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Cathie Silengah
Clerk of Court

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Kimberly Amundsen, John Bluestone, Brian Hester, David Hester, Kaye Hester, Teresa Johnson, Beverly Kosin, Kirk Leith, Forest Leith, Shahn Leith, Gary Prescott, Jacqueline Prescott, Terri Schmitt, Richard Scott, Robert Scott, Karen Swann, and Dorothy Whipple, jointly and individually,

Plaintiffs/Petitioners

vs.

Court File No. 049-94

The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, Susan Totenhagen, as Enrollment Officer, and Anita Campbell (Barrientez), Susan Totenhagen, Darlene McNeal, Cherie Crooks-Bathel, and Lanny Ross, constituting the current members and alternate member of the Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, officially, jointly and individually, the Shakopee Mdewakanton Sioux (Dakota) Community Business Council, and Stanley R. Crooks, Kenneth Anderson and Darlene McNeal, officially, jointly and individually,

Defendants/Respondents.

MEMORANDUM OPINION AND ORDER

Summary

In this action, the Plaintiffs seek to compel the government of the Shakopee

Mdewakanton Sioux (Dakota) Community ("the Community") to take certain actions with respect to the Plaintiffs' application for membership in the Community. Each of the Plaintiffs claims to possess at least one-quarter degree Mdewakanton Sioux (Dakota) blood. In their Complaint, each Plaintiff alleges that he or she has submitted an application for enrollment in the Community under the Community's Enrollment Ordinance 6-08-93-001 ("the 1993 Enrollment Ordinance"), each alleges that his or her application has not been acted either by the Community's Enrollment Officer or by the Community's Enrollment Committee, and each seeks declaratory, injunctive, mandatory, and compensatory relief from this Court.

The bases relied upon by the Plaintiffs' for their claims are the 1993 Enrollment Ordinance itself, which the Plaintiffs contend mandates that their applications be processed; the Community's Constitution, which the Plaintiffs say entitles them to membership; and the due process and equal protection clauses of the Federal Indian Civil Rights Act, which the Plaintiffs have been violated by the Community's failure to act upon their applications.

In the view of this Court, however, even if the Plaintiffs could prove their allegations, they have failed to state a claim upon which relief can be granted, because their claims have been mooted by subsequent action of the Community. Accordingly, under Rule 12(b)(6) of the Rules of Civil Procedure of this Court, and for the reasons outlined below, the Defendants' Motion to Dismiss is granted.

Discussion

The first words in the Constitution of the Shakopee Mdewakanton Sioux Community of Minnesota are these:

PURPOSE

We, the people of the Shakopee Mdewakanton Sioux Community, in order to secure the advantage of local self-government for ourselves and our children, do ordain and establish this constitution.

Then, after identifying the territory of the Community, in Article I, the Community's Constitution defines the membership of the Community, and the power of the Community's General Council with respect thereto:

Section 1. The membership of the Shakopee Mdewakanton Sioux Community shall consist of:

(a) All persons of Mdewakanton Sioux Indian blood, not members of any other Indian tribe, band or group, whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the Prior Lake Reservation, Minnesota, prepared specifically for the purpose of organizing the Shakopee Mdewakanton Sioux Community and approved by the Secretary of the Interior.

(b) All children of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood born to an enrolled member of the Shakopee Mdewakanton Sioux Community.

(c) All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled as members of some other tribe or band of Indians.

Section 2. The governing body shall have power to pass resolutions and ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership.

At the time the Plaintiffs filed this action, the 1993 Enrollment Ordinance governed the Community's enrollment procedures. Section 6 of the 1993 Enrollment Ordinance required applicants for enrollment to submit certain specified information to the Community's Enrollment

Officer, and imposed on the Enrollment Officer the following obligation:

> The Enrollment Officer shall verify the data shown on the application and the supporting documentation and recommend in writing acceptance or rejection of the application to the Enrollment Committee no later than thirty days after receipt of the application.

When the Enrollment Committee received a recommendation from the Enrollment Officer, section 6 of the 1993 Enrollment Ordinance provided:

> The Enrollment Committee shall approve or reject all enrollment applications based on the record presented and other evidence deemed acceptable by said Committee

Any person whom the Enrollment Committee rejected for membership had the right to appeal their rejection, under section 7 of the 1993 Enrollment Ordinance. The appeal was to the Community's General Council; and section 7 expressly stated that the General Council's decision--

> ...shall be final and conclusive for the Shakopee Mdewakanton Sioux Community. No appeal shall lie to any judicial, executive or legislative body. ...

