IN THE COURT OF APPEALS OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Louise B. Smith, Winifred S. Feezor, Cecilia M. Stout, Alan M. Prescott, Cynthia L. Prescott, and Patricia A. Prescott, Appellants, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Business Council, Stanley R. Crooks, Kenneth Anderson, Darlene McNeal, in their official positions as members of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council and individually; Shawn Bielke, James Bigley, Robert Bigley, Anthony Brewer, Teresa Coulter, Cheryl Crooks, Clarence Enyart, Stephen Florez, David Matta, Don Matta, Elizabeth Totenhagen, Robert Totenhagen, Barbara Anderson, James Anderson, Keith Anderson, Jr., Lesli Beaulieau, Lisa Beaulieau, Lori Beaulieau, Walter Brewer, Jennifer Brewer, Roberta Doughty, Selena Mahoney, Lori Ann Stovern, Linda Welch, and Maxine Woody, Respondents.	COURT OF APPEALS FILE NO. 011-96

MEMORANDUM DECISION AND ORDER

Before Judges John E. Jacobson and Robert GreyEagle. (Judge Henry M. Buffalo, Jr. took no part in this decision).

Summary

In this action, the Plaintiffs/Appellants contend that business proceeds owned by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") have been distributed to persons who are not eligible to receive those proceeds, under the Community's 1988 Business Proceeds Distribution Ordinance, Ordinance No. 12-29-88-001 ("the BPDO") and the 1993 amendment thereto, Ordinance No. 10-27-93-002 ("the Amended BPDO"). The Defendants/Respondents are the Business Council of the Community ("the Business Council"), the three persons who were serving on the Business Council at the time this action was filed, and the twenty-seven persons who, it is claimed, have improperly received the business proceeds.

This appeal is from a December 16, 1996 Order, by Judge Buffalo, granting the Defendants/Respondents' Motion to Dismiss the Amended Complaint for failure to state a claim under which relief can be granted, under Rule 12(b)(6) of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community.

Because prior decisions of this Court, and the record of the Community, clearly establish that the complained-of payments are consistent with the law, we affirm.

Scope of Review

As we stated in Welch v. the Shakopee Mdewakanton Sioux (Dakota) Community, App. No. 009-96 (Shak. Ct. App., decided October 14, 1996), the standard for this Court's review, on appeal, of an order of dismissal, under Rule 12(b)(6), is de novo.

Dismissals under our Rule 12(b)(6) are appropriate only if there is no reasonable view of the facts alleged in the Complaint which would support the Plaintiffs' claim. See generally, Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157 (Fed. Cir. 1993). In making such a decision, we naturally begin with the four corners of the Complaint; but we also will consider pertinent matters of public record--statutes and ordinances of the Community, decisions of administrative bodies, and decisions of courts of record, including, of course, our own decisions. And in that last regard, we think it is appropriate to adopt the approach of the United States Court of Appeals for the Second Circuit, in Day v. Moscow, 955 F.2d 807 (2nd Cir., 1991), cert. denied 113 S.Ct. 71 (1992), and the United States Court of Appeals for the Ninth Circuit, in Commodity Future Trading Commission v. Co Petro Marketing Group, Inc., 680 F.2d 573 (9th Cir. 1982), which permits us to take judicial notice of matters which are of record in litigation which previously has been before us.

History of the Case

The Appellants initiated this litigation on October 18, 1995, and filed an Amended Complaint on January 9, 1996. On January 10 1996, the Respondents filed a Motion to Dismiss. The parties then attempted to settle the case; those attempts were unsuccessful; and on June 19, 1996, after a hearing on the record, Judge Buffalo

granted the Respondents' Motion to Dismiss[1]. On December 16, 1996, Judge Buffalo filed a written Memorandum setting forth in more detail the basis for the dismissal, and this appeal followed.

Discussion

In deciding this appeal we are again obliged to visit the history of the BPDO and the Amended BPDO, and the Community's history of accepting persons into Community membership under the provisions of Article II, section 2 of the Community's Constitution.

The BPDO was adopted in 1988. It mandated that the Business Council make monthly payments, from all of the Community's business proceeds, to persons who were named in lists which were appended to the ordinance. We have observed that the BPDO was adopted by the Community's General Council as a grand compromise, to resolve "nearly constant turmoil" over membership rights. See Ross v. Shakopee Mdewakanton Sioux Community, No. 013-91 (decided July 17, 1992), at 1.

It is clear from the face of the BPDO that some of the persons who received payments under the BPDO, including three of the individually named Respondents here (Walter Brewer, Cheryl Crooks, and Linda Welch), are not members of the Community. The list of

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[1] Appellants' counsel failed to timely file any response to the Motion to Dismiss, and accordingly was not permitted to make oral argument to Judge Buffalo on June 19, 1996. On appeal, the Appellants have moved to supplement the record with significant amounts of material which were not before Judge Buffalo. Judge Buffalo's decision certainly was not inappropriate, under the circumstances. But under the standard we have articulated in this opinion, we think the some of the materials submitted by the Appellants are appropriate for judicial notice, and we therefore have considered them in deciding this appeal.

names, on which those persons appeared, was captioned "Persons who are not Mdewakanton but who now receive payments as Indian spouses of members". Hence, when the BPDO was adopted, the Community's General Council obviously was perfectly aware that the persons on that particular list were not members of the Community; and the General Council nonetheless concluded that payment to those persons, for their health and welfare was appropriate and warranted.

Some time ago, this Court held that, under the BPDO, the Business Council had no discretion with respect to the payments that it made. Specifically, we held that during the effective life of the BPDO, the Business Council was mandated to make payments to the persons whose names appeared on the ordinance's lists. Welch v. Shakopee Mdewakanton Sioux Community, No. 022-92 (decided June 3, 1993), at 5.

The Community's payment system changed in 1993, with the passage of the Amended BPDO. Section 14 of the Amended BPDO denied any future payments, derived from the Community's gaming enterprises, to persons other than Community members. The General Council of the Community chose instead to provide for the welfare of non-members who in the past had received payments under the BPDO by adopting a Non-Gaming Program Allowance Ordinance, Ordinance No. 10-27-93-003 ("the NGPAO"). Section 2 of the NGPAO provides:

> The following individuals are receiving revenue allocations under the Business Proceeds Distribution Ordinance. However, because of new requirements issued by the Secretary of Interior, it has become clear that non-members of Tribes cannot receive revenue allocations from Tribal gaming revenues. These individuals cannot qualify to receive gaming

revenue allocations to them shall cease:

1. Todd Weldon
2. Ron Perrault
3. Linda Welch
4. Walter Brewer
5. Cheryl Crooks

Section 3.1 of the NGPAO provides that those five listed persons will receive an allowance of four thousand dollars per months from the Community's non-gaming revenues.

The provisions of the Community's Constitution which relate to Community membership, like the BPDO and the Amended BPDO, repeatedly have been before this Court; and those proceedings have established, inter alia, two conclusions--one general and one specific--which directly bear on this appeal:

First (the general conclusion), it is clear that from the earliest days, following the adoption of the Community's Constitution in 1969, the Community's General Council has interpreted the authority which is granted in Article II, section 2, to permit the "voting in" of new members to the Community without requiring those persons to demonstrate that they possess one-quarter degree Mdewakanton blood; and we have held that that practice was and is a reasonable and fair interpretation of Article II, section 2, of the Community's Constitution, to which we should defer. See, In Re: Election Ordinance 11-14-95-004, (decided January 5, 1996), at 11.

Second (the specific conclusion), all of the non-Business Council Defendants in this matter--except for Walter Brewer, Cheryl Crooks, and Linda Welch, who concededly are not members, and who do

not receive monies under the Amended BPDO--already have been determined by this Court to be members of the Community. Specifically, the membership of each of those persons was challenged in the last election of the Community; the extensive documentation relating to the adoption of each was examined by this Court; and the membership of each was upheld. Again, see In Re: Election Ordinance 11-14-95-004, supra.

With this background, it becomes apparent why Judge Buffalo's dismissal of the Amended Complaint must be affirmed. The entire thrust of the Amended Complaint was that the Business Council Defendants violated Community law by paying monies to the twenty-seven named individual Defendants, and that the twenty-seven individual Defendants should be required to disgorge the payments they received. The violation of Community law allegedly flowed from the fact that none of the twenty-seven was a "qualified enrolled member" of the Community. But, as we have noted, the payments which were made to the twenty-seven persons under the BPDO were mandated by the law of the Community; and the payments which have been made since, under the Amended BPDO and the NGPAO, are entirely consistent with the status of the twenty-seven recipients: the three persons among that group who are not members of the Community do not receive any monies under the Amended BPDO, and the remaining twenty-four persons previously have been determined by this Court to be members of the Community and therefore are entitled to receive monies under the Amended BPDO.

Nothing in the materials submitted by the Appellants to

"supplement the record" alters our conclusions. Among those materials are a decision by a Interior Department Secretarial Election Board, in connection with an April, 1995 election on proposed amendments to the Community's Constitution; a subsequent decision by the U.S. Department of the Interior's Assistant Secretary -- Indian Affairs, with respect to the same election; and a decision of the United States District Court for the District of Columbia, in Feezor v. Babbitt, Civil No. 96-1678 (D.D.C., decided December 20, 1996).

The Election Board decision and the decision of the Assistant Secretary set forth the views of those officials as to the eligibility of certain persons, who are not parties to this litigation, to vote in the Constitutional referendum election held by the Secretary of the Interior in 1995. Neither the Election Board decision nor the decision of the Assistant Secretary addresses or affects this Court's long-established conclusion that Article II, section 2 of the Community's Constitution always has permitted, and continues to permit, the Community to adopt persons into membership without scrutinizing their degree of their Mdewakanton blood. And neither of the two administrative decisions in any way concerns the propriety of payments made under the BPDO or the Amended BPDO.

Nor does the decision of the United States District Court in Feezor v. Babbitt impact this litigation. In that decision, United States District Judge James Robertson remanded, to the United States Department of the Interior, an appeal (by many of the

persons who are Appellants here) from an administrative decision approving the Adoption Ordinance under which the Community currently operates. Judge Robertson's holding was not that the Adoption Ordinance was invalid, but that the record of the Department's decision required supplementation. And as with the agency materials just discussed, nothing in the District Court's decision suggests to us that our conclusions with respect to the effect of Article II, section 2 of the Community's Constitution, or the BPDO, or the Amended BPDO, are erroneous.

The Appellants also submitted lists of persons receiving payments from gaming revenues. Assuming these are public records with respect to which we appropriately can take notice, the lists actually serve to confirm that the three non-member Defendants are not participating in those revenues. And nothing in the remainder of the documents (correspondence, handwritten notes on lists, etc.) operates to change our conclusion that the Amended Complaint was properly dismissed for failing to state a claim upon which relief can be granted.

ORDER

For the foregoing reasons, the decision to dismiss the Amended Complaint in this matter is AFFIRMED.

August 7, 1997

John E. Jacobson
Judge

Robert GreyEagle
Judge