

FILED AUG 24 1998

*als*

COURT OF THE  
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

GARRIE L. SVENDAHL  
CLERK OF COURT

COUNTY OF SCOTT

STATE OF MINNESOTA

Winifred Feezor, Cecelia M. )  
St. Pierre, )

Plaintiffs, )

vs. )

Court File No. 311-98

Shakopee Mdewakanton Sioux )  
(Dakota) Community Business )  
Council; Stanley R. Crooks, )  
Glynn Crooks, and Susan )  
Totenhagen individually and in )  
their official capacities; )  
Stanley R. Crooks, Kenneth )  
Anderson, and Darlene Matta, )  
individually and in their former )  
capacities as designated )  
officers of the Shakopee )  
Mdewakanton Sioux (Dakota) )  
Community Business Council; and )  
various unnamed individuals, )

Defendants. )

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiffs' Motion for Temporary and Preliminary Relief. Plaintiffs ask this Court for a temporary restraining order preventing Defendants from making any future per capita distributions from the Community's net gaming revenues or from providing any other benefits of Community membership to various unnamed defendants. Plaintiffs also request



a Writ of Mandamus seeking information regarding the unnamed Defendants, a preliminary injunction preventing the distribution of future per capita payments to the unnamed defendants, and another Writ of Mandamus directing that the per capita payments barred by the injunction be put into escrow. Plaintiffs' motion was accompanied by a complaint.

Normally, a motion for a temporary restraining order would be considered first, and a motion for a preliminary injunction would be entertained at a later date. See SMS(D)C Rule of Civil Procedure 29. Given the intertwined nature of Plaintiffs' requests, however, this Court will consider all aspect of Plaintiffs' motion at this time.

The main thrust of Plaintiffs' Complaint is that the unnamed Defendants are people who are not properly qualified for Community membership, but who, nonetheless, have enjoyed the benefits of Community membership since approximately 1992.

With their motion, Plaintiffs have not submitted any affidavits to support the factual allegations in their Complaint. Plaintiffs have attached to their motion, however, an opinion by the Solicitor's Office for the United States Department of the Interior relating to the status of a case currently pending before the Assistant Secretary for Indian Affairs.

The federal case referenced in the Solicitor's opinion was brought by at least some of the same Plaintiffs as here, seeking review in federal court of the decision by the United States



Department of the Interior to approve two ordinances passed by the Community's General Council. Those ordinances provide for the adoption of certain people into the membership of the SMS(D) Community. It is the position of the Plaintiffs in that litigation that the decision of the Secretary of the Interior to approve those ordinances should be reversed. The United States District Court has not decided the validity of the ordinances or the validity of the Secretary's decision to approve them. Instead, after it heard arguments by the parties, that court remanded the cause back to the United States Department of the Interior to supplement the record and to consider additional aspects of the dispute, including the validity of the earlier approved ordinances. See Feezor v. Babbitt, 953 F.Supp. 1 (D.C. 1996). The case is currently pending before the Assistant Secretary for Indian Affairs on remand from the federal district court.

It is important to note that the ordinances in question have been approved by the United States Department of the Interior, and neither the Department of the Interior nor the United States District Court have reversed the decision to approve those ordinances at this point in time. In addition, neither the district court nor the Department of the Interior have taken any steps that this Court is aware of to try to suspend the effect of those ordinances during the pendency of the federal court proceedings. The Solicitor's opinion attached to Plaintiff's complaint addresses whether the federal remand is moot, and does



not address whether the ordinances in question were properly approved. In any event, even if the Solicitor's opinion had concluded that the ordinances were invalid, Plaintiffs conceded at oral argument that the Solicitor's opinion, by itself, is not binding on this Court.

#### I. AMENDMENT OF THE PLEADINGS

As an initial matter, the Court has before it a rather technical issue of pleading. Plaintiffs filed their Complaint and Motion for Temporary and Preliminary Relief on August 13, 1998. A hearing was set for August 18, 1998. On August 17, 1998, the Defendant Shakopee Mdewakanton Sioux (Dakota) Community Business Council filed a response to Plaintiffs' motion, but did not file an answer to the complaint. Then, on August 18, 1998, approximately two hours before the hearing on this matter, the Court received from Plaintiffs an Amended Motion for Temporary and Preliminary Relief, and an Amended Complaint.

At the hearing, counsel for Plaintiffs indicated that there was no substantive difference between the original and amended motions and complaints. However, when compared with the original motion, the amended motion seeks additional information under one of the Writs of Mandamus, and expands the scope of the injunction requested. When compared with the original complaint, the amended complaint contains an additional allegation of jurisdiction,



additional factual allegations, and an additional prayer for relief.

