IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 013-91
PATRICK H. WELCH, and CHARLES VIG, Plaintiffs, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, et al., Defendants.	Court File No. 022-92

MEMORANDUM OPINION AND ORDER
ON MOTIONS FOR RECONSIDERATION

Summary of Procedural History

On June 3, 1993, the Court in Ross v. Shakopee Mdewakanton Sioux Community held that it had the authority to apply retroactively its July 22, 1992 decision in the case, and that it was legally and equitably appropriate to do so in, a limited fashion. Specifically, we held that, for Ross, our July 22, 1992 decision would be retroactive to January 13, 1991, the date on which Ross filed his Complaint.

Also on June 3, 1993, we held that the Plaintiffs in Welch and Vig v. Shakopee Mdewakanton Sioux Community were identically situated to Ross, and that they, too, were entitled to relief retroactive to the date upon which they filed their Complaint.

In both cases, we stayed the effect of our Order to permit the parties to confer with the Court with the aim of establishing an appropriate schedule for paying the amounts which were awarded.

Thereafter, the Shakopee Mdewakanton Sioux Community moved for reconsideration of, and for relief from, our June 3, 1993 Orders, under the provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure, and Rule 40 of the Federal Rules of Appellate Procedure. The Plaintiffs in Welch and Vig filed a Response to that motion; counsel for Ross communicated with the Court by letter, expressing opposition to the motion; and the Community filed a Reply on July 14, 1993.

To date, the Court has not adopted the Federal Rules of Appellate Procedure, but we will consider the Community's motion for Relief from Judgment under the provisions of Rule 28 of this Court.

The principal points urged by the Community in support of its motion was that we incorrectly applied the test for determining whether a decision is appropriately made retroactive that was established by the United States Supreme Court in Chevron Oil Co. v. Hudson, 404 U.S. 97 (1971).

As we noted in our June 3, 1993, Memorandum Opinion in Ross, the Chevron case sets out three factors that should be considered in cases where retroactivity is at issue:

1. The decision to be applied non-retroactively, i.e. prospectively, must establish a new principle of law, either by overruling a past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

2. The court must examine the prior history, purpose, and effect of the rule in question to determine whether retrospective operation will further or retard its operation; and

3. The court must determine whether retroactive application would impose inequitable results or substantial injustice.

Ross, at 4 (June 3, 1993), citing 30 L.Ed.2d, at 306 (1971)(emphasis added).

We held that when Ross, Welch, and Vig filed their Complaints with this Court, "the simple pendency of the case, and the absence of any strong argument to justify the distinction" which the Community had made, in List C of Ordinance 12-29-88-002 of the Shakopee Mdewakanton Sioux Community, provided sufficient foreshadowing of the ultimate result in Ross, and in Welch and Vig, to justify retroactive application of the decisions to the dates on which the Complaints were filed. Ross, at 6 (June 3, 1993) (emphasis added).

In the memoranda supporting its Motion, the Community has argued, correctly, that in none of the cases decided by Federal Courts since Chevron has the mere filing of a Complaint been considered an appropriate triggering event for a retroactive award in a case involving Constitutional issues. And the Community has asserted that if our June 3, 1993 holding is allowed to stand, the Community will have been obliged to accept at face value the "allegations in unproven complaints and change its laws accordingly or face retroactive application of decisions later declaring the

laws unconstitutional to the date a complaint is filed." (July 14, 1993 Reply Memorandum of the Community, at 5).

The Community also has argued that, in their Response to the Community's Motion, Welch and Vig misstated Federal case law, and this Court's June 3, 1993 holding, and the Community's position.

With these latter contentions, we agree. The Community's statements of Federal law, the Court's holding, and the Community's summary of its own ongoing position all are correct--save only for the Community's argument that it would be appropriate here to penalize Ross, Welch, and Vig by denying them a measure of retroactive relief.

We consider that the situation of Ross, Welch and Vig, and of the Community in these matters, is highly unusual. While the principles of Chevron and other Federal cases can inform this Court's deliberations, in our view the unique circumstances of the Community require us to apply those principles and shape relief in ways that may have no applicability to governments that exercise jurisdiction over millions of persons, whose status is not intimately known to the governors. The Shakopee Mdewakanton Sioux Community is composed of a relatively small group of persons, almost all of whom know each other. Ross, Welch and Vig were identified by name in List C of Ordinance 12-29-88-002. Their situation was commonly known in the Community, as was the fact that, save for their appearance on List C, they were situated identically to other persons in the Community who were entitled to receive per capita payments, once the Community removed the residency requirements for per capita payments. At no time after

the Complaints in the two cases were filed were these facts contested by the Community.

So, each of the three Plaintiffs could make a plausible argument that he should have been entitled to an award dating to the removal of the residency requirement for per capita payments. But it was and is our view that something more than merely standing by and silently waiting should be required of one who seeks to establish his rights. Unambiguous notice to the Community, as well as facts which clearly establish an identity of situation, are what we consider to be the essentials of a retroactive award, consistent with the foreshadowing requirement of Chevron. Here, the point where we believe that notice was provided was the point at which the Plaintiffs formally made their claims before this Court.

To have given relief pre-dating the filing of their claims would have placed too great a burden on the Community, and too little on Ross, Welch, and Vig, in our judgment; and to have required the Plaintiffs to forego the benefits of per capita payments during the period of litigation, with all of the delays which attend that process--delays which in no way may have been the fault of the parties--would have been unfair, given the facts surrounding their situation.

We must stress again that the situation of these litigants is unique. They, alone, appeared on List C.

We also must stress that the Community clearly can establish appropriate conditions, restrictions, and procedural requirements as prerequisites for the receipt of per capita payments, and that this Court will not permit itself to serve as a short-circuit for

those efforts.

ORDER

For the foregoing reason, the Community's motion for Relief from this Court's June 3, 1993 Order is denied. The parties are directed to proceed to comply therewith.

Dated: July 19, 1993

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge

Henry M. Buffalo, Jr.
Associate Judge

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