

FEB 11 1994

IN THE COURT OF THE  
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

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In re: ADVISORY FROM THE	)	
BUSINESS COUNCIL -- PAYMENT	)	Court File 037-94
OF REVENUE ALLOCATION TO	)	
THIRTY-ONE MEMBERS	)	

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## ADVISORY OPINION

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On February 3, 1994, the Business Council of the Shakopee Mdewakanton Sioux Community filed with this Court what the Business Council termed "extraordinary relief": In a pleading which it termed "Request for Advisory Opinion", the Business Council sought the Court's guidance with respect to the manner in which it could deal with a dilemma caused, on the one hand, by the Constitution of the Shakopee Mdewakanton Sioux Community and certain actions of Federal officials, and on the other hand by actions of the General Council of the Community.

The materials accompanying the Business Council's Request illustrate the dilemma. For many years, the Community had made payments from its gaming revenues to a list of persons that included individuals that were not members of the Community. This arrangement, which was the result of painstaking negotiations among various groups within the Community over many years, was utterly disrupted in 1993 when the Bureau of Indian Affairs, implementing guidance from Assistant Secretary of the Interior for Indian Affairs Eddie Brown, required the Community to amend its ordinances, and refused to approve the Community's payment of



gaming revenues to non-members. Thereafter, in late 1993, seeking to implement the provisions of Article II, section 2 of the Community's Constitution, the Community's General Council twice approved adoption ordinances that would have permitted the Community to accept into membership the persons who had lost their eligibility to receive payments; and the Bureau of Indian Affairs twice disapproved those ordinances. Then, on January 11, 1994, in evident frustration, even desperation, the Community's General Council voted to adopt into membership some (though apparently not all) of the persons who had lost their eligibility to receive gaming revenue payments.

From the minutes of the General Council meeting supplied to the Community by the Business Council, it is clear that the General Council took the position that its action was consistent with procedures which had been employed many times in earlier years. The persons were being adopted or "recognized" as members--a procedure which the Bureau of Indian Affairs had sanctioned in writing as long ago as 1971.

The Business Council's dilemma, however, arises from the fact that the Community's Constitution expressly requires that ordinances relating to membership must be approved by the Secretary of the Interior or his designee. The vote to adopt or "recognize", which the General Council took on January 11, 1994, clearly did not follow the procedure of the Enrollment Ordinance which the Bureau of Indian Affairs has approved; it could not comport with any adoption ordinance, since none has been approved by the Bureau of Indian Affairs; and the vote itself has not been approved by the



Bureau of Indian Affairs.

Hence, until some Bureau of Indian Affairs approval is obtained, or until the Community's Constitution is amended, it would appear that the January 11, 1994 vote is not consistent with the Constitution. Under Article III of the Community's Constitution, the Business Council must perform such duties as may be authorized by the General Council. But under section 14.9 of the Community's Amended Business Proceeds Distribution Ordinance, Ordinance No. 10-27-93-002, if the Business Council wrongfully pays the proceeds of a Community Business to any person the Council is subject to penalties of up to three times the amount thus paid.

This is the problem that has caused the Business Council to take the extraordinary step of requesting an Advisory Opinion from this Court.

In the past, this Court has resisted all efforts to obtain advisory opinions. It has been our view that the Court's function is to hear cases and controversies--that justiciability, and the adversarial process, alone produce the sort of complete record which permits sound decisions. But the Business Council submits that the Community faces a Constitutional crisis; and it points out that all of the restrictions which are imposed on courts in the Federal and State processes do not necessarily apply here. And the Court notes that the General Council has given, and the Court in a grudging and limited manner has accepted, certain functions which would be utterly inappropriate for a Federal Court under Article III of the United States Constitution. See section 63 of the Shakopee Mdewakanton Sioux Community Corporation Ordinance, No. 2-



27-91-004; and see Shakopee Mdewakanton Sioux (Dakota) Community, Court File No. 025-92 (Decided June 3, 1993). The Business Council has pointed out, also, that even courts which operate under strict case and controversy requirements have observed that governmental crises of Constitutional proportions may make advisory opinions appropriate. Advisory from the Governor, 633 A.2d 664 (R.I. 1993).

With trepidation, therefore, the Court believes that it should respond to the Business Council's request.

Given the clear requirement of Article II, section 2 of the Community's Constitution that ordinances relating to membership must be approved by the Secretary of the Interior, and given the fact that the Secretary's delegee has to date disapproved the Community's adoption ordinances and has not approved the January 11, 1994 vote, it seems very possible that a payment of gaming revenues to the persons who were voted into membership on that date would not be consistent with the Community's Constitution or with the Amended Business Proceeds Distribution Ordinance. On the other hand, if an adoption ordinance is approved which sanctions the January 11, 1994 vote, or if the vote itself (or the resolution which accomplished it) is approved by the Bureau of Indian Affairs, or if the Constitution of the Community is amended appropriately, or if some other event occurs which resolves the Business Council's dilemma, then payments clearly can and should be made to the affected persons. Therefore, in the Court's view, the most prudent action for the Business Council to take, until a resolution of the dilemma is achieved, is to (1) pay into an escrow account the gaming revenue payments which the persons who were voted into




membership on January 11, 1994 would receive, (2) pay to those persons any amounts they would otherwise be eligible to receive, (3) release the escrowed amounts to the affected persons (less the payments they have received from non-gaming revenues), if the dilemma is resolved in a manner which clearly permits the payments, and (4) return the escrowed amounts to the Community's accounts if the dilemma is resolved in a way which forbids the payments.

In the Court's view, the Business Council's dilemma exists principally because the January 11, 1994 vote was taken after the Community's adoption ordinances were explicitly disapproved by the Bureau of Indian Affairs, and because the January 11 vote has not itself been approved by that agency. It exists, in other words, as to the persons who were voted upon on January 11, 1994, and not as to persons who in years past were voted into membership under the provisions Article II, section 2, and since that time have openly and regularly participated in the governing and economic processes of the Community without complaint or objection from the Bureau of Indian Affairs.

The Court wishes to stress that the foregoing opinion is offered with great reluctance. It is the Court's deepest wish that all officers and members of the Community can succeed in their efforts to extricate themselves from their dilemma, in a way that protects the expectations of all of the persons who have been burdened by the events of recent months. And it is the Court's commitment to assist the Community in any manner, in those efforts.

February 11, 1994

  
John E. Jacobson  
Associate Judge