Plaintiffs argued that even if there were substantive differences in the amended filings, Plaintiffs were entitled to amend their pleadings once as a matter of right. Plaintiff is correct that under Rule 15(a) of the SMS(D)C Rules of Civil Procedure a party may amend its pleadings once as a matter of right before a responsive pleading is filed.

There is, however, a difference between a pleading and a motion. A pleading is a formal allegation by a party as to their claims, such as a complaint, an answer, a reply to a counter claim, a response to a cross claim, a third party complaint, or a third party answer. See, e.g., Fed. R. Civ. Pro. 7(a). A motion, on the other hand, is simply an application to the Court for an order. See, e.g. SMS(D)C R. Civ. Pro. 8(b). The rules of this Court do not allow a party to unilaterally amend a motion. To do so after the opposing party has already responded to the original motion, as Plaintiffs have attempted to do so here, seems particularly inequitable. The Plaintiff's Amended Motion for Temporary and Preliminary Relief is therefore stricken.

For the purpose of considering Plaintiff's original Motion for Temporary and Preliminary Relief, the Court will rely on the Plaintiff's original Complaint. While Plaintiffs are free to amend their Complaint under Rule 15, it would not be fair to consider their motion on the basis of a complaint that some of the



Defendants, and this Court, received only hours before the scheduled hearing, and after some of the Defendants had responded on the basis of the original Complaint.<sup>1</sup> Those seeking relief in equity, as Plaintiffs do here, must approach this Court with clean hands, or risk the denial of their claims. See, e.g., Brooks v. SMS(D)C, et al., No. 57-96 (SMS(D)C Tr. Ct. June 28, 1995).

In sum, the Court will evaluate Plaintiffs' motion in reference to the original Complaint, but the purpose of the proceedings hereafter, the parties should consider Plaintiffs' Amended Complaint as properly filed on August, 18, 1998.

## II. PRELIMINARY RELIEF

Plaintiffs have requested a temporary restraining order and preliminary injunction preventing the benefits of Community membership from being conferred to anyone who is not qualified under Art. II, Sec. 1 of the Community's Constitution. Temporary restraining orders and preliminary injunctions are extraordinary remedies and are normally only used to preserve the status quo until an adjudication on the merits can be reached. See, e.g., Wright & Miller, 11A Federal Practice and Procedure § 2948 (1995).

---

<sup>1</sup>The record does not even indicate whether all of the Defendants have received notice of the original complaint and motions, let alone the amended complaint and motions. The Court has not received or seen any certificates of service on any of the Defendants. A failure to properly serve notice on all Defendants is sufficient to prevent a preliminary junction from issuing. See SMS(D)C R. Civ. P. 29.



The four factors considered in a decision for preliminary relief are (1) whether irreparable harm will befall the plaintiffs in the absence of preliminary relief, (2) whether the plaintiff is likely to succeed on the merits, (3) the extent of the injury experienced by the defendants if relief is granted, and (4) the public interest. Welch v. Crooks, No. 003-88 (SMS(D)C Tr. Ct. Dec. 16, 1998).

As an initial matter, Plaintiffs have not filed any affidavits or other verified documents, providing support for their factual claims. Rule 29 of the SMS(D)C Rule of Civil Procedure incorporates Rule 65 of the Federal Rules of Civil Procedure. Rule 65 clearly requires that a motion for a temporary restraining order be accompanied by an affidavit or verified complaint attesting to the veracity of the factual allegations reference by the motion. The serious nature of some of Plaintiffs' allegations demonstrates the importance of providing sworn verification of factual allegations in a motion for preliminary injunctive relief. For example, Plaintiffs allege that unnamed persons are not qualified to receive the benefits of Community membership, and that Community officials have knowingly and willfully violated Community law by treating these people as members. Yet, as the record stands at this moment, the Court has no evidence before it to support these allegations because Plaintiffs have provided none. Counsel for Plaintiff stated at oral argument that the facts in this case are uncontroverted, and there is no need for affidavits to support



their factual allegations. But Defendants have not stipulated to any facts, nor have they even presented an answer, so the need to provide some sort of factual support at this early stage of the litigation is paramount, especially given the drastic relief the Plaintiffs request. The Court is of the opinion that the lack of affidavits alone in this case would be sufficient to deny the motion for temporary restraining order, and given the intertwined nature of Plaintiffs' other requests, to deny those requests as well.

However, Plaintiffs have also failed to demonstrate that the four factors considered for preliminary relief weigh in their favor. For a substantial part of their claims, Plaintiffs fail to establish that they will be irreparably harmed in the absence of preliminary relief. The main thrust of Plaintiff's allegations are that the distribution of per capita payments to people who are not qualified under the Constitution deprives rightful members of a certain amount of money. This Court, however, has noted in the past that the mere payment or non-payment of money generally does not create the possibility of irreparable harm. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Feb. 4, 1994). In Welch, this Court denied a request for preliminary relief from someone who alleged that they had stopped receiving per capita because they had been improperly disenrolled. The Court noted that even if the Plaintiff was correct on the merits, he had only alleged a financial harm and he could be made whole at a later date with proper compensation.



