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7/13/88

JUDICIAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Patricia Hove, et al. and
The Shakopee Mdewakanton Sioux
Community,

Plaintiffs,

vs. ORDER
NO. 001-88

Amy Stade, et al.,

Defendants.

The above referenced matter was heard before the court sitting en banc on June 27, 1988 at William Mitchell College of Law in St. Paul, Minnesota. The Plaintiffs appeared by their counsel, James E. Townsend, 701 Fourth Aveneue South, Minneapolis, MN 55415. The Defendants appeared by their counsel, Lance W. Riley, Edina Executive Plaza, Suite 308, 5200 Willson Road, Edina, MN 55424. The matter was brought on by Plaintiffs seeking a preliminary injunction directing Defendants to:

1. a. refrain from obstructing or impeding the normal flow of vehicular or pedestrian traffic along the right of way leading from County Road 83 to the public building and parking lots of the Shakopee Mdewakanton Sioux Community Reservation;

b. refrain from harassing, intimidating or otherwise impeding the public from normal and free ingress and egress to the above mentioned public buildings and parking lots;

2. for costs, fees and disbursements and such other relief as the Court may deem just and appropriate.

Based upon the pleadings, exhibits, motions and memorandums of law filed and oral arguments, the Court makes the following

ORDER

The motion for a preliminary injunction sought by the plaintiffs is denied.

By The Court

Dated: July 12, 1988.

Kent P. Tupper
Chief Judge

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX COMMUNITY

Patricia Hove, Chairman, SMCS Enrollment Committee, et al., Plaintiffs, vs. Amy Stade, et al., Defendants.	No. 001-88
and	
Amy E. Stade, et al., Plaintiffs, vs. The Shakopee Mdewakanton Sioux Community, et al., Defendants.	No. 002-88

MEMORANDUM OPINION ON
MOTIONS FOR PRELIMINARY INJUNCTIONS

Before Chief Judge Kent P. Tupper, Judge Henry M. Buffalo, Jr., and Judge John E. Jacobson. (Judge Jacobson did not participate in section 2.a. of the Court's opinion).

On June 27, 1988, this Court heard argument on motions for preliminary injunctive relief, made under Rule 29 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux Community, in both of the above-captioned cases. On July 13, 1988, the Court denied the motion for preliminary relief in Hove v. Stade; and the Court granted in part and denied in part the motion for preliminary relief in Stade v. The Shakopee Mdewakanton Sioux Community. This Memorandum Opinion is filed in support of those decisions.

1. The motion for a preliminary injunction in Hove v. Stade.

In Hove v. Stade the Plaintiffs sought a preliminary injunction restraining the Defendants from interfering with or obstructing vehicular or pedestrian traffic on the right of way leading from Scott County Road 83 to the public bulidngs and parking lots on the reservation of the Shakopee Mdewakanton Sioux Community ("the Community"). The Plaintiffs further sought an order restraining the Defendants from harassing, intimidating, or otherwise impeding the public from the normal and free ingress and egress to and from the Community's public buildings. Finally, the Plaintiffs sought costs and fees from the Defendants.

After careful consideration, the Court denied the Plaintiff's motion in its entirety. The granting of the preliminary relief is discretionary, and should only occur in extraordinary circumstances where the Court is satisfied that irreparable injury will occur absent the relief:

> To warrant the granting of an injunction on the ground that irreparable injury is threatened, the injury contemplated must be real, not fancied; actual, not prospective; and threatened, not imagined.
>
> Association of Professional Engineering Personnel v. Radio Corporation of America, 183 F. Supp. 834, at 834 (D. Nev. 1960).

See generally, Wright and Miller, Federal Practice and Procedure, §§2942 and 2948.

Here, giving due weight to the evidence presented to the Court, the Court finds that one incident took place, on June 3, 1988, in which Scott County Road 83 was blocked for a short period of time. The incident has not been repeated, and there does not appear any significant likelihood that it will be repeated in the future.

The Court in no way intends to suggest that it considers

the June 3 incident trivial; and it specifically rejects Defendants' arguments that the obstruction of the free flow of traffic on the Community's reservation could be an appropriate exercise of First Amendment rights. But it appears that at the present time, the June 3 incident was isolated, and therefore the probability of irreparable injury, which would be requisite of preliminary relief, is lacking at this time.

2. The motion for a preliminary injunction in Stade v. The Shakopee Mdewakanton Sioux Community.

The Motion for preliminary relief in Stade v. The Shakopee Mdewakanton Sioux Community presents a factual and legal matrix far more complex than that involved in Hove v. Stade. The Plaintiffs variously allege, in support of their motion, that they are being denied a wide range of rights, based solely on their political views. The Plaintiffs claim that they wrongfully have been deprived of monies, of voting rights, of employment, and of land. (Indeed, the range of parties, issues, and facts presented by the case are so diverse that, in the view of the Court, the claims are misjoined. The Court will not dismiss the claims on these grounds, but at a pretrial conference which will be scheduled with all deliberate speed, the Court will seek a segmentation or separation of the parties and issues in the case, to permit orderly processing of the various claims).

a. This Court's jurisdiction.

