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TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Clifford S. Crooks Sr. Court File Number 054-95

Plaintiff,

v.

Shakopee Mdewakanton Sioux
(Dakota) Community,

Defendant.

MEMORANDUM

INTRODUCTION

This matter is before the Court to resolve the remaining issue as to whether or not the Plaintiff, Clifford S. Crooks Sr., is entitled to an award of damages from the Defendant, Community, for allegedly violating his rights under the due process and equal protection clauses of the Indian Civil Rights Act of 1968 and the Community's Constitution by intentionally preventing timely consideration of his enrollment application thereby denying his membership and the rights of membership including voting rights and community benefits for a ten month period. The Defendant, has submitted its Motion to Dismiss under Rule 12(b) (6). This matter was previously before the Court on a related matter wherein the Plaintiff, filed suit against the Defendant asking the Court to either "recognize" his membership in the Community or to make him a member of the

Community by order of the Court. The Trial Court in that matter dismissed the Plaintiff's motion finding the Plaintiff had not exhausted tribal administrative remedies in the form of the Community's Enrollment Ordinance. The dismissal was appealed and the Community's Court of Appeals reversed and remanded the issue for consideration of the case under the Community's 1993 Enrollment Ordinance, No. 06-08-93-001, which is in effect. The issue as to whether the Plaintiff should be a member of the Community has been rendered moot vis- -vis the Community's Enrollment process. The Community has since, through their General Council, voted the Plaintiff into membership on June 20, 1996. The Plaintiff now asserts that he is entitled to retroactive payments. The reasoning put forth by the Plaintiff is that had the Community acted sooner he would have been entitled to membership and the rights of membership sooner. The Plaintiff further asserts that the Community intentionally deprived him of his membership and membership rights and as a result he is entitled to damages equivalent to the amount of per capita payments covering the time period when he felt the Community should have acted on his enrollment application. The Court having heard the matter on oral argument and having reviewed the file and the pleadings contained therein hereby issues the following:

MEMORANDUM

The Court must weigh the arguments put forth by both the Plaintiff and the Defendant in light of the Motion to Dismiss filed by the Defendant, Community pursuant to Rule 12 (b) (6) of the Community Rules of Civil Procedure. In so doing, the Court must examine whether the Plaintiff has in fact stated a claim for relief upon which the Court can grant the relief requested. The Plaintiff's status has changed from mere

enrollment applicant to being an enrolled member with certain vested rights such as entitlement to participate in the Community's financial programs, and can now vote on Community matters and so forth. With the change of status from enrollment applicant to membership does not mean his membership rights are retroactive to the time of application or any other time other than the actual time when he was voted into membership under the Community's Enrollment Ordinance.

Prior to being actually voted into membership the Plaintiff's status was that of enrollment applicant. Enrollment applicants certainly can not participate as actual members of the Community by receiving per capita payments, voting and having membership rights in the Community. It is the Courts understanding that an integral component of the enrollment process is the vote of the Community's General Council on qualified enrollment applicants into membership. As discussed and elaborated upon in F.Cohen, Handbook of Federal Indian Law (1982) at pg. 20, "Tribal Power to Determine Membership", the Courts have consistently held that Indian Tribes' most basic and paramount power is their ability to establish their membership requirements and define their membership. F.Cohen, supra, further cites Santa Clara Pueblo v. Martinez, 436 U.S. 49, at 72 n. 32 , wherein the Court held "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence....[t]he judiciary should not rush to create causes of action that would intrude on these delicate matters."

Even if the Community had acted on the Plaintiff's enrollment application in accordance with his wishes, there was no guarantee the Community's General Council would have voted him into membership at that time. In fact in support of this statement

the Court looks to the Affidavit of Stanley Crooks at 2. which states, "I was present at and presided over a General Council meeting on February 13, 1996, during which the General Council voted to reject Clifford S. Crooks Sr.'s application for enrollment." The same Affidavit later states at 4., "Clifford S. Crooks Sr.'s enrollment application was again presented to the General Council on June 20, 1996. I was present at and presided over that meeting and know that Clifford S. Crooks Sr. was accepted into membership by the General Council on that date." The Court can not and will not dictate to the Community General Council as to how they should vote on any given enrollment application. Therefore the Court cannot conclude that had the Plaintiff's enrollment application been processed sooner it would have been voted on favorable to him by the General Council. That is pure speculation.