The harm he alleged, therefore, was not "irreparable," and preliminary relief was denied.

Similarly, the Plaintiffs here allege a financial harm for which compensation can be obtained later. Section 12 of the Business Proceeds Distribution Ordinance, No. 12-29-88-002, and Section 14.9 of the Gaming Revenue Allocation Amendments, No. 10-27-93-002, both state:

Any person who wrongfully receives, distributes or intentionally refuses to distribute funds or benefits as mandated by this Ordinance, shall be subject to civil penalties up to three times the amount wrongfully received, distributed or withheld. Actions pursuant to this Section may be brought before the Judicial Court of the Shakopee Mdewakanton Sioux Community . . . by any person receiving benefits who has a good faith reason to believe that benefits have been wrongfully paid or distributed to another.

Under this section, any per capita payments improperly distributed can be returned to the Community by Court order. This is, in fact, the provision of Community law under which Plaintiffs seek damages. Since preliminary relief is not necessary to prevent irreparable harm to Plaintiffs in a financial sense, their request for a temporary restraining order and a preliminary injunction should be denied as to those claims for relief. See Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Feb. 4, 1994).

At oral argument, Plaintiffs also argued that allowing people to vote who are not qualified as members under the Constitution, dilutes their voting rights, and this in turn constitutes irreparable harm. While the jurisdictional basis for these claims



is not apparent in Plaintiffs' original Complaint, Plaintiffs' motion for a temporary restraining order does request an order prohibiting the distribution of per capita payments, or "any other benefits" of Community membership to the unnamed Defendants. Reading Plaintiff's written submissions in the most liberal light possible, the Court will entertain Plaintiffs' dilution of voting rights arguments.

Plaintiffs rely heavily on this Court's decision to grant preliminary relief preventing certain people from receiving the benefits of Community membership in Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June 10, 1994). Smith is not relevant to the issues here for at least two reasons.

First, in Smith this Court granted Plaintiff's motion for a voluntary dismissal without prejudice. See Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June 30, 1995). The order granting the dismissal specifically stated that all pending orders in the case were vacated. At the time of the dismissal, the preliminary injunction in that case was still in force. See Smith v. SMS(D)C Business Council, No. 11-97 (SMS(D)C Ct. App. Aug. 8, 1997). Therefore, the order granting preliminary relief was vacated by the June 30, 1995 order dismissing the case and is of no precedential value for Plaintiffs' present arguments to this Court.

Second, even if Smith was either binding or persuasive precedent on this Court, which it is not, the factual situation there was completely different than here. In Smith, the Court



based its decision on the fact that there was no indication that the United States Secretary of the Interior had approved the action making the disputed adoptees members of the Community. In contrast, here the Department of Interior has specifically approved both the 1993 and 1997 adoption ordinances. The preliminary injunction in Smith, therefore, was granted in very different factual circumstances.

Setting Smith aside and assuming, without deciding, that Plaintiff's dilution of voting rights theory demonstrates an actual threat of irreparable harm,<sup>2</sup> Plaintiffs have failed to show that the balance of harm weighs in their favor, that there is a reasonable likelihood that they would succeed on the merits, or that granting preliminary relief of the voting component of their claim is in the public interest.

The balance of harms does not weigh in Plaintiff's favor. If Plaintiffs are correct, the strength of their voting rights may be diluted to a certain extent. If Plaintiffs are incorrect, however, the unnamed Defendants who are otherwise entitled to vote will be

---

<sup>2</sup>There is authority in American courts that the alleged denial of a constitutional right can serve to demonstrate irreparable harm. See, e.g., Wright & Miller, 11A Federal Practice and Procedure § 2948.1 (1995). Without further briefing on the subject, however, it is not clear that Plaintiff's dilution of voting rights states a constitutional claim under Community law. The Court wants to emphasize that it does not decide today whether Plaintiffs have stated a constitutional claim, or whether that an allegation of a violation of a constitutional right serves to demonstrate irreparable harm. The Court simply assumes as much for the purpose of deciding the motion presently before it.



improperly denied the right to vote for the pendency of this litigation. Viewed in this light, it becomes clear that Defendants risk greater harm if preliminary relief is granted than the Plaintiffs will risk if preliminary relief is denied.

