COURT OF THE SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Amy E. Stade, et al., Plaintiffs,	)	
vs.	)	Case No. 002-88
The Shakopee Mdewakanton Sioux Community, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Summary

This matter comes before this Court on cross-motions for summary judgement, under the provisions of Rule 28 of our Rules of Civil Procedure. The Plaintiffs, members of the Shakopee Mdewakanton Sioux Community ("the Community"), contest the validity of two ordinances ("the Referendum Ordinances"), the purpose of which is to establish a procedure for voter registration and voting by mail for the Community's General Council.

The first ordinance is dated October 2, 1986 ("the October Ordinance"). It contained a "sunset" provision, under which it would expire six months after its effective date, unless it was amended. The second ordinance is dated January 13, 1987 ("the January Ordinance"), and was voted upon by mail, under the procedures of the October Ordinance. The January Ordinance describes itself as a "Bylaw Amendment".

A relatively large number of official actions apparently

have been submitted for vote by the referendum procedure of the two Referendum Ordinances. The Plaintiffs contend not only that the Referendum Ordinances are void, but also that all actions purportedly taken under both also are void.

The Plaintiffs' principal argument in support of their position is that the Referendum Ordinances are inconsistent with the Bylaws of the Community. Article III, Section A of the Bylaws discusses meetings of the General Council. It requires that such meetings be held in public places, and mandates that a defined quorum be present for any such meeting to be effective. The quorum requirements of the Referendum Ordinances--in terms of the fraction of Community members that is required for the Community's General Council to do business--is not different than the requirements in the Bylaws; but both Referendum Ordinances establish procedures under which General Council votes can take place without the necessity of any specific number of Community members gathering together in one place at one time. This, the Plaintiffs contend, varies from the requirements of the Bylaws, and therefore, in their view, neither the October Ordinance nor the January Ordinance could be effective unless they were adopted in a manner that would suffice to amend the Bylaws. The Plaintiffs then argue at some length that neither ordinance was so adopted, and from that argument follows their conclusion that both ordinances, and all actions taken under them, are void.

The Defendants respond by urging that the Plaintiffs lack standing; and they argue that, even if the Court should hold that the Plaintiffs have standing, still the procedures by which the Referendum Ordinances were passed were sufficient to amend the Community's Bylaws.

In considering these arguments, the Court has noted that the Community's Bylaws were not adopted by an election under the provisions of section 16 of the Indian Reorganization Act

of 1934. Rather, they are simply contained in an ordinance, adopted in 1972--an ordinance which in its Article IV states that it cannot be amended unless the amendment carries by "an affirmative vote of two-thirds (2/3rds) of the eligible voters". Neither party has discussed, and we do not find it necessary to reach, a question which this provision may present, relating to the extent to which one session of the Community's General Council can limit the powers of future sessions of that body by imposing requirements that ordinances may not be amended except by a majority larger than fifty percent plus one.

In the view of the Court, the decision of this case in fact does not require us to reach any of the questions which have been argued by the parties. We think that, properly read, the Refendum Ordinances simply are not inconsistent with the Community's Bylaws. Therefore, although the January Ordinance is couched in terms of an "amendment" to the Bylaws, we believe that it is, and the October Ordinance before it was, a wholly consistent supplement to the Bylaws' procedures.

From this view, and from the fact that there is no dispute among the parties that a simple majority of the voters, following proper procedures, adopted both the Referendum Ordinances, it follows that the Defendants are entitled to an Order of Summary Judgment on the question of whether or not the two Ordinances are consistent with the Community's Bylaws.

It is our view, however, that it is inappropriate to dispose of the entirety of this case at this time through Summary Judgment, because there is one aspect of the Referendum Ordinances which may present difficulties. Section 7.B. of the October Ordinance, and section 8.A. of the January Ordinance, provide that persons who are otherwise eligible to vote in General Council proceedings may not vote with respect to their own disenrollment, and further provide that any person related

by blood to such person also shall not be eligible to vote in such proceedings if in some manner the two persons' memberships are "dependent on a common finding of contested fact". We do not find that either party in this matter has briefed the legality of these provisions sufficiently to enable us to rule on their validity. There appears to be no colorable basis in the Community's Bylaws to fault the provisions. But read broadly, we believe the Plaintiffs' Complaint can be viewed simply to contend that the October and January Ordinances are inconsistent with law; and we believe that the parties should be given the opportunity to brief and argue the validity of these provisions, under all applicable law, in specific detail.