Similar provisions in the 1993 Enrollment Ordinance applied to membership applications which the Enrollment Committee voted to accept: they, too, could be appealed to the General Council, by any member of the Community who disagreed with the Committee; and once again, section 7 provided that the General Council's decision "shall be final" for the Community.

The Plaintiffs allege that on January 25, 1994 the Enrollment Committee adopted a resolution purporting to "freeze" the processing of enrollment applications, except the applications of persons who were children of members of the Community, because the records of the Community were in disarray.

This action was filed on November 18, 1994. In their Complaint, the Plaintiffs alleged

that each of them had submitted an application for membership in the Community, together with appropriate supporting documentation establishing that each was a descendant "of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace [his or her] Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided in Minnesota on May 20, 1886". The Plaintiffs alleged, therefore, that under the 1993 Enrollment Ordinance the Enrollment Officer was obliged, as a matter of law, to "recommend in writing acceptance or rejection of the application to the Enrollment Committee no later than thirty days after receipt". The Plaintiffs alleged that the Enrollment Officer failed to make such a recommendation; and they sought a writ of mandamus from this Court, directed to the Enrollment Officer, requiring that a written recommendation be forwarded to the Enrollment Committee for each Plaintiff, to commence the Community's deliberation on the applications.

On December 28, 1994, after this action was filed, the General Council of the Community voted to adopt Resolution No. 12-28-94-005, Amendments to Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Ordinance ("the 1994 Enrollment Ordinance Amendments"). In many respects, the 1994 Enrollment Ordinance Amendments resemble the 1993 Enrollment Ordinance; but in Section 6, relating to the filing and processing of applications for membership, the 1994 Enrollment Ordinance Amendments differ substantially from the predecessor provisions. In pertinent part, Section 6 of the 1994 Enrollment Ordinance Amendments states:

> There shall be no open enrollment in the Shakopee Mdewakanton Sioux (Dakota) Community. Applications from persons who have not first relinquished their membership in another federally recognized Indian Tribe or Band shall not be processed and no action shall be taken on those applications by the Enrollment Committee.

Only the following types of enrollment applications shall be considered by the Enrollment Committee or the General Council if an Enrollment Committee action is appealed or challenged:

First priority shall be given to:

a. applications of adult or minor children of enrolled members of the Shakopee Mdewakanton Sioux (Dakota) Community; and

b. applications of persons not otherwise enrolled in a federally recognized tribe who are lineally descended from those Mdewakanton Sioux who resided in Minnesota on May 20, 1886.

Such applications may be accepted and processed pursuant to this Ordinance whenever properly submitted to the Enrollment Officer.

Second priority shall be given to:

applications of persons who have relinquished their membership in another federally recognized tribe. Such persons must be lineally descended from those Mdewakanton Sioux who resided in Minnesota on May 20, 1886.

Such applications may be accepted and processed pursuant to this Ordinance whenever properly submitted to the Enrollment Officer.

The Enrollment Officer shall verify the data shown on the application and the supporting documentation and recommend to the Enrollment Committee in writing acceptance or rejection of the application, subject to the priorities and limitations of this Section. That recommendation shall be made no later than six months after receipt of the enrollment application.

The Enrollment Committee shall approve or reject all enrollment applications, subject to the foregoing priorities and limitations of this Section, based on the record presented and other evidence deemed acceptable by said Committee no later than six months after submission by the Enrollment Officer.

As with the 1993 Enrollment Ordinance, the 1994 Enrollment Ordinance Amendments provide for an appeal to the General Council, both for successful and unsuccessful applicants, and once again the decision of the General Council "shall be final and conclusive for the

Shakopee Mdewakanton Sioux Community and no appeal shall lie to any judicial, executive or legislative body."

Section 9 of the 1994 Enrollment Ordinance Amendments provides:

RETROACTIVE APPLICATION

> The priority provisions of Section 6 of this Amended Enrollment Ordinance shall apply retroactively to all pending applications not yet acted on by the Enrollment Committee at the time of passage of this Amended Ordinance.