Prior to dealing with the merits of the Plaintiffs' motion, the Court must deal with a jurisdictional matter. In this action the Community argues that it has not waived its immunity from suit, and therefore cannot be the subject of preliminary relief. But the Court has concluded that if it has jurisdiction then preliminary relief is appropriate here, as to a part of the Plaintiff's claims. So, the Court must decide what the probability is that the Community has submitted itself to the power of this Court.

The Defendants have exhaustively discussed the principles

of tribal sovereignty. The lengthy list of cases cited by Defendants hold either that Indian tribes have sovereign immunity from suits in Federal and State courts, absent a waiver of that immunity, or that those courts lack subject matter jurisdiction to decide certain matters involving Indian law.

The United States Supreme Court in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978), discussed tribal forums and the Indian Civil Rights Act of 1968 when it stated--

> ...Tribal forums are available to vindicate rights created by the ICRA, and §1302 has the substantial and intended effect of changing the law which these forums are obligated to apply. Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians... [citations omitted].
>
> 436 U.S., at 65.

The cases cited by Defendants deal with claims of sovereign immunity by tribes and tribal officers in Federal and State court actions. It is clear that the Supreme Court and lower Federal courts have given great consideration to the desire of Congress not to intrude needlessly in tribal self-government, although the Supreme Court did caution tribes in Martinez--

> ...Congress retains authority expressly to authorize civil actions for injunctive and other relief to redress violations of §1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions.
>
> Ibid, at 75.

This Court concludes that the Shakopee Mdewakanton Sioux Community was mindful of the need to have a tribal court to resolve intratribal disputes when it passed Resolution Number 02-13-88-01 and to provide a tribal forum to enforce the substantive provisions of the ICRA.

Yet the Defendants are asking this court to decide that Section II of Ordinance 02-13-88-01 is not a waiver of the

sovereign immunity of the General Council, Business Council, and the Officers and Committees of the Community.

But the plain reading of the ordinance, in Section II, states that this Court has original and exclusive jurisdiction to hear and decide all controversies arising out of the Shakopee Mdewakanton Sioux Community Constitution, its By-Laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its officers or the Committees of the Community pertaining to (1) membership, (2) the eligibility of persons to vote in the proceedings of the Shakopeee Mdewakanton Sioux Community or in the Community elections, (3) the procedures employed by the General Council, Business Council, the Committees of the Community or the officers of the Community in the performance of their duty. In addition, the Ordinance provides that the Tribal Court shall have jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et seq..

The Court is aware that a grant of jurisdiction to courts to hear certain types of civil causes of action is not in and of itself a waiver of sovereign immunity. For example, statutes which grant Federal courts Federal question jurisdiction and diversity jurisdiction are not in themselves waivers of the sovereign immunity of the United States or its officers, or for that matter of tribal sovereign immunity. But the fundamental provision of the Indian Civil Rights Act is that "No Indian tribe in exercising powers of self government shall...", and from that languange the Act proceeds to set forth various rights similar to those contained in the Bill of Rights to the United States Constitution. And Section II of the Ordinance Number 02-13-88-01 gives this Court the jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the ICRA. It would make very little sense to say that this Court has original and exclusive jurisdiction over violations of the ICRA, which only relates to actions by an Indian tribe and its officers, and to

then conclude that this was not a waiver of sovereign immunity.

The Court therefore decides that the language of Section II of Ordinance 02-13-88-01 is an explicit waiver of the sovereign immunity of the General Council, Business Council, and Officers and Committees of the Shakopee Mdewakanton Sioux Community, as to those areas of jurisdiction set forth in that Section.

The Court does not express any opinion at this time as to whether a money judgment can be enforced against the Community, its Councils, Committees, or Officers. This opinion only relates to the motions before the Court; and as to them, the Court finds that it has the jurisdiction to hear the pending case, and that the Community by Ordinance number 02-13-88-01 has waived its sovereign immunity for the categories of causes of action set forth in the second section of the Ordinance.

(Judge John E. Jacobson took no part in the Court's decision on this portion of the case.)

b. <u>The Claim of Norman M. Crooks for 3% of the net revenues of the Little Six Bingo Hall</u>.

The Plaintff Norman M. Crooks alleges that he is entitled to receive from the Community, on an ongoing basis, monies equal to three percent of the net revenues of the Community's commercial bingo enterprise. He has supplied the Court with a arbitration decision, resulting from litigation in the United States District Court for the District of Minnesota, affirming his right to these monies; and he alleges that the Community nonetheless has failed to pay him for a number of months.

The Community admits that Mr. Crooks has been denied the payments which the arbitration decision contemplated, but it alleges that the monies were rightfully withheld as an offset for monies which, it is alleged, Mr. Crooks owes the Community. However, the Community has not pleaded that it has a money judgment against Mr. Crooks, or even that it presently is seeking such a judgment; nor has it counterclaimed against Mr. Crooks in this action. Hence, the Community at this point is

merely stating a naked claim for an unliquidated sum.

