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COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT — STATE OF MINNESOTA

Raymond L. Cermak, Sr., Stanley Cermak, Sr., Raymond L. Cermak, Jr., Stanley F. Musiak, Bradley W. Peterson, Stanley F. Peterson III, Eleanor F. Krohn, David J. Collins, Bernice T. Collins, Darlene M. Church, and Lorie Beerling,

Plaintiffs,

v.

Shakopee Mdewakanton Band of Sioux Indians, d/b/a "Mystic Lake Casino and Dakota Country Casino," Little Six, Inc., The Mdewakanton Band of Sioux Council and its former officers: Chairperson Leonard Prescott, its Vice-Chair Stanley Crooks, and its Secretary-Treasurer Allene Ross; and current officers: Chairperson Stanley Crooks, its Vice-Chair Kenneth Anderson, and its Secretary-Treasurer Darlene McNeal,

Defendants.

Court File No. 039-94

MEMORANDUM

I.

This lawsuit was initiated on April 28, 1994. The Plaintiffs seek damages claiming that the current system for per capita distribution of the tribal funds is improper. They also seek an injunction against any further distributions under the current system. The case presently is before the Court pursuant to the Plaintiffs' motion to remove the Judges of this Court, John E. Jacobson, Henry M. Buffalo, Jr., and Robert Grey Eagle ("the Judges"), for bias, prejudice, or appearance of impropriety.

VSMSC.006

II.

The Plaintiffs allege that the Judges' bias flows from its associations with counsel for the Defendants. Defendants' counsel are associated with the BlueDog law firm. Attorneys for the BlueDog firm have been appointed to serve as judges and clerk to the Tribal Courts of the Lower Sioux Community and the Prairie Island Community. Specifically, attorneys Andrew Small, Steven Olson, and Kurt BlueDog, serve as Judges on the Lower Sioux Community in Minnesota Tribal Court, and attorney Vanya Hogen-Kind serves as the Clerk of that Court. Judges Jacobson and Buffalo represent the Lower Sioux Indian Community in Minnesota and, accordingly on occasion appear before the Lower Sioux Court. Attorneys Small, Olson, and BlueDog also serve as Judges on the Tribal Court of the Prairie Island Indian Community and attorney Hogen-Kind serves as the Clerk of that Court. Judge Grey Eagle represents the Prairie Island Community and, accordingly, on occasion appears before the Prairie Island Court.

The Plaintiffs allege that the foregoing facts create "significant ties" resulting in a "a bona fide appearance of bias," on the part of Judges Jacobson, Buffalo and Grey Eagle which warrants their recusal and disqualification.

III.

The Tribal Court of the Shakopee Mdewakanton Sioux Community was created by and is governed in accordance with Ordinance Number 02-13-88-01 (the "Ordinance"). Section IV of the Ordinance provides that "there shall be three Judges on the Tribal Court" and that the "Judges of the . . . Tribal Court shall be appointed by the Chairman with the advice and consent of the General Council. . . ." Id. The Ordinance further provides that the General Council may fill vacancies on the Court within ninety (90) days of the resignation, death, or recall of a judge

or judges.[1] If ninety (90) days passes without an appointment, the remaining judges may then exercise their power of extraordinary appointment under Section V(D). No other procedures exist for the removal or appointment of judges on the Shakopee Mdewakanton Sioux Community Tribal Court.

Section VII of the Ordinance provides that "cases shall be heard by one judge . . . " and that "a matter may be certified for appeal to a three-judge panel of the full Court. . . ." Id.

IV.

The Plaintiffs argue, and this Court does not dispute, that a judge should not hear a case where it appears that he or she is biased or prejudiced against either party. State and federal courts all recognize this principle; so, too, does this Court. In fact, Rules 32(a) and (b) of the Shakopee Tribal Court Rules of Civil Procedure specifically so provides.[2] However, in cases such as the one at bar, where recusal of an otherwise disqualified judge would destroy the jurisdiction of the only Court which could hear the matter, the rules regarding disqualification

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[1] Judges are subject to recall only upon passage of a Resolution of Recall by absolute two-thirds majority of all enrolled and eligible voting members of the Shakopee Mdewakanton Sioux Community. Ordinance 02-13-88-01 at Section IV(A).

[2] Rules 32(a) and (b) provide as follows:

Rule 32. Disqualification of Judge.

(a) Any judge of the Court of the Shakopee Mdewakanton Sioux Community shall disqualify himself or herself in any proceeding, or portion of a proceeding, in which, in his or her opinion, his or her impartiality might reasonably be questioned,

(b) A judge of the Court of the Shakopee Mdewakanton Sioux Community also shall disqualify himself or herself in any proceeding, or portion of a proceeding, in the following circumstances:

(1) Where he or she has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where is private practice he or she served as a lawyer in the matter in controversy, or a lawyer with whom he or she previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

yield to the Rule of Necessity. State ex rel. Gardner v. Holm, 241 Minn. 125, ____, 62 N.W.2d 52, at 53-54 (1954); Atkins v. United States, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), cert. denied, 434 U.S. 1009 (1978); Pilla v. American Bar Assn., 542 F.2d 56 (8th Cir. 1976); Evans v. Gore, 253 U.S. 245 (1920); United States v. Will, 499 U.S. 200, at 213 (1980).