On February 17, 1995, the Area Director, Minneapolis Area Office, Bureau of Indian Affairs ("the Area Director"), concluded that the 1994 Enrollment Ordinance Amendments were a "reasonable interpretation" of the Community's Constitution. She therefore approved them in accordance with the provisions of Article II, Section 2 of the Constitution.

The Plaintiffs questioned, during oral argument in this matter on April 10, 1995, whether the document submitted by Defendants' counsel as the 1994 Enrollment Ordinance Amendments were, in fact, a true copy of the ordinance which the General Council of the Community adopted on December 28, 1994. Defendants' counsel, as an officer of the Court, formally represented that the document she provided was, in fact, a true and correct copy of the 1994 Enrollment Ordinance Amendments, and the Court accepts that representation to be the truth.

In turn, Plaintiffs' counsel represented during oral argument that the action of the Area Director approving the 1994 Enrollment Ordinance Amendments has been appealed, pursuant to the provisions of 25 C.F.R. Part 2 (1994). The Court also accepts that representation to be the truth.

The procedural posture of this matter is as follows: Defendants have moved to dismiss the Plaintiffs' Complaint, under Rule 12(b)(6) of the Rules of Civil Procedure of the Court of

the Shakopee Mdewakanton Sioux (Dakota) Community. The Defendants' motion was fully briefed, and was argued on February 17, 1995. At that argument, Defendants' counsel advised the Court that the Defendants expected to be informed momentarily that the Area Director had approved the 1994 Enrollment Ordinance Amendments. Thereafter, the Court established a further briefing schedule, to permit the parties to argue the effect, if any, of the 1994 Enrollment Ordinance Amendments on the Defendants' motion; and, at the request of the Plaintiffs, a second oral argument was heard on April 10, 1995.

Based on the materials submitted as a consequence of that process, the Court has concluded that action of the General Council, in adopting the 1994 Amendments to the Enrollment Ordinance, mooted the Plaintiffs claims, and that no provision of the Indian Civil Rights Act of 1968 operates to change that result.

1. The Plaintiffs Claim for Mandamus.

Under the provisions Section II of Ordinance Number 2-13-88-01 of the Shakopee Mdewakanton Sioux (Dakota) Community, this Court was given "the authority to formulate appropriate equitable and legal remedies to secure the protections of tribal law and the Indian Civil Rights Act for the Shakopee Mdewakanton Sioux Community and other Indians within its jurisdiction." This authority clearly includes the power to issue writs of mandamus.

Mandamus, however, is "an extraordinary remedy, to be reserved for extraordinary situations" Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271, at 289 (1988). A writ of mandamus generally should not issue, unless the Plaintiff demonstrates a clear right to the relief sought, a plainly defined and preemptory duty on the part of the Defendant to do the act in question, and the absence of any other adequate remedy.

Inasmuch as this matter is before the Court on the Defendants' motion to dismiss, the allegations in the Plaintiffs' Complaint must be taken to be true, and the motion should be granted only if the facts alleged would, if proven, not entitle the Plaintiffs to the relief sought. Robertson v. MFA Mutual Insurance Co., 629 F.2d 497 (8th Cir., 1980).

In the view of this Court, had the 1994 Enrollment Ordinance Amendments not been adopted by the Community's General Council, the Plaintiffs' Complaint would state a cause of action that would survive a Rule 12(b)(6) motion to dismiss, at least against the Community's Enrollment Officer. In the 1993 Enrollment Ordinance, the General Council appears to have given the Enrollment Officer a duty--the Enrollment Officer was required to forward completed applications to the Enrollment Committee with a recommendation, within thirty days after the applications are complete. The Plaintiffs Complaint alleges their applications are complete, and that the Enrollment Officer took no action; therefore, absent a change in the law, it would appear that the Plaintiffs should have been permitted to attempt to prove the facts that they alleged.

Whether the Complaint would have stated a claim against the Enrollment Committee of the Community's Business is altogether another matter. The 1993 Enrollment Ordinance did not require the Enrollment Committee to act upon the recommendations of the Enrollment Officer at any particular time, or in any particular manner. The obligation of the Enrollment Committee, under section 6 of the 1993 Enrollment Ordinance, was to "approve or reject all enrollment applications based on the record presented and other evidence deemed acceptable by said Committee". And the Business Council of the Community appears to have no function, under the 1993 Enrollment Ordinance, which could be the subject of mandamus.

