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

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

FILED JAN 17 1996

CARRIE I. SVENDAHL
CLERK OF COURT

COUNTY OF SCOTT

STATE OF MINNESOTA

Kimberly Amundsen, et al. Plaintiffs, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, et al., Defendants.	)	File No. 049-94

MEMORANDUM AND ORDER

Summary

The purpose of this Memorandum and Order is to establish, for this case, the law respecting enrollment into the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") which this Court will apply (until and unless the law is amended by the Community) in matters relating to enrollment in the Community. For the reasons discussed below--and principally because the text of an enrollment ordinance approved by the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs on February 17, 1995 differed in small but significant ways from the text of the enrollment ordinance adopted by the General Council of the Community on December 28, 1994--the Court has concluded that, until and unless it is amended, the law governing enrollment in the

Community is Ordinance No. 6-08-93-001 ("the 1993 Enrollment Ordinance").

Procedural History

Each of the Plaintiffs in this litigation alleges that he or she properly has applied for membership in the Community, and each contends that his or her application for enrollment has not been processed properly by the Community's Enrollment Committee ("the Enrollment Committee"), under the provisions of the 1993 Enrollment Ordinance. The Defendants have contended that the 1993 Enrollment Ordinance has no applicability--that it was succeeded by Ordinance 12-28-94-005 ("the 1994 Enrollment Ordinance").

The Plaintiffs' Complaint was filed on November 18, 1994. On December 12, 1994, the Defendants moved to dismiss the Complaint, contending both that this Court lacked jurisdiction over the subject matter thereof, and that the Complaint failed to state a claim upon which relief could be granted. Thereafter, on December 28, 1994, the General Council of the Community adopted Resolution 12-28-94-005, approving the 1994 Enrollment Ordinance.

After that General Council action, apparently on December 29, 1994, a number of changes to the text of the 1994 Enrollment Ordinance which had been considered by the General Council were made by the Community's attorney who had principal responsibility for the explanation of the 1994 Enrollment Ordinance to the General Council during the December 28 meeting. A detailed review of the changes leaves the Court in no doubt that all of the changes were intended only to "clean up" the text of the ordinance, and not in

any way to change the substance of the provision that had been adopted by the General Council. But it was the "cleaned up" ordinance, and not the document which had been before the General Council, which was submitted to the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs ("the Area Director"), by a January 3, 1995 letter from the Community's Chairman, under Article V, Section 2 of the Community's Constitution.

Article V, Section 2, of the Community's Constitution provides:

> Any resolution or ordinance which, by terms of this constitution, is subject to review by the Secretary of the Interior shall be presented to the Area Director of this jurisdiction, who shall, with [sic] ten (10) days thereafter, approve or disapprove the same. If the Area Director shall approve any ordinance or resolution, it shall thereupon become effective, but the Area Director shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, rescind the action of the Area Director for any cause by notifying the council of such decision.
>
> If the Area Director shall refuse to approve any resolution or ordinance submitted to him within ten (10) days of its enactment, he shall advise the council of his reasons therefore [sic]. If these reasons appear to the council insufficient, it may, by a majority vote, refer the ordinance of [sic] resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.
>
> If the Area Director takes no action to approve or disapprove any resolutions [sic] or ordinance within thirty (30) days of its being presented to the Area Director, the community shall consider the resolution or ordinance approved and notify the Area Director of the same.

The events which unfolded, concerning the 1994 Enrollment

Ordinance, after its "cleaned up" version had been submitted to the Area Director, were not simple.

On January 13, 1995, after reviewing the "cleaned up" version of the 1994 Enrollment Ordinance, the Area Director wrote to the Chairman of the Community and said, in part, "...there are circumstances which preclude approval of the ordinances [sic] at this time." The Area Director also said that "approval cannot be granted without additional clarification of the ordinance itself and consideration of the related litigation".

There then followed considerable colloquy between the Area Director and her staff, attorneys in the Office of the Field Solicitor, U.S. Department of the Interior, and officers and attorneys for the Community. On February 17, 1995, apparently as a result of that colloquy, the Area Director again wrote to the Community's Chairman, this time informing him that the 1994 Enrollment Ordinance had been approved.

Meanwhile, the Defendants' motion to dismiss was briefed and, after Judge Grey Eagle recused himself from this matter, the undersigned granted the motion, on April 14, 1995, on the grounds that the Plaintiffs' claims had been mooted by the Community's adoption of, and the Bureau of Indian Affairs' approval of, the 1994 Enrollment Ordinance.

There matters stood, perhaps even peacefully, for thirty-three days, until, on May 17, 1995, the Assistant Secretary of the Interior -- Indian Affairs ("the Assistant Secretary") wrote letters to the Community's Chairman and to the Area Director,

informing each of them that the Area Director's approval of the 1994 Enrollment Ordinance was "ineffective", because it had not been rendered within ten days of the ordinance having been submitted to the Area Director, as is contemplated by Article V, section 2 of the Community's Constitution.