In addition, at this stage of the litigation, Plaintiffs have not demonstrated a reasonable likelihood of success on the merits. The two adoption ordinances that Plaintiff refer to have apparently been voted on by the Community's General Council and approved by the Secretary of the Department of the Interior. This Court has indicated that Secretarial approval of at least one of the adoption ordinances would be sufficient to validate that ordinance as Community law. See In re: Election Ordinance 11-14-95-004, No. 76 (SMS(D)C Tr. Ct. May 9, 1997). Plaintiffs have not produced evidence of any subsequent decision binding on this Court that would invalidate those ordinances.

As to the allegations that other people have been adopted outside of the terms of these two ordinances, Plaintiffs have not yet produced any factual evidence to support those claims.

Lastly, Plaintiffs' general claim that only people qualified under Art. II, Sec. 1 of the Community Constitution may enjoy the benefits of membership is contrary to what the SMS(D)C Court of Appeals has held in the past. See, Smith v. SMS(D)C Business Council, No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (noting Community practice of voting in members under Art. II, Sec. 2 was a reasonable interpretation of Community law). Plaintiffs have not



made a clear showing that they are likely to succeed on the merits of their dilution of voting rights claim.

Granting preliminary relief here would also not be in the public interest. The Court appreciates that the allegations raised by the Plaintiffs are grave and serious matters. Membership issues have been an almost constant source of turmoil in the Community since its inception. However, the factual and legal record in this case is preliminary and undeveloped, and the issues raised by this litigation are far reaching in their effect. It is the view of this Court that the public interest would not be served at this point by radically altering the present status quo based on such a limited record.

That the Secretary may or may not be reconsidering his decision to approve the adoption ordinances is not a sufficient basis for this Court to suddenly act as if those ordinances were invalid, and to grant preliminary relief that would upset the present status quo. Plaintiffs may ultimately succeed on the merits of this case and demonstrate that the ordinances they object to are invalid. But on the basis of the Complaint and motion they have filed, this Court cannot say that they have made a clear showing that they are likely to suffer irreparable harm in a financial sense, or that they have met any of the other requirements for preliminary relief on their dilution of voting rights claim.

Since the Court denies Plaintiffs' requests for a temporary restraining order and for a preliminary injunction, it is not



necessary to consider Plaintiff's requests for the associated Writs of Mandamus.

ORDER

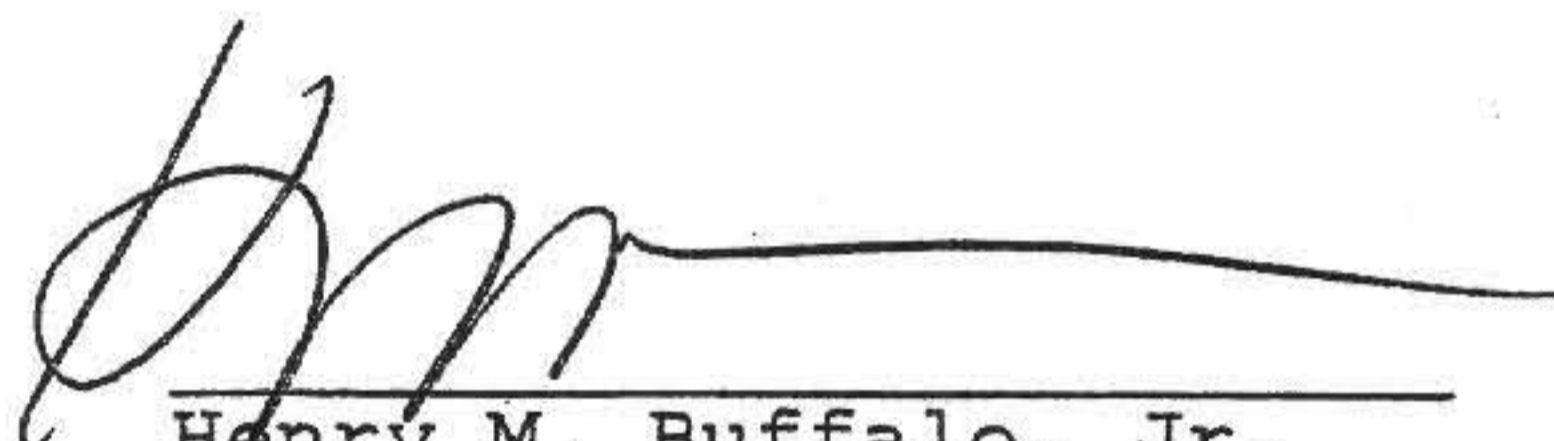
Based on a review of the submissions herein, and for the foregoing reasons,

Plaintiff's Motion for a Temporary Restraining Order is DENIED;

Plaintiff's Motion for a Preliminary Injunction is DENIED.

Plaintiff's Amended Complaint is treated as properly filed on August 18, 1998 and will govern the course of any further proceedings.

Dated: 8/24/98

  
Henry M. Buffalo, Jr.  
Judge