But whether the Plaintiffs could state a cause of action for mandamus against any of the Defendants under the 1993 Enrollment Ordinance is a matter which this Court now need not decide, because the 1993 Enrollment Ordinance no longer is the law applicable to this case. The applicable law is the 1994 Enrollment Ordinance Amendments.

The Plaintiffs have argued that the 1994 Enrollment Ordinance Amendments actually are not yet effective, because the approval of the Area Director has been appealed; and as to such appeals, 25 C.F.R. §2.6(a) (1994) provides--

> No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Department action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.
>
> (Emphasis supplied).

See also 43 C.F.R. §4.21(a) (1994).

This Court previously has been obliged to interpret the requirement, in Article II, Section 2 of the Community's Constitution, that mandates the "approval of the Secretary of the Interior" before resolutions or ordinances governing future membership, adoptions and loss of membership are effective. We have held that the disapproval of the Secretary of Interior cannot be ignored--that any ordinance or resolution which has been disapproved cannot be effective until and unless that disapproval has been reversed on appeal. Smith v. Shakopee Mdewakanton Dakota (Sioux) Community Business Council, SMSC Ct. No. 038-94 (Memorandum decision filed June 10, 1994).

But we also have held that since the Secretary-approval requirement in Article II, section 2 of the Community's Constitution is, indeed, imposed by the Community's Constitution, and

not by any Federal law requirement, the interpretation of the requirement is a matter of Community law, not Federal law. Id. And in our view, as a matter of Community law, it would be unreasonable to conclude that when the Constitution of the Community was adopted, the members of the Community who voted for its adoption intended the requirement for approval of the Secretary of the Interior, under Article II, Section 2, to mean that, if an approval is received, nonetheless that approval will not effective if it is sent into a Federal appeal process, of uncertain duration, by any person who happens to disagree with an action of the Community's General Council. It can be assumed that most enrollment decisions of the Community would be opposed by at least one person; and if the Plaintiffs' contention, with respect to the Secretary-approval requirement were the law, the effectiveness of any enrollment ordinance adopted by the Community could be stalled for potentially great periods, simply by the actions of one opponent appealing the approval within the Federal bureaucracy.

Further, it is evident that the purpose of 25 C.F.R. §2.6(a) (1994) is simply to make it clear when, for purposes of the Federal Administrative Procedure Act, a party who feels aggrieved by the actions of the Bureau of Indian Affairs can properly allege, in Federal Court, that all administrative remedies have been exhausted. See e.g., Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Community, 781 F. Supp. 612, at 614-615 (D. Minn., 1991), aff'd 991 F.2d 458 (8th Cir. 1993). Clearly that purpose would not be furthered in any way by interpreting the provisions of the section to delay the effectiveness of enrollment provisions adopted by the Community's General Council.

Therefore, this Court will not interpret the Secretary-approval requirements of Article II, Section 2 of the Community's Constitution to require both the approval of the authorized

representative of the Secretary of the Interior and the exhaustion of all subsequently available administrative appeals from that approval.

From that conclusion follows the further conclusion that the Plaintiffs' Complaint does not state a cause of action against the Defendants. Section 6 of the 1994 Enrollment Ordinance Amendments removed the requirement, contained in the 1993 Enrollment Ordinance, that the Enrollment Officer forward completed applications to the Enrollment Committee within 30 days after the applications are complete. In its stead, the 1994 Enrollment Ordinance Amendments provide a "priority" system, set forth in the sections quoted above; and Section 9 of the 1994 Enrollment Ordinance Amendments made the priority provisions of Section 6 apply retroactively "to all pending applications not yet acted on by the Enrollment Committee".

The Plaintiffs argue, however, that the retroactivity provisions of Section 9 of the 1994 Enrollment Ordinance Amendments actually do not operate to affect their claims. They suggest that Section 9, by its terms, retroactively applies only to the "priority provisions" of Section 6. But to the Court, this narrow reading of the effect of Section 9 would torture logic. If it were adopted, the Enrollment Officer would be obliged to report to the Enrollment Committee within thirty days of the receipt of membership applications which were received prior to the December 28, 1994, regardless of the priority that would attend those applications under Section 6 of the 1994 Enrollment Ordinance Amendments. Effectively, then, the Plaintiffs' reading of Section 9 would give the retroactivity provision no meaning whatever; and that is not acceptable statutory construction.

