





Although many of the cases which this Court has considered in the seven and one-half years of its existence have presented issues of great importance to the future of the Community, in the view of the undersigned none has been more significant than this case. In the balance here, on the one hand, is the understandable desire of the membership of the General Council to achieve stability and predictability in the Community's affairs and structure; and, on the other hand, is the fundamental need for the lawmaking body of the Community to have the power to make law.

In deciding this case, it has been valuable to look outside the Community for precedents; but the centrally important considerations have come from the Community's own history and governing documents. From its inception, the Community has employed the device of requiring supermajorities to amend legislation as a means of achieving structural stability; but it has employed the device sparingly, and only in matters most vital to Community functioning. It is the Court's conclusion that the ordinance at issue here, while undeniably important, is not of the character that justifies a supermajority requirement for its amendment. The Court therefore grants the Defendants' Motion for Judgment on the Pleadings, pursuant to Rule 12(b)(6) of this Court's Rules of Civil Procedure.

#### Factual Background

This action was filed on May 16, 1994. In their Complaint, the Plaintiffs set forth the provisions of Resolution No. 8-12-88-1, and alleged that on March 31, 1993 the General Council of the



Community met and considered Resolution No. 03-31-93-001, the terms of which would repeal Resolution No. 8-12-88-1. The Plaintiffs alleged that the General Council vote on the motion to approve Resolution No. 03-31-93-001 was 38 for, 18 against, 1 abstention, and that at the time of the vote there were 75 enrolled and eligible voting members of the Community. They alleged that the Gaming Ordinance which was the subject of Resolution No. 03-31-93-001 purported both to create a Gaming Commission ("the Gaming Commission") and to require that certain employees of the Community's gaming enterprises be licensed by the Gaming Commission. The Plaintiffs alleged that they were such employees (Mr. Prescott was the Chief Executive Officer, and Mr. Johnson was the Chief Operating Officer, of Little Six, Inc., a corporation chartered by and wholly owned by the Community, which owned and operated the Community's gaming ventures), and that on or about May 5, 1994 the Gaming Commission acted to suspend their gaming licenses.

The Plaintiffs sought temporary and permanent injunctive relief, and a declaratory judgment, based on their contention that Resolution 03-31-93-001 never had been adopted by the Community--because an absolute two-thirds majority of all eligible voters of the Community had not voted in favor of the Resolution--and therefore the Gaming Commission was a nullity, having never been legally created. On May 17, 1995, this Court denied the Plaintiffs' Motion for a Temporary Restraining Order that would have prevented the Gaming Commission from conducting hearings with



respect to the Plaintiffs' licenses. (The validity of subsequent action by the Gaming Commission with respect to the Plaintiffs' gaming licenses is the subject of another case, In re Leonard Louis Prescott Appeal from 7/1/94 Gaming Commission Final Order, No. 041-94 [decided December 12, 1994], appeal pending, Ct. App. No. 003-95]).

The Defendants' Answer admitted that the Plaintiffs correctly had stated the terms of Resolution No. 8-12-88-001 and Resolution No. 03-31-91-001, and had correctly stated the vote of the General Council on Resolution No. 03-31-93-001 and the number of members in the Community. But the Defendants contended that this Court lacked jurisdiction over the Plaintiffs' claims, that the Plaintiffs failed to state a claim, under Rule 12(b)(6) of this Court's Rules of Civil Procedure, that the matter was moot, and that the Plaintiffs were estopped from raising their claim by their previous acquiescence, for more than one year, to the requirements of Resolution 03-31-93-001. The Defendants then moved to dismiss, on the grounds stated in their Answer, and on the additional grounds that the passage of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 - 2721 (1994) pre-empted Resolution No. 8-12-88-001, and that this Court should refrain from deciding this matter because it presented a "political question". Their motion was fully briefed and argued to this Court.

Today this Court does dismiss the Complaint, albeit on grounds different than those argued by the Defendants.



### Discussion

At the outset, it may be worthwhile for the Court to discuss why the grounds urged by the Defendants as reasons for dismissal are the not basis for this decision.