In her letter to the Chairman, the Assistant Secretary said the ordinance "was not properly before" the Area Director on February 17, 1995. The Assistant Secretary also offered the opinion that the 1994 Enrollment Ordinance should not be approved, as a matter of substance, because, in the Assistant Secretary's view, the 1994 Enrollment Ordinance was inconsistent with Resolution and Ordinance Nos. 02-13-88-001, by which this Court and its jurisdiction were created and protected. In offering this opinion, the Assistant Secretary did not address the possibility that this Court could protect its jurisdiction by finding that any provisions of the 1994 Enrollment Ordinance which might contravene Ordinance No. 02-13-88-001 could be severed from others which might be altogether valid. See e.g., Campbell v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 034-93 (decided December 5, 1995), appeal pending, and Barrientez v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 033-93 (decided December 5, 1995), appeal pending.

In any case, in the proceedings in this case which have followed the Assistant Secretary's action, the Community has contended that the Assistant Secretary herself was powerless to tell the Area Director that the Area Director was powerless to

approve the 1994 Enrollment Ordinance. That is, the Community has contended that the Assistant Secretary let too much time lapse before taking action, because the provision of the Community's Constitution which authorizes the Assistant Secretary to rescind an Area Director's approval of a Community ordinance contemplates that such action will take place within ninety days following the Community's enactment of the ordinance. The Assistant Secretary's letters to the Area Director and the Chairman were dated one hundred and forty days after the 1994 Enrollment Ordinance was adopted by the Community's General Council.

The Plaintiffs, not surprisingly, have taken a different view, and, following the Assistant Secretary's action, they moved for reconsideration of this Court's April 17, 1995 Order. After some procedural give-and-take, the Court granted that motion on August 10, 1995; and on August 24, 1995, the Court established a schedule under which the parties provided to the Court a stipulation summarizing the facts to which they could agree, with respect to the events surrounding the 1994 Enrollment Ordinance's progress through the Community's General Council, to the Office of the Area Director, and ultimately to the Office of the Assistant Secretary. On October 3, 1995, the parties filed a Stipulation of Facts with exhibits, and then each filed two simultaneous briefs, discussing their view as to whether the 1994 Enrollment Ordinance, or the 1993 Enrollment Ordinance, or some other enrollment ordinance, currently is the law of the Community. They amplified their positions during a hearing on October 19, 1995.

Having now reviewed all of very considerable volume of materials filed by the parties, the Court has concluded that it need not reach any of the multitude of questions raised by the parties relating to the Area Director's authority, or the Assistant Secretary's authority, or the timing requirements imposed by Article V, section 2 of the Community's Constitution.

The document which the Area Director approved differed sufficiently from the document which the Community's General Council approved to make the Area Director's action meaningless, even if the Assistant Secretary were powerless to take the action she purported to take, and even if the Area Director's purported approval of the 1994 Enrollment Ordinance was within her authority and consistent with Article V, section 2 of the Community's Constitution.

The stipulation of the parties, and its attached exhibits reveal that, although the editing efforts which followed the General Council's approval of Resolution 12-28-94-005 clearly were well-intended, and resulted in a document that was more elegant and concise, those efforts also produce changes which, though small, could perhaps produce different results, under certain circumstances, that would the original language of the original:

> 1. In the text of section 6 of the 1994 Enrollment Ordinance, as it was passed by the General Council, two levels of priority were established for the Enrollment Committee's proceedings. The first priority was given to applications from children of members of the Community,

and to lineal descendants of those Mdewkantons who resided in Minnesota on May 20, 1886 and who have not been not enrolled as members of another Indian tribe. As to all of those people, the provisions of the ordinance that was approved by the General Council said "Such applications may be accepted and processed pursuant to this Ordinance whenever properly submitted to the Enrollment Officer." Second priority was given, by the ordinance, to persons who are descendants of those Mdewaknatons who resided in Minnesota on May 20, 1886, and who have relinquished membership in another Indian tribe. As to those persons, the document which the General Council approved did not contain the language paralleling the sentence underlined above. However, in the version of the 1994 Enrollment Ordinance that was submitted to the Area Director, such language had been inserted.

2. In section 7, in provisions dealing with the procedures which are to be followed when a person whose application for membership has been approved and is then challenged, the version of the ordinance that was submitted to the Area Director contains a requirement that the challenged applicant be notified by the Enrollment Officer "by certified mail". There was no such provision attending the notice requirement in the version of the ordinance approved by the General Council.

3. Also in section 7, the version of the ordinance which was approved by the General Council required the Enrollment Committee--in the case of appeals by applicants whose application had been rejected by the Committee--to "...recommend in writing to the General Council acceptance, denial, or dismissal of the appeal...". The version of the ordinance which was approved by the Area Director deleted the word "dismissal".

All of these differences, and all of the other differences identified in the parties' Stipulation, are minor. But--in a matter of such great consequence as this--in the view of the Court they preclude the conclusion that one, single ordinance was approved both by the General Council and by the Area Director.

Conclusion

Until and unless the law of the Community is changed in accordance with the Community's Constitution, this Court will apply the provisions of Ordinance No. 6-08-93-001 to questions in this litigation relating to enrollment in the Community.

January 17, 1996

John E. Jacobson
Judge