IN THE COURT OF APPEALS OF
THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Docket No. 001-94

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY 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,

Appellants,

vs.

LOUISE B. SMITH, WINIFRED S. FEEZOR, LEONARD L. PRESCOTT, AND PATRICIA L. PRESCOTT, AND OTHERS SIMILARLY SITUATED,

Appellees,

Docket No. 002-94

LOUISE B. SMITH, WINIFRED S. FEEZOR, LEONARD L. PRESCOTT, AND PATRICIA L. PRESCOTT, AND OTHERS SIMILARLY SITUATED,

Appellants,

vs.

THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY, THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY 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,

Appellees.

MEMORANDUM OPINION AND ORDER

Summary

By this Memorandum Opinion, we decline to recuse ourselves, based on the Rule of Necessity; we affirm the decisions appealed from and remand for an expedited proceedings to reach the merits of this case; and we direct that, in the interests of finality, further proceedings on the merits of this case will take place before all three judges of this Court, pursuant to Rule 25 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community.

1. The Appeals. This matter is before us on two appeals: (1) an appeal (Docket No. 001-94) by the Defendants below ("the Community Appellants") from the decision of Judge John E. Jacobson, issued on March 15, 1994, which was supplemented by a Memorandum dated June 10, 1994, enjoining the Defendants below from implementing a January 11, 1994 action of the General Council of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") that purported to grant membership in the Community to thirty-one persons, and directing that escrow accounts be established for monies which they would otherwise would be paid from the Community if they were members, during the pendency of this litigation; and (2) an appeal (Docket No. 002-94) from the Plaintiffs below ("the Smith Appellants") from the decision of Judge Robert A. Grey Eagle, issued on July 8, 1994, lifting that injunction as to nine persons.

2. Recusal. After the appeal of the Community Appellants had been briefed and argued, the Smith Appellants moved to have all the

three judges of this Court declare themselves disqualified and recuse themselves. We will deal with that motion at the outset.

As Judge Buffalo noted in Memorandum of Law in In re Leonard Louis Prescott Appeal from July 1, 1994 Gaming Commission Final Order, No. 041-94 (filed December 8, 1994)--

> ...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".
>
> (Ibid., at 3.)

The Court of the Shakopee Mdewakanton Sioux (Dakota) Community consist of three judges. The ordinance by which the Court was created, Ordinance No. 02-13-99-01, contains no provision which explicitly or implicitly permit the appointment of other judges for specific or general purposes. And the same ordinance clearly gives all of the judicial authority of the Community to this Court.

So, although we do not agree with the Smith Appellants' contention that any Judge of this Court has a conflict of interest which would require his recusal, if there were other Judges available to hear this matter, the plain fact is that the Smith Appellants' contention in this regard is moot, given the structure of this Court. We must and will hear these appeals.

3. Developments Subsequent to the Appeals. To say the least, considerable activity has occurred in other forums since the March 15, 1994, June 10, 1994, and July 8, 1994 Orders were entered in this matter.

The March 15, 1994 and June 10, 1994 Orders were explicitly predicated on the fact that, at the time the Orders were entered,

two attempts by the Community to enact Adoption Ordinances--Ordinance No. 10-27-93-001 and Ordinance No. 11-30-93-002--had been disapproved by the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs ("the Area Director").

The provisions of Ordinance No.l 11-30-93-002 permits the Community to adopt into membership persons who are lineal descendants of enrolled members of the Community, who are not enrolled in another tribe, and who possess either a land assignment or a lease on the Community' Reservation (provided that minor children are exempted from that latter requirement).

In Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (Feb. 8, 1995), the Area Director's decision with respect to Ordinance No. 11-30-93-002 was reversed and remanded with instructions that the Ordinance be approved. On February 17, 1995, the Area Director complied, and approved Ordinance No. 11-30-93-002; and by a letter dated May 23, 1995, the Assistant Secretary of the Interior for Indian Affairs ("the Assistant Secretary") declined to overturn that approval.