Section 9 of the 1994 Enrollment Ordinance Amendments clearly was adopted to eliminate the problems which the General Council perceived to have been caused by Section 6

of the 1993 Enrollment Ordinance; and this Court will interpret the effect of Section 9 to be applicable to all applications which were pending before the Enrollment Officer, regardless of when they were completed.

2. Due Process and Equal Protection Considerations.

The Plaintiffs have argued, in the second round of briefing on the motion to dismiss, that if Section 9 of the 1994 Enrollment Ordinance Amendments were intended by the General Council to apply to their applications for membership, then such application would be barred by the due process and equal protection requirements of the Indian Civil Rights Act, 25 U.S.C. §1302 (1994) ("the ICRA"). They assert have asserted that they are entitled to retain the process that was afforded to them by the 1993 Enrollment Ordinance--that the General Council could not legally strip that process away. And they argue that there is no rational basis, consistent with the equal protection provisions of the ICRA, that would justify the priorities established by Section 6 of the 1994 Enrollment Ordinance Amendments.

But, in the view of the Court, nothing in the ICRA would operate to prohibit the General Council of the Community from adopting the 1994 Enrollment Ordinance Amendments, or from making them applicable to all pending applications for membership, including the applications of the Plaintiffs. The law applicable to a case in litigation certainly can change while the case is before a court, perhaps changing the outcome of the case, without offending the litigants' right to due process. Cf., State Highway Department v. Goldschmidt, 629 F.2d 665 (10th Cir. 1980). Nor does the substance of the 1994 Enrollment Ordinance Amendments, as they apply to Plaintiffs, deny the Plaintiffs due process. Whatever may be the property and liberty rights of persons who have applied for membership in the Community, the Community is entitled to

establish, and to amend, systems to deal with their applications. Section 6 of the 1994 Enrollment Ordinance Amendments establishes a system of priorities, and gives first priority to the applications of persons who are children of members of the Community, second priority to persons who are not members of other Indian tribes, and third priority to persons who have relinquished membership in another Indian tribe.

In some future proceedings, the provisions of Section 6 may require interpretation and clarification. The section says that applications "may be accepted and processed pursuant to this Ordinance whenever properly submitted to the Enrollment Officer", and also says that the Enrollment Officer "shall" make a recommendation to the Enrollment Committee no later than six months after an application is received, "subject to the priorities and limitations of this Section". (Emphasis supplied). But the Community and its officers clearly are entitled, in the first instance, to provide a reasonable interpretation of any ambiguities which the section contains. At bottom, the process contemplated by the 1994 Enrollment Ordinance Amendments gives the Enrollment Officer some "breathing space", and presumably increasing her ability to deal with the complex and potentially substantial materials involved in her workload. It is a process which on its face does not violate the due process requirements of the ICRA, and which the Community clearly is entitled to implement. Welch v. Shakopee Mdewakanton Sioux (Dakota) Community, SMSC Ct. No. 023-92 (Findings of Fact, Conclusions of Law, and Order for Judgment filed December 23, 1994).

Nor do the priority provisions of Section 6 of the 1994 Enrollment Ordinance Amendments deny the Plaintiffs equal protection of the law. All parties conceded that the classifications established by Section 6 involve no "suspect classification." Therefore, in the

view of this Court, the Community simply must have a rational basis for its decision. For the first priority established by Section 6--the applications of children of the Community--the Defendants' counsel correctly has argued that a rational basis is established by the Preamble to the Community's Constitution, itself. The persons who adopted the Constitution identified, as their purpose for creating the Community's governmental structure, the securing of the advantages of local self-government for themselves and their children. Surely, then, that purpose provides a rational basis for the first priority in Section 6. And a rational basis for the second priority--persons who are not members of another tribe--can easily be surmised: those persons can reasonably be presumed to be more in need of the benefits of tribal membership than persons who have enjoyed membership in another tribe.

In short, this Court sees no bar in the ICRA to the retroactive applicability of the 1994 Enrollment Ordinance Amendments to the Plaintiffs here.

ORDER

For the reasons stated in the foregoing Memorandum, the Plaintiffs' Complaint is dismissed as moot.

Dated: April 14, 1995

John E. Jacobson, Judge