First, this Court rejects the assertion that the General Council has not waived the Community's sovereign immunity from unconsented suit with respect to this matter. In pertinent part, Ordinance No. 02-13-88-01, which established this Court, provides:

Jurisdiction. The Shakopee Mdewakanton Sioux Tribal Court shall have original and exclusive jurisdiction to hear and decide all controversies arising out of the Shakopee Mdewakanton Sioux Community Constitution, its By-laws, Ordinances, Resolutions, other actions of the General Council, Business Council or its Officers or the Committees of the Community pertaining to: ... 3- the procedures employed by the General Council, the Business Council, the Committees of the Community or the Officers of the Community in the performance of their duty. The Tribal Court shall also have jurisdiction to hear and decide all controversies arising out of actual or alleged violations of the Indian Civil Rights Act of 1968, 25 U.S.C. §1301, et seq. ...

In one of the earliest decisions of this Court, the three judges of the Court held, in Stade v. Shakopee Mdewakanton Sioux Community, No. 002-88 (July 15, 1988), that when the General Council of the Community passed Ordinance No. 02-13-88-01, it intended to waive, and did explicitly waive, the immunity of the Community and its institutions with respect to "all controversies" arising out of the Community's Constitution, and out of the actions of the General Council.

The questions presented by this case are precisely whether the actions of the General Council were effective to adopt Resolution 03-31-93-001--a matter which this Court clearly has the



jurisdiction to decide.

The Defendants also argue that the Plaintiffs' Complaint should not be heard because section 11 of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2710 (1994) ("the IGRA") "pre-empted" the effect of Resolution No. 8-12-88-001. The IGRA, which became effective on October 17, 1988, requires, inter alia, that the gaming ordinances of Indian tribes meet certain requirements. Individuals who serve Indian tribes as "primary management officials" and "key employees" must be the subject of background checks and licenses; and in the licensing process, the tribes must provide certain information to the National Indian Gaming Commission ("the NIGC"). 25 U.S.C. §§2710(b)(2)(F) and 2710(d)(1)(A)(ii). On February 22, 1993, the NIGC adopted regulations, appearing at 25 C.F.R. Parts 522 and 523 (1994), which detail the requirements that Indian tribes' gaming ordinances must meet.

Clearly, the gaming ordinance adopted by Resolution No. 8-12-88-001 does not meet the requirements of the IGRA or the regulations of the NIGC. But it does not follow, from that fact, that the IGRA or the regulations of the NIGC preempted the effect of Resolution No. 8-12-88-001. Neither the IGRA nor the NIGC regulations establish the affirmative, substantive law of the Community with respect to gaming. Rather, they establish the requirements which the Community must adhere to--the legislative and administrative structure and controls which the Community itself must put in place--if the Community wishes to engage in



gaming under the IGRA. In other words, neither Congress nor the NIGC adopted a gaming ordinance for the Community; rather, they specified what sort of ordinance the Community would be obliged to adopt if, but only if, the Community wished to continue operating its gaming businesses. And the question before this Court is whether the Community succeeded in adopting the ordinance that is required. (The fact that the NIGC approved the ordinance adopted by Resolution 03-31-93-001 also is immaterial, because, as the Plaintiffs note, the Chairman of the NIGC, in his letter approving the ordinance, only examined whether the terms of the ordinance fit with the terms of the IGRA and the NIGC's regulations, not whether the ordinance was properly adopted as a matter of the law of the Community).

Nor does the Plaintiffs' delay in bringin this action control this Court's decision. Although this Court denied the Plaintiffs' motion for the extraordinary remedy of a Temporary Restraining Order at least in part because the Plaintiffs had waited for more than a year to challenge Resolution 03-31-93-001, and because the Plaintiffs had not exhausted their tribal remedies under the ordinance, that delay does not figure in the Court's decision on the Defendants' motion here. The Plaintiffs' contention is that the Community is purporting to operate under a law, of general and ongoing effect, that is not truly the law. If that contention were true, then as a matter of equity the harm that would be worked to the Community at large by permitting the situation to continue would outweigh the fact that the Plaintiffs had sat on their rights



for more than a year before bringing this action.

But that contention--that Resolution 03-31-93-001 is not the law--is erroneous, in the view of this Court. It is erroneous because the supermajority requirement contained in Resolution No. 8-12-88-001 violates both the Constitution of the Community and the Indian Civil Rights Act, and therefore is void.