Meanwhile, on May 17, 1995, the Assistant Secretary rescinded the Area Director's February 17, 1995 approval of an Enrollment Ordinance which the General Council of the Community had passed--Ordinance No. 12-28-94-005--on the grounds that too much time had expired between the Area Director's receipt of the Ordinance and its approval and therefore that the Area Director had no jurisdiction to approve or disapprove the Ordinance. And despite

this absence of jurisdiction, the Assistant Secretary also opined, apparently on behalf of this Court, first that Ordinance No. 12-28-94-005 was inconsistent with Ordinance No. 02-13-88-01, which established this Court and its jurisdiction over enrollment matters, and had not received the "supermajority" vote required by Ordinance No. 02-13-88-01 to withdraw jurisdiction from this Court; and second, that Ordinance No.6-08-93-001, an earlier version of the Enrollment Ordinance, also was invalid because of its purported effect on this Court's jurisdiction. In thus ruling on behalf of this Court, the Assistant Secretary did not apparently conduct any analysis which might sever any portions of either Ordinance that might offend Ordinance No. 02-13-88-01 from the portions that might not.

Then, on June 2, 1995, in a letter to the Area Director, the Assistant Secretary announced her refusal to approve a Secretarial Election on proposed Amendments to the Constitution of the Community, based on the Assistant Secretary's concerns with respect to the persons who had and had not been permitted to vote in the election. The Assistant Secretary directed that a hearing examiner or administrative law judge be appointed to determine the eligibility to vote of certain persons who were the subject of challenges in that election; and she further directed that, once that process is completed, a new election be held. To the knowledge of the Court, no proceedings have taken place with respect to making those determinations.

4. <u>The Community Appellants' Appeal.</u> The Community

Appellants argued, in Docket No. 001-94, that the Orders of March 15, 1994 and June 10, 1994 should be reversed because (1) the Community always has had the authority, under Article II, section 2 of the Community's Constitution, to adopt persons who may not meet the enrollment requirements specified in Article II, section 1 of the Constitution; and (2) since the Adoption Ordinance, Ordinance No. 11-30-93-002, now has received the approval requisite under the Community's Constitution, the General Council's vote on January 11, 1994 should be interpreted as taking place under the Adoption Ordinance.

The Smith Appellants, on the other hand, argued, in Docket 001-94, that the General Council which voted on the Adoption Ordinance, and which then voted on the thirty-one persons on January 11, 1994, was filled with persons who are not qualified to be members of the General Council; and the Smith Appellants also contended that the subsequent approval of Ordinance No. 11-30-93-002 did not operate to validate the January 11, 1994 vote, but at most meant that a process--the process of ascertaining whether the persons at issue in the Community Appellants' appeal are qualified for adoption--could begin.

After considerable soul-searching, we have concluded that, in the context of appeals from preliminary relief, the appropriate course for us is to leave intact the status quo established by the March 15, 1994 and June 10, 1994 Orders, as modified by the July 8, 1994 Order, and to initiate an expedited process which will enable the Court to rule definitively on the authority of the Community to

adopt persons into membership, in the past and in the future, and to determine the effect which any uses of that authority, whether under the name of enrollment or adoption, has had on the membership of the Community over time.

It may well be that our conclusion will be that the action of the General Council on January 11, 1994 was a wholly valid exercise of that authority. If so, the protective provisions contained in the March 15, 1994 Order and the June 10, 1994 Order will ensure that those persons at least will not be damaged monetarily by our continuing the injunction in effect.

The critical thing, in our view, is for the Court to have a comprehensive and completely illuminated picture of the entire history of enrollment and adoption into the Community before making our decision.

5. The Smith Appellants' Appeal. As with the Community Appellants' Appeal, so with the Smith Appellants' Appeal: in the context of an appeal from decisions on preliminary relief, we do not think it would be appropriate to modify the status quo established by the July 8, 1994 Order.

The Smith Appellants, in Docket No. 002-94, suggest that Judge Grey Eagle's July 8, 1994 decision to vacate the preliminary injunction with respect to the nine persons should be reversed because, they assert, the nine were not notified that, after the Enrollment Committee acted favorably upon their applications for membership, they were being challenged by the Smith group, and were not give ten days to rebut the challenges before the General

Council acted upon their applications. But as to that argument, the fact is that the General Council approved their applications, so clearly the nine were not prejudiced by any failure to give them notice and rebuttal rights.

The Smith Appellants also argued that Judge Grey Eagle erred when he vacated the preliminary injunction with respect to the nine persons because he made no "determination as to the legitimacy of the General Council" which voted on the applications of the nine. (Smith litigants May 29, 1995 Reply Brief, at 4). This suggestion is of a piece with the Smith Appellants' position throughout these proceedings--that this Court, in the context of motions for preliminary relief, should dissect each vote taken by the General Council of the Community, in the past and in the future, using as a scalpel the volumes of genealogical and other materials submitted by the Smith litigants.

It is our view that such surgery would be altogether inappropriate in the context of preliminary relief, where the particularized inquiry and systemic protections, afforded by a full hearing on the merits, are lacking.

6. Conclusion. It had been the hope of this Court that the dispute underlying this litigation might be resolved and the matter settled. But the Court's own early attempts to facilitate that result came to naught; and succeeding months have produced neither progress in the litigation nor progress toward settlement. Instead, it appears that more and more resources of the Community and its members have been consumed, and the conflict underlying the

litigation has spilled into numerous other forums.

It therefore is our conclusion that this matter must be set on a course for final and speedy resolution within the Court established by the Community.

On June 14, Judge Grey Eagle scheduled a pre-trial conference for June 23, 1995; and today, Judge Grey Eagle has certified this action to be heard by all three of the Judges of the Court, under the provisions of Rule 25 of our Rules of Civil Procedure. Given the need to bring these proceedings to a close, a hearing by the three judges, which eliminates any appeal under our Rule 31, is appropriate. Therefore, at the scheduling conference on June 23, the three Judges of this Court will proceed to establish an orderly, fair, and expeditious schedule for the full resolution of all of the issues, and we thereafter will hear all and decide all of the issues in this matter as a three-judge panel.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the March 15, 1994, June 10, 1994, and July 8, 1994 decisions of this Court in No. 042-94 are affirmed; and

2. That, under Rule 25 of the Rules of Civil Procedure of this Court, all future proceedings in this matter shall be heard by all of the Judges of this Court.

Date: June 16, 1995

Judge John E. Jacobson

Judge Henry M. Buffalo

Judge Robert A. Grey Eagle

litigation has spilled into numerous other forums.

It therefore is our conclusion that this matter must be set on a course for final and speedy resolution within the Court established by the Community.

On June 14, Judge Grey Eagle scheduled a pre-trial conference for June 23, 1995; and today, Judge Grey Eagle has certified this action to be heard by all three of the Judges of the Court, under the provisions of Rule 25 of our Rules of Civil Procedure. Given the need to bring these proceedings to a close, a hearing by the three judges, which eliminates any appeal under our Rule 31, is appropriate. Therefore, at the scheduling conference on June 23, the three Judges of this Court will proceed to establish an orderly, fair, and expeditious schedule for the full resolution of all of the issues, and we thereafter will hear all and decide all of the issues in this matter as a three-judge panel.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the March 15, 1994, June 10, 1994, and July 8, 1994 decisions of this Court in No. 042-94 are affirmed; and

2. That, under Rule 25 of the Rules of Civil Procedure of this Court, all future proceedings in this matter shall be heard by all of the Judges of this Court.

Date: June 16, 1995

Judge John E. Jacobson

Judge Henry M. Buffalo

Robert Grey Eagle

Judge Robert A. Grey Eagle