The United States Supreme Court has held that where disqualification would destroy the jurisdiction of a court of last resort, the rule of necessity requires the disqualified judge to hear the case. The Court specifically held that --

> The true rule unquestionably is that whenever it becomes necessary for a judge to sit even where he has an interest - where no provision is made for calling another in, or where no one else can take his place - it is his duty to hear and decide, however disagreeable it might be.

United States v. Will, 499 U.S. at 214, citing Philadelphia v. Fox, 64 Pa. 169, 185 (1870).

This rule is an ancient one which has its roots in English common law as far back as 1430. United States v. Will, 499 U.S. at 213. See also Dimes v. Grand Junction Casualty Co., 10 Eng. Rep. 301, at 313 (1852), and Frank, "Disqualification of Judges," 56 Yale L.J. 605, at 609-610 (1947). It has been cited repeatedly throughout the century by both state and federal courts. State ex rel. Gardner v. Holm, 241 Minn. 125, 62 N.W.2d 52 (1954); Ulson v. Cory, 609 P.2d 991, 994 (Ca. 1980); Schwab v. Ariyoshi, 555 P.2d 1329 (Ha. 1976); Dacey v. Connecticut Bar Assn., 368 A.2d 125 (Conn. 1976); Atkins v. United States, supra.; Pilla v. American Bar Assn., supra.; Brinkley v. Hussig, 83 F.2d 351 (10th Cir. 1936); Salisbury v. Housing Authority of City of Newport, 615 F.Supp. 1433 (D.C. Ky. 1985). It has been invoked repeatedly by the United States Supreme Court as well. United States v. Will, supra.; Evans v. Gore, supra.; Miles v. Graham, 268 U.S. 501 (1925); O'Malley v. Woodrough, 307 U.S. 277 (1939).

The common sense underpinnings of the rule are perhaps best stated by the Minnesota Supreme Court in State ex rel. Gardner v. Holm, supra, where the Court held that the necessities of the case will overcome disqualification. The Court specifically stated that--

> . . . we must frankly admit that there is such an indirect interest [in the case at bar] that were it possible to do so we should all be happy to declare ourselves disqualified. Nothing is better established than the principle that no judge or tribunal should sit in any case in which he is directly or indirectly interested [citations omitted]. However, this principle must yield to the stern necessities of the case; and when there is no other tribunal that can determine the matter, it is the duty of the Court, which would ordinarily be disqualified, to hear and determine the case, however disagreeable it may be to do so. The judicial function of the courts may not be abdicated even on the grounds of interest when there is no other court that can act.

Holm, 62 N.W.2d at 53-54 (1954).

V.

In the present case the same holding must apply. Though there may exist sufficient grounds to disqualify the Judges--or there may not--the Court concludes that the Rule of Necessity imposes a duty on the Court to consider and decide this case. The Shakopee Mdewakanton Sioux Community Tribal Court likely is the only tribunal with jurisdiction over this suit. The Plaintiffs vaguely allege that there exists a federal forum for this dispute; however, they cite no law, and the Court is aware of none, which vests the federal judiciary with jurisdiction over such an inherently tribal matter. Rather, the United States Supreme Court has held that issues of tribal membership are specifically outside the jurisdiction of the federal courts. Santa Clara Pueblo v. Martinez, 436 U.S. 47, at 71 (1978). See also Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Vurney, 168 U.S. 218 (1897)

The Plaintiff's motion seeks the disqualification of all of the Judges. There is no procedure by which alternate judges substitute for disqualified judges. The Plaintiffs argue that

Minnesota law provides for prompt reassignment in cases of disqualified judges; however, this law is irrelevant because the Ordinance, not Minnesota common law, controls the appointment, recall, and replacement of Tribal Court Judges. So, if the Judges are disqualified, the Court could not fulfill the requirements of the Ordinance, effectively destroying the jurisdiction of the only tribunal qualified to hear this suit. The Plaintiffs then would be without a forum which has jurisdiction to consider their claim. This result is unacceptable. See, United States v. Will, 499 U.S. 200, at 214 (1980); Brinkley v. Hussig, 83 F.2d 351, at 357 (10th Cir. 1936); State ex rel. Holm v. Gardner, 241 Minn. 125, 62 N.W.2d 52 (1954); State ex rel. Null v. Polley, 34 S.D. 565, at 570, 138 N.W. 300, at 302 (1912); Federal Constr. Co. v. Curd, 179 Cal. 489, 177 P. 469 (1918), State ex rel. Wickham v. Nygaard, 159 Wis. 396, 150 N.W. 513 (1915).

The Court notes in passing that the Rule of Necessity has been invoked to overcome disqualification of judges even where their "interest" was financial or in some other way pecuniary. The situation alleged to exist in the present case represents a much more indirect and tenuous interest on the part of the Judges. If the Rule of Necessity overcomes disqualification based on direct financial interest, it surely overcomes disqualification here.

For the foregoing reasons, the Plaintiffs' motion to remove the Judges has been denied.

Dated: March 11, 1994

Henry M. Buffalo, Jr.
Judge of Tribal Court

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Defendants.

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ORDER

The above-entitled matter came before the Court on the Plaintiffs' Motion to Remove the Judges of this Court.

The Court being fully advised of the premises and based on all the records and files herein as well as the arguments of counsel,

IT IS HEREBY ORDERED:

1. That the Plaintiffs' Motion for Removal of the Judges of this Court be, and hereby is, in all things DENIED;

VSMSC.005

2. That the attached memorandum be, and hereby is, incorporated as part of this Order.

Dated: November 11, 1994

Henry M. Buffalo, Jr.
Judge of Tribal Court