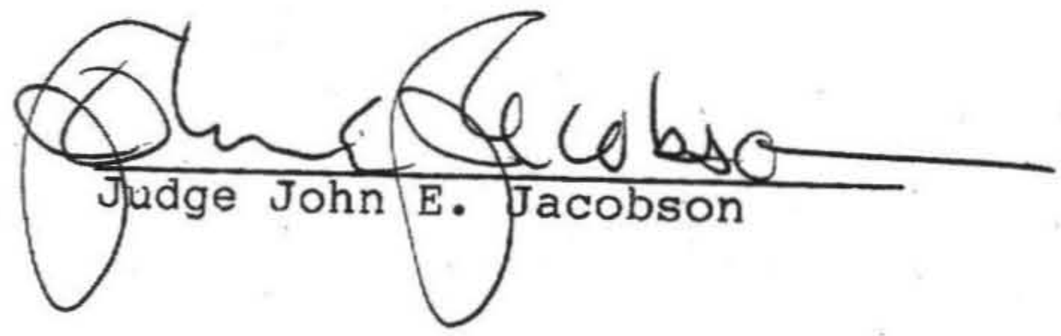
1. That Judge John E. Jacobson will take no part in this Court's decision, in either of these cases, on issues relating to the effectiveness of, or the effect of, the February 13, 1988 Ordinance which created or purported to create this Court.

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