

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 in 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.

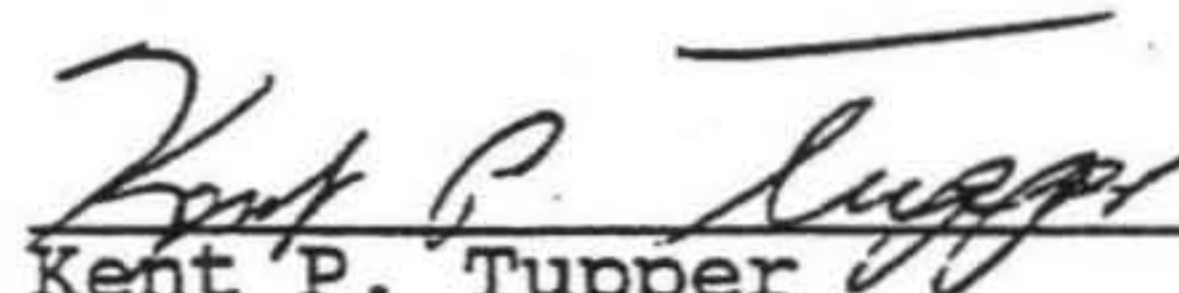
2. That Summary Judgment be and hereby is granted in favor of the Plaintiffs Patrick H. Welch and Charles Vig, as follows:

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