Discussion

Because this Court has not been in existence for an extended period of time, the body of case law which it has issued is necessarily small. With this in mind, and considering both the need for establishing a basis upon which parties in the future may ascertain the law which this Court will apply to cases before it, and the importance of the particular issues raised in this case, we believe it is appropriate for us to begin our discussion by acknowledging certain principles of law that will guide us, as they long have guided other courts.

The United States Supreme Court, in Santa Clara Pueblo v. Martinez, 98 S.Ct. 1670 (1978) stated:

> ...as separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.
>
> 98 S.Ct., at 1675.

The Court also observed that this lack of constraint could be modified by the plenary power of Congress:

> As the Court in Talton recognized, however, Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. [cits.]
>
> Ibid, at 1676.

The Court went on to explain that, by enacting Title I of the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§1301 - 1303 (1988), Congress had exercised that plenary authority. The Court held that the ICRA did not authorize any Federal remedies other than habeas corpus; but it stated that tribal forums may vindicate rights created by the ICRA. Accordingly, this Court considers that the ICRA is law which it must and will apply to matters brought before it.

In discussing the manner in which the ICRA should be applied, the Martinez Court noted that--

> By not exposing tribal officials to the full array of federal remedies available to redress actions of federal and state officials, Congress may also have considered that resolution of statutory issues under [25 U.S.C.] §1302, and particularly those issues likely to arise in a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts.
>
> Ibid., at 1683.

This Court is of the view that such tradition and custom clearly is appropriate material for inclusion in its decision-making processes. However, neither of the parties in this case have offered any evidence of tribal tradition or custom regarding the interpretation of tribal laws, in question in this case. Therefore, we will consider the matters before us looking strictly to principles of common law, and to federal and state court decisions which have dealt with similar issues.

Having said that, we will expound on the role of this Court in the Community's affairs. First and foremost, this

Court cannot and will not exercise legislative or administrative powers. It can and will only exercise judicial power. It is not for this Court to make, amend or change the law, but only to apply it. If a statute is constitutional, any unfairness which it may work is a matter for the legislative body and not the Court to correct: What law ought to be is for the legislative body; and what law is, rests with the Court. When the intention of the legislative body has been ascertained, it is the duty of the Court to give full effect to that intention without limiation or qualification of judicial action.

From these principles follows the fact that the legislative body of the Community may exercise its powers to meet the vital needs of a changing society. The legislative body has the essential police powers of government, and those powers are among the least limitable of governmental powers. See District of Columbia v. Brooke, 214 U.S. 138 (1909). The limits of the police power are not capable of exact definition; but the power extends to all matters where the general public welfare, morals, and health of the Community are involved. The police power in its broadest sense includes all legislation and almost every function of civil government. An exercise of police power which is consistent with the Community's Constitution will be upheld where it has for its object the public health, safety, morality or welfare, and where it is reasonably related to the obtainment of those objectives. And the burden of showing that a legislative act is so arbitrary or unreasonable as to abridge the rights of citizens rests upon the complaining party, and is a heavy one, not easily met. See Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931).

It often happens--as it has happened in this case--that courts are called upon to reconcile statutes or ordinances which apparently conflict with one another. Where two validly adopted provisions are in irreconcilable conflict, the one more

recently adopted controls. Great Northern Railway Co. v. United States, 155 F. 945 (8th Cir. 1906), 208 U.S. 452 (1907). And, of course, more particular statutory provisions govern over more general ones. Northern Border Pipeline Co. v. Jackson County, 512 F. Supp. 1261 (D. Minn. 1981); Fagerlie v. City of Willmar, 435 N.W.2d 641 (Minn. App. 1989). But clearly, if possible it is the first duty of a court to construe two enactments of the legislative body in such a manner as to give effect to both. Wichelman v. Messner, 83 N.W.2d 800 (Minn. 1957). Atwell v. Merit Systems Protections Board, 670 F.2d 272 (D.C. Cir. 1981). Sonnesyn v. Federal Cartridge Co., 54 F. Supp. 29 (D.D.C., 1944). It is this last principle which is our chief guide in this case.

The provisions of Ordinance No. 3, adopted by the General Council of the Community on July 11, 1972, serve as the Community's Bylaws. The aspects of that ordinance upon which the Plaintiffs have put their principal reliance are those which discuss public meetings of the Community. In their entirety, those provisions are as follows:

ARTICLE III. MEETINGS.

Section A. General Council Meetings.

1. Regular meetings shall be held the second Tuesdays of January, March, May, July, September and November.

2. Special meetings shall be called:

a. By any member of the Business Council at any time he deems it necessary.

b. By any member of the Business Council upon receipt of a petition signed by at least seven (7) members of the General Council.

3. All meetings shall be held in public places at all times practical, and all eligible voters shall be notified of the time and place in writing by mail with 48 hours notice in advance and a copy of the agenda

to be included with said notice.

4. One-third (1/3) of the eligible voting members of the Community shall constitute a quorum, and no business shall be transacted unless a quorum is present.

In this language there is no specific statement that there must be public meetings in order for the General Council to vote on a matter. Nor is there any specific discription of the manner in which a vote of the General Council must take place. The closest thing to a requirement on either point is the provision of Article III, Section A.4., to the effect that no business may be transacted by the General Council of the Community unless a quorum of one third of the eligible voters is "present".

The Plaintiffs infer from that provision that one cannot have a quorum "present" without having persons together in one room; and since a quorum must be "present" before the General Council can conduct business, the Plaintiffs conclude that the General Council cannot conduct business without meetings.

In our view, however, the quorum requirement in the Bylaws does not foreclose the Community from adopting a procedure where a quorum is deemed to have been "present", in the consideration of a matter, if the requisite number of eligible persons review the matter and cast votes on it, even if those persons do not gather in one room at one time to cast those votes. The word "quorum" does not connote anything more than simply a minimum number of members that is required before a particular body can transact business. See generally, Words and Phrases, Vol. 35A, page 634 (West, 1963). Adding the word "present" to the quorum requirement, though it could be read to require physical simultaneous presence at a meeting, also simply can be read simply to require participation in the deliberation on a matter: from the early days of American jurisprudence, courts have been willing to find, in the context

of governmental decisions, that the word "present" can mean that the requisite number of decision-makers considered and voted on the matter, whether or not they all were present at the same time. See e.g., Niles v. Edwards, 30 P. 134, at 135 (Cal. 1892). Given our obligation, discussed above, to read the Bylaws ordinance and the Referendum Ordinances together in an harmonious manner, we find that this latter interpretation is the appropriate one.

But the Plaintiffs argue that Article III, Section A.3., which requires that all members must receive written notice of special meetings, creates an inference that no business can be transacted unless such a meeting is called. Again, however, the simple fact is that the Bylaws ordinance does not say that. The notice requirement of the Bylaws serves two purposes: it provides assurance that Community members will be given a reasonable chance to arrange their schedules in such a way that they can participate in the Community's affairs, if they choose to do so; and it gives members some chance to consider and deliberate in advance on the items of business on which they will be asked to act. We would be reluctant to find the Referendum Ordinances to be wholly consistent with the Bylaws if either of these purposes were ill-served by them. But in our view, both Referendum Ordinances can be read to be consistent with both of these purposes. (This reading of the Referendum Ordinances may require changes in the procedures which have taken place in the past, but those changes are slight.)

An understanding of the mechanics of the Referendum Ordinances is essential to our holding, here. Under the Ordinances, every member of the Community who is entitled to vote in General Council meetings also is entitled, at any time, to request ballots under the referendum voting procedures. This requesting procedure is straightforward and non-discriminatory: it involves the member providing his or

her notarized signature and current address to the Community's Enrollment Officer. If the request is granted, the member is placed on a list of persons registered to vote under the referendum procedure, and he or she thereafter automatically will receive ballots for all matters submitted for referendum vote. If the ballot request is denied, an appeal process is provided. Matters may be submitted for referendum by members; and the Community's Chairman has broad discretion to determine what other matters that are before the Community's General Council shall be voted upon in this manner.

Each matter that is voted upon by the referendum procedure is the subject of substantial notice: the period in which voting will take place is not be less than ten days in duration. During that period the General Council can meet and discuss matters, provided that no votes may be taken on matters that are pending in the referendum process.

Hence, persons who are on the list of members that have registered for the referendum procedure are given even more notice--more opportunity to deliberate on the matters before them, to discuss them with others, and to arrange their schedules in such a fashion that they can participate in the governmental process, if they choose to--than they would receive if all matters were dealt with at Community meetings which, under the Bylaws, could be called on two days notice. As to those persons, then, we do not see that the notice provisions of the Bylaws in any way conflict with the Referendum Ordinances. But matters are on a different footing for members who have elected not to request referendum ballots. Those persons, as we see it, might not be notified of fundamental changes that are being considered by the General Council. This, we think, is inconsistent with the spirit, if not the letter, of the notice provisions of the Bylaws. The Bylaws do not require that business be done by meetings; but we believe that, fairly read, they do require that every member of

the Community who would receive notice of a General Council meeting must also receive notice that a matter is being considered for referendum vote.

We are not saying, by the foregoing, that ballots must be sent to all such persons: the ballot request and verification procedures in the Referendum Ordinances are unobjectionable. But we believe that, to harmonize the Referendum Ordinances and the Bylaws, it is necessary that all persons who might be eligible to successfully request referendum ballots be notified of the nature of the matters that will be voted by referendum procedure. In that manner, members who have chosen not to register for the referendum process can make an ongoing, informed choice as to the consequences of continuing to fail to register. Assuming that, in the future, referendum voting procedures are handled in this way, we do not believe they conflict with the Bylaws.

However, if such notice has not routinely provided to Community members in the past--and we believe from the record that it has not--we do not hold that the many actions taken by the General Council by referendum are thereby void. Counsel informed the Court during oral argument on this matter that the level of Community participation in the referendum procedure was over fifty percent, and that every member of the Community has been informed by certified mail of his or her ongoing right to participate in the process. So, persons who are not participating in the process at this time can reasonably be said to have made the conscious choice not to do so. Ordinarily, if a Court decides that a modification is necessary in the reading of a statute which has been in place for a period of time, the Court will not upset the actions that previously have been taken under that statute if the actions were taken in good faith. Here, reinforcing the thrust of that doctrine, it would be a complete miscarriage of justice to work disruption of settled governmental decisions simply at the

behest of persons who for their own reasons elected not to attempt to participate in those decisions.

We have reached the foregoing conclusions, harmonizing the Bylaws and the Referendum Ordinances, mindful of the fact that it is not undesirable for a government like the Community's to meet and air the views of all members before transacting business. But the Community's decision to adopt a system where voting by mail is an option is clearly within the legislative prerogative. From the materials before the Court, it is evident that the community's history is a tumultuous one, where meetings of the General Council have been marred by violence and disorder. Under these circumstances, the Community's exercise of its police power to adopt the Referendum Ordinances is not an unreasonable one.

As a final matter, the Plaintiffs objected, in their written materials, to certain procedural aspects of the October, 1987 meeting of the General Council, at which the October Ordinance was approved. But in oral argument before this Court on January 17, 1989, the Plaintiffs waived their objections to these matters. Therefore, we do not here consider them.

As we have noted above, the thrust of our Opinion and Order is that the Referendum Ordinances are not inconsistent with the Community's Bylaws. Therefore, the Plaintiffs' objections to the Referendum Ordinances, based upon the argument that the procedures by which they were adopted were inadequate to amend the Bylaws, are irrelevant to the Ordinances validity. We hold that the Defendants are entitled to Summary Judgment as to the consistency of the Referendum Ordinances with the Bylaws. But we hold open for further proceedings the issue of the consistency with applicable law of Section 7.B. of the October Ordinance and Section 8.A. of the January Ordinance.

ORDER

Based upon the foregoing, and all of the pleadings, materials, and argument herein, it is hereby ordered:

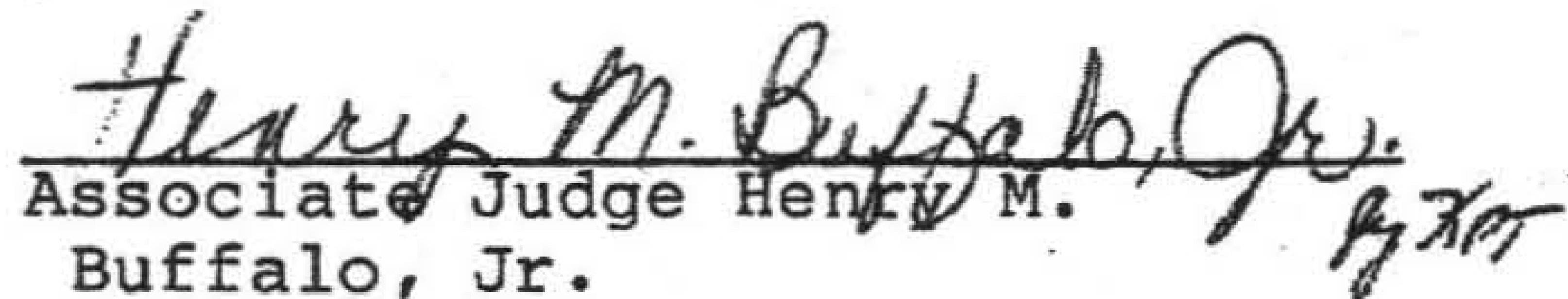
1. The Plaintiffs' Motion for Summary Judgment is denied.

2. The Defendants' Motion for Summary Judgment is granted, as to the issue of the consistency of the October and January Referendum Ordinances with the Bylaws of the Shakopee Mdewakanton Community; and

3. The Defendants' Motion for Summary Judgement is denied, as to the portions of the Plaintiffs' Complaint that relate to the consistency of Section 7(b) of the October Referendum Ordinance, and Section 8(a) of the January Referendum Ordinance, with other applicable law.

Date: 4/13/89

Chief Judge Kent P. Tupper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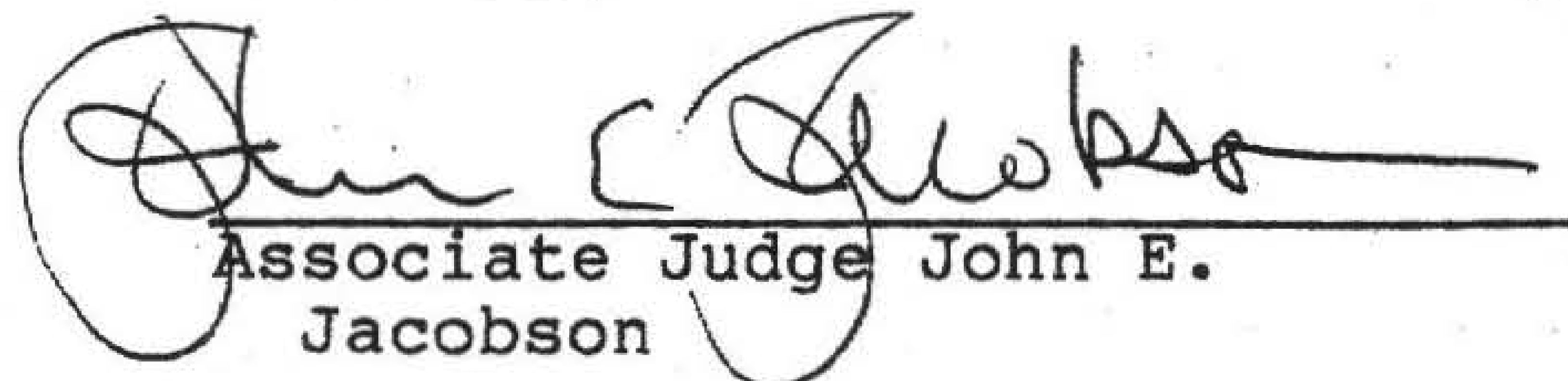
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