Awarding damages on what the Plaintiff thinks might have happened on his enrollment application had it been processed sooner is beyond the purview of this Court to even consider. There is no guaranting that had the application been processed sooner, the General Council would have voted him in sooner. In fact, the General Council voted to reject his application first and then subsequently voted him in at a later meeting.

The Plaintiff argues that his claim is distinguishable from the claims asserted in the Amundsen v. SMS(D)C Enrollment Committee, Case No. 049-94, (September 16, 1996), and Amundsen v. SMS(D)C Enrollment Committee, Case No. 049-94, (April 14, 1995), in that Plaintiff asserts as a factual distinction he was never a member of another tribe such as the Plaintiffs in the Amundsen case were members of other tribes. What is not distinguishable and what is important in this matter is that both the Plaintiff here in this

case and the Plaintiffs in the Amundsen case allege had the enrollment officer acted sooner they would have been enrolled members. The status of the Plaintiffs may have been different as to their membership elsewhere but their cause of action is similar and legally indistinguishable from the case at hand. The holding of this case therefore applies in that the Court is unable to compensate the enrollment applicant for not having their applications acted on sooner.

The status of being a mere enrollment applicant as opposed to being a member with vested rights is comparatively held in the same light as to applicants for benefits anywhere else as discussed in the pleadings filed in this matter and by the Supreme Court in its holding that it has "never held that applicants for benefits, as distinct from those already having them, have a legitimate claim for entitlement protected by the Due Process Clause of the Fifth and Fourteenth Amendment." Lyng. v. Payne, 476 U.S. 926,942 (1986) citing Walters v. National Assn. Of Radiation Survivors, 473 U.S. 305, 320 n. * (1985). An enrollment applicant does not have a property or liberty interest to protect. Therefore, the Court need not further examine whether a due process right had been violated. Therefore, the Court concludes that there is no violation of the Indian Civil Rights Act 25 U.S.C. § 1302 that can be ascertained upon an examination of the legal status of the Plaintiff when he was an enrollment applicant. This is consistent with the holding of Kentucky Dept. of Corrections v. Thompson, 590 U.S. 454, 460 (1989) wherein the holding was if there was a liberty or property interest found to exist then the Court could go to the second stage of examination on whether procedures attendant upon the deprivation were constitutionally sufficient."

CONCLUSION OF LAW

The plaintiff in his prior capacity as an enrollment applicant did not have a legal claim compensable by this Court and any award for damages would be entirely speculative.

Date: February 10, 1997

Robert Gray Eagle

Robert A. Grey Eagle, Judge,
Tribal Court

TRIBAL COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Clifford S. Crooks Sr.

Plaintiff,

v. Court File 054-95

Shakopee Mdewakanton Sioux (Dakota)
Community,

Defendant.

ORDER AND MEMORANDUM

The above-entitled matter came on for hearing before the undersigned Judge of Tribal Court on the 12th day of November, 1996, at 2330 Sioux Trail Northwest in the City of Prior Lake, County of Scott, State of Minnesota, pursuant to the Defendant's Motion to Dismiss.

Larry B. Leventhal, Esq. appeared on behalf of the Plaintiff. Vanya S. Hogen-Kind, Esq. appeared on behalf of the Defendants.

The Court being fully advised of the premises, and based on the files, records and evidence herein, as well as the arguments of counsel for both parties,

IT IS HEREBY ORDERED,

1. That the Defendant's Motion to Dismiss be, and hereby is, GRANTED; and,

2. That the attached Memorandum of Law be, and hereby is INCORPORATED into, and made a part of this Order.

Date: February 10, 1997

Robert Grey Eagle
Robert A. Grey Eagle, Judge

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

FILED FEB 10 1997

CARRIE L. SVENDAHL
CLERK OF COURT

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

Vance Gillette,

Plaintiffs,

v.