Given the findings of the arbitrators, to the effect that Mr. Crooks is entitled to the three percent payments, the probability appears extremely high that Mr. Crooks will prevail with respect to his claim that he is entitled to those monies. And, as is noted below, although the mere denial of money by one party to another usually is not sufficient grounds for obtaining preliminary relief, in instances where the probability of success on the merits is quite high it may be appropriate to preliminarily enjoin nonpayment. The Court believes that this is such a case.

The Community paid to the Court sums representing several month's installments of Mr. Crooks' three percent monies. It did not then file any additional materails with the Court. And even if it were to have done so, the Community clearly would not be in the position of a "stakeholder" initiating an interpleader action, since the Community itself has claimed the sums. Accordingly, the Court has no framework of rules within which to accept and hold those monies. And in view of the Court's decision that Mr. Crooks is entitled to a preliminary injunction restraining the Community from withholding the monies, and since the Community clearly intended that the Court would have dispositive power over the monies when it forwarded them to the Court, the Court will transmit to Mr. Crooks the monies it has received, and order that his three percent payments not be withheld from him pending these proceedings.

Obviously, the Court expresses no view here with respect to the merits of, or consequences of, any action the Community may have against Mr. Crooks for damages.

c. Remaining claims for relief.

Four other categories of prayers for preliminary injunctive relief are sought in the Plaintiffs' motion: (1) Amy Stade, Tracy Rath, Scott Campbell, Anthony Brewer, and Anita Barrientez seek an order mandating that they be permitted to vote in the Community's General Council. (2) Amy Stade,

Susan Totenhagen, Anita Barrientez, Tracy Wisnewski, Joseph Brewer and the minor children of each of them, together with Scott Campbell, Anthony Brewer, and Paul Enyart, seek an order mandating that they be paid from the Community's "per capita" program. (3) Anita Barrientez and Paul Enyart seek a mandate prohibiting the nullification of land assignments which they claim. And (4) Tracy Rath, Terry Rath, and Cheri Crooks Bathel seek reinstatement in their former jobs.

Each of these persons has in common the claim that they have been mistreated by the Community because of their political views; but there the commonality stops. The factual and legal context varies, from one category of claim to another, and within categories, as well.

Each of the categories of claim, except the first (pertaining to voting rights), allege deprivation of property--which by definition can be recompensed by the payment of money. And it is hornbook law that if a claim has an adequate remedy at law, then the injury alleged is not irreparable and the use of the court's equitable powers is not appropriate. Glasco v. Hills, 558 F.2d 179 (2nd Cir. 1977); Ferry-Morse Seed Co. v. Food Corn, Inc., 729 F.2d 589 (8th Cir. 1984).

The Court is mindful, however, that irreparable injury can on occasion be found in the denial of money payments or other property rights. See e.g., Gorrie v. Heckler, 606 F. Supp. 368 (D. Minn. 1985). This may be particularly true in instances where the entity doing the denying is a government. And if the circumstances are appropriate, the denial of voting rights certainly could be alleged to be irreparable injury, as well.

But for preliminary injunctive relief to issue in such cases, the balance of the other factors to be considered in connection with injunctive relief--the likelihood of success on the merits, the potential for injury to the Defendants, and the public interest--must favor the movants.

In this case, given the materials before the Court, it cannot be said that the balance lies there. As has been noted,

the factual and legal claims of the movants are diverse; and the Court has been provided with no real discussion of the legal merits of their claims within the context of the laws applicable to the Community. The movants have supplied affidavits discussing their factual situation; but there has been little provided to relate that situation to the laws and rules of the Community. For example, in a number of instances, a movant alleges that that he or she was admitted to membership in the Community, and the Community then denies the allegation; but neither party discusses the membership requirements or procedures--or the disenrollment procedures, for that matter--which would appear to be at the heart of the issue. Hence, it cannot be said that the movants have made a showing that they likely will succeed on the merits. The foregoing failure is particularly significant in light of the fact that the Community is a very small cosmos. If money is paid to one person, other persons' payments are reduced by a proportionate amount. If one person is permitted to vote, the voting power of the other Community members voters will be measurably diluted. If land is given to one person, it must be denied to another.

So, if the Court cannot find a likelihood of success on the merits, it also cannot find that a preliminary injunction would be harmless to the Community or consistent with the public interest. And in this case, except for the clear showing made by Mr. Crooks, noted above, the Court has not been supplied with materials sufficient to enable it to find that the Plaintiffs, or some of them, likely will succeed on the merits. Therefore, this not a situation where the Court finds that irreparable injury, of the sort not compensable by damages, will flow from the Community's actions; and a preliminary injunction must therefore be denied to all of the movants save Mr. Crooks.

July 15, 1988

Kent P Tupper

Chief Judge Kent P. Tupper

Judge Henry M. Buffalo, Jr.

Judge John E. Jacobson