The Constitution of the Community, which is the most central document to this inquiry, is very general, but is not without provisions of significance. Under the Constitution, there is one governing body:

The governing body of the Shakopee Mdewakanton Sioux Community shall be a general council, composed of all persons qualified to vote in community elections. ...

Constitution, Art. III

The Constitution gives that governing body sixteen enumerated powers, including the power to bind itself, at least in certain circumstances:

...The general council shall exercise the following powers...

(i) To adopt resolutions regulating the operation and procedures of the council itself and of other community committees, agencies and officials.

Ibid., Art. V.

And the Constitution incorporates the provisions of the United States Constitution and (given the nature of the guarantees specified) the equal protection and due process guarantees of the Bill of Rights:

All members of the community shall be accorded equal opportunities to participate in the economic resources



and activities of the community. All members of the community may enjoy, without hindrance ... due process of law, as guaranteed by the Constitution of the United States.

Ibid., Art. VI.

As the Defendants have argued, Congress and the legislatures of the United States have generally been held to have no power to bind future Congresses and future legislatures. Woodruff v. Trapall, 51 U.S. (10 How.) 190, at 208 (1850). And it would appear that these holdings would flow, at least in part, from the guarantees of due process and equal protection, which are imposed on the General Council by the Community's Constitution and the Indian Civil Rights Act. If the legislature elected by one set of voters could in some way bind all successor legislatures, then the voters who would be electing subsequent legislatures clearly would not stand on an equal footing with those who elected the first legislature.

But the General Council of the Community is unique to the Community. It not only is the legislative branch. To the extent it has not delegated its executive and judicial powers, it also is the executive and judicial branch, as well. The Constitution gives it the authority "to adopt resolutions regulating the operation and procedures of the council". And--if that power is to have any meaning--there must be some matters in which the decision of one General Council will bind future General Councils, at least with respect to some matters.

But what matters? Clearly, the General Council could not--to take the most extreme example--adopt a resolution which provided that no future resolutions could amend any previous General Council



actions. If such an action were effective, it would write out of existence the Constitutional powers of the General Council, and the equal protection and due process rights of the members of the Community.

On the other hand--and this is a matter of considerable significance to the Court--if the General Council never could impose a greater-than-simple-majority requirement, as a condition of amending ordinances, then the resolution by which the Community's Bylaws themselves were adopted would be of no effect. The Community's Bylaws were adopted not as a part of the Constitution's adoption, but subsequently, by Resolution No. 3, on July 11, 1972. And Article IV of the Bylaws provides:

These Bylaws may be amended or rescinded at any time by action of the General Council in any regular meeting, by an affirmative vote of two-thirds (2/3) of the eligible voters.

From this provision, adopted at a very early date in the history of the Community's government (less than three years after the Community's Constitution itself was approved by the Secretary of the Interior), we conclude two things: First, that the General Council indeed does possess the power to impose "supermajority" requirements upon future General Councils; and second, that power is limited to matters like the Bylaws--matters which are fundamental to the structure of the Community's government.

The gaming ordinance which was adopted by Resolution 8-12-88-001 is not fundamental to the structure of the Community's government. It established a structure for regulation and licensing, to respond to a particular economic and regulatory



environment relating to gaming. By its nature, the economic and regulatory environment relating to gaming in the United States is a changing one; and no purpose relating to the fundamental structure of the Community would be served, in the view of this Court, by limiting the ability of the General Council to respond to those changes through the imposition of supermajority requirements on gaming ordinances.

It is the conclusion of this Court, then, that the Defendants' motion to dismiss this matter for failure to state a cause of action is well taken. The single cause of action which the Plaintiffs sought to state relates to the fact that Resolution No. 03-31-93-001 was adopted by a simple majority of the General Council. That majority, in the view of the Court, was sufficient, because Resolution No. 8-12-88-001 could not, consistent with the due process and equal protection requirements of the Community's Constitution and the Indian Civil Rights Act, impose the requirement of a different majority upon the General Council.

ORDER

For the foregoing reasons, and based upon the all pleadings and matters herein, it is herewith ordered that this matter be dismissed.

July 31, 1995



John E. Jacobson  
Judge of the Court of the  
Shakopee Mdewakanton Sioux  
(Dakota) Community