Karen Anderson, Barbara Anderson,
and Keith Anderson,

Defendants.

Court File Number 085-96

MEMORANDUM

INTRODUCTION

This matter is before the Court to resolve a dispute between the parties over the amount of attorney's fees owed to the Plaintiff, Vance Gillette, by the Defendants, Barbara, Karen and Keith Anderson, which shall hereinafter be referred to respectively as the Plaintiff or the Defendants. The basis of the dispute goes to the meaning of the contingency fee clause contained in the attorney-client agreement regarding Plaintiff's representation of the Defendants. The Plaintiff's representation involved establishing a right to per capita payments and receiving compensation back to 1988 on the Defendants' behalf. In return, the parties agreed that the Plaintiff would be entitled to recover 30% of any initial benefits and back pay should that be recovered. The Defendants terminated the attorney client relationship in March of 1995.

Both parties have submitted Motions for Summary Judgment. The Court having heard the matter on oral argument and in consideration of the pleadings, affidavits, motions, arguments, and memoranda of law in support of the parties respective positions issues the following:

STATEMENT OF ISSUES

What is the plain meaning of the "contingency fee agreement" between the parties which states in part that the Plaintiff would receive thirty percent 30% of any "gross recovery" ? "Gross recovery" is defined in a subsequent agreement to mean "30% of any initial benefits, and back pay should back pay be recovered."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In May of 1993 the parties entered into an attorney - client agreement which stated the purpose of the representation and provided for a contingency fee arrangement which included terms such as thirty (30%) percent of all recovery. The amount of thirty percent (30%) of recovery was to be applied to "...any initial benefits, and back pay should back pay be recovered in tribal ct. (sic) suit."

2. The Plaintiff filed suit against the Community alleging a violation of the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (8) had been committed against the Defendants for having been excluded from the list of per capita recipients. The Plaintiff's suit did not seek membership on behalf of the Defendants but only per capita benefits from 1988 to 1993.

3. In the meantime, other lawsuits were filed against the Community in an attempt to force per capita payments for other individuals.

4. The Community had to contend with the issues and holdings in Maxam v. Lower Sioux Indian Community, 829 F. Supp. 277 (D. Minn. 1993), wherein portions of per capita payments were enjoined because of non-compliance with the Indian Gaming Regulatory Act of 1988.

5. The Community in an attempt to provide per capita payments to those entitled to such under the 1988 Business Proceeds Distribution Ordinance (hereinafter 1988 Ordinance) but who were disqualified by Bureau of Indian Affairs guidelines enacted the Adoption Ordinance 10-27-93-001 on October 27, 1993. The Defendants were included on this list of adoptees.

6. Adoption Ordinance 10-27-93-001 was rejected for approval by the Bureau of Indian Affairs.

7. The Community enacted a second Adoption Ordinance, Ordinance No. 11-30-93-002, which also allowed for the Defendants eligibility for per capita benefits as lineal descendants of Community members. This second Adoption Ordinance was also rejected for approval by the Bureau of Indian Affairs. The matter was appealed by the Community to the Interior Board of Indian Appeals.

8. The Plaintiff filed a supplemental complaint dated December 13, 1993, on behalf of the Defendants seeking "back pay with interest for denial of benefits" for payments the Defendants would have received between 1988 and 1993 had they been eligible to receive per capita distributions under the 1988 Ordinance.

9. Finally on January 11, 1994, the Defendants were voted in as members of the Community by the Community's General Council and as a result each Defendant received

his or her initial benefit in the form of a per capita check each in the amount of $7,779.53 on February 16. 1994.

10. The issue of the Defendants and others receiving per capita benefits was contested in the case of Smith v. SMSC, Shakopee Mdewakanton Sioux Community Tribal Court File No. 038-94. On March 15, 1994, the Court enjoined per capita payments to persons voted into membership on January 11, 1994.

11. On April 15, 1994, the Plaintiff filed a second supplemental complaint seeking a declaratory judgment stating that the Andersons were eligible for benefits as lineal descendants under the November 1993 Adoption Ordinance, an issue that was not in dispute. No claim was made for back pay nor did the complaint seek payment for moneys owed to the Andersons under the 1988 Ordinance. A Motion for Stay was filed that same day recognizing that if the Interior Board of Appeals upheld the Adoption Ordinance the Andersons would be entitled to the per capita benefits.

12. On March 15, 1994, the Tribal Court ordered these payments into escrow until the Interior Board of Indian Appeals ruled on the Adoption Ordinance or the Community passed a Constitutional Amendment regarding membership. The Defendants' per capita payments were placed into escrow from April 1994 to June 1995.

13. The Interior Board of Indian Appeals upheld the Adoption Ordinance on February 22, 1995. The Defendants were then recognized as fully enrolled members of the Community entitled to receive per capita payments going forward and entitled to the per capita payments placed into escrow by the Court.

14. The Defendants terminated their attorney - client relationship with the Plaintiff on March 24, 1995, when the Plaintiff requested payment of fees from the escrowed amounts ordered by the Court.

15. The Plaintiffs representation of the Defendants in regard to this matter can be described as a limited suit for "back pay" under the 1988 Ordinance as evidenced by the pleadings filed on behalf of the Defendants. This is what the Plaintiff and the Defendants understood "back pay" to mean. Back pay meaning payments under the 1988 Ordinance from 1988 to 1993. The Defendants have never received moneys for the years 1988 to 1993 and in fact the only form of per capita payments received by the Defendants was based on the Community's General Council vote taken on January 1994 and the Courts Order in a related matter of March 15, 1994. The moneys received by the Defendants cannot be construed as a direct result of the Plaintiff's representation for "back pay" nor was it money actually recovered by the Plaintiff. The Plaintiff's actual representation for back pay never resulted in moneys to the Defendants.

MEMORANDUM

The Court of the Shakopee Mdewakanton Sioux (Dakota) Community has adopted and incorporated Rule 56 (c) Summary Judgment of the Federal Rules of Civil Procedure. Summary Judgment is proper when the Court finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A trial court may enter an order for summary judgment on liability questions. The matter before the Court is clearly undisputed as to the facts that lead up to the meaning of the language

contained in the contingent fee agreement. Therefore, the Court may ascertain the meaning of the contingency fee agreement between the parties. It is the actual amount owed to the Plaintiff by the Defendants that is in controversy. The amount is in controversy because the parties have differing points of view as to the meaning of the language "30% of any recovery" and in a subsequent agreement "gross recovery " is explained to be "any initial benefits and backpay".

The Defendants have conceded the Plaintiff's terms of the contingent fee agreement should be enforced. Enforcement of the contingent fee agreement should be in accordance with the principle elucidated in N.L.R.B. v. Superior Forwarding, Inc., 762 F.2d 695 (8th Cir. 1985) which held essentially that contract terms which are unambiguous must be given their plain, ordinary meanings. The terms "initial" and "back pay" are unambiguous in the context of the Community's per capita distribution nomenclature. The Plaintiff's representation in the filing a claim for "back pay" payments from 1988 to 1993 is construed as the mutual understanding by the parties. This was the intent of the parties at the time the contingency fee agreement was drafted and executed between the parties. In construing a contract the Court may ascertain the intent of the parties by looking into the circumstances surrounding its execution in accordance with Deauville Corp. v. Federated Dept. Stores, Inc. 756 F.2d 1183 (5th Cir. 1985). On March 15, 1994, the Court ordered the Defendants' per capita be placed in escrow until the IBIA or the Community Constitutionally reconciled the matter in accordance with federal and tribal laws. This created a different sum of moneys which cannot by any stretch of ordinary or plain meaning be considered "back pay" as agreed upon earlier by the

parties in their May and July of 1993 contingency fee agreements because it had not yet occurred. Nor is there any evidence to support that either party even anticipated their receiving per capita payments and then having the Court order said payments into escrow. Although the amount placed into escrow can be said to be a type of back pay it is certainly not the "back pay" sought after in the pleadings filed on Defendants' behalf nor agreed upon to be the focus of the Defendants claim in May and July of 1993. The Court finds the plain and ordinary meaning to term "back pay" are those amounts sought after dating from 1988 to 1993. Since no amounts were received for these time periods, there can be no amount owed to the Plaintiff by the Defendants. Thirty per cent (30%) recovery of back pay equals no amount of money since no back pay was recovered within the meaning of back pay which is payments from 1988 to 1993.

The other disputed term "initial benefits" of which the Plaintiff seeks enforcement is easier to deal with since the term "initial" refers to the first per capita payment received by the Defendants. The meaning is confirmed by the Plaintiff in his correspondence informing the Defendants that the fee agreement provided for payment of "30% of the first check and 30% of any recovery (back pay)." It is clear the meaning of initial benefits meant the first per capita check received by the Defendants. Thirty per cent (30%) of the Defendants first check amounts two thousand three hundred and thirty three dollars and eighty six cents ($2,333. 86). Each of the Defendants owes the Plaintiff this amount.

ORDER

Defendant's Motion For Summary Judgment is GRANTED and Plaintiff's Motion for Summary Judgment is DENIED. This decision is based on the plain and ordinary meaning of the terms "back pay" and "initial benefits". Since no "back pay" was recovered there is no amount of money owed in that regard. However, the Plaintiff is owed 30% of the initial benefits which equals two thousand three hundred and thirty three dollars and eighty six cents ($2,333.86) from each Defendant. So ordered.

Date: February 10, 1997

Robert A. Grey Eagle, Judge
Tribal Court

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

FILED FEB 10 1997 cls

JANICE L. SVENDAHL
CLERK OF COURT

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

Vance Gillette,

Plaintiffs,

v.

Karen Anderson, Barbara Anderson,
and Keith Anderson,

Defendants.

Court File Number 063-96

ORDER AND MEMORANDUM

The above-entitled matter came on for hearing before the undersigned Judge of the Tribal Court on the 12th day of November, 1996, by telephonic conference-call, pursuant to the Plaintiff's and the Defendants' Motions for Summary Judgment.

Anne M. Laverty, Esq. appeared on behalf of the Plaintiff. Jeannice M. Reding, Esq. appeared on behalf of the Defenants.

The Court being fully advised of the premises, and based on the files, records and evidence herein, as well as the arguments of counsel for both parties,

IT IS HEREBY ORDERED,

1. That the Plaintiff's Motion for Summary Judgement be, and hereby is, GRANTED; and

2. That the Defendants' Motion for Summary Judgment be, and hereby is, DENIED; and

3. That the attached Memorandum of Law be, and hereby is, INCORPORATED into and made a part of this Order.

Date: February 10, 1997

Robert Grey Eagle

Robert A. Grey Eagle, Judge,
Tribal Court

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

FILED FEB 20 1997

CARRIE L. SVENDAHL
CLERK OF COURT

TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT

STATE OF MINNESOTA

In re Leonard Louis Prescott
Appeal from 7/1/94 Gaming
Commission Final Order

Court File No. 041-94

MEMORANDUM AND ORDER
NUNC PRO TUNC

I.

BACKGROUND & PROCEDURAL HISTORY

This matter is before the Court on administrative appeal from a decision of the Shakopee Mdewakanton Sioux (Dakota) Community Gaming Commission (the Commission or Respondent) revoking the gaming license of Leonard Louis Prescott (Prescott or the Appellant). In addition to challenging the substance of the Commission's decision, Prescott also alleges that the Commission's proceedings violated his procedural and substantive due process rights.

The Commission is the regulatory arm of the Community government charged with overseeing gambling on the Reservation. The Commission was established by the Community's Tribal Gaming Ordinance (the Ordinance) which was approved by the National Indian Gaming Commission (NIGC) on November 2, 1993. Section 307 of the Ordinance requires the Commission to perform a background investigation on all persons falling within the definition of a Key Employee or Primary Management Official. After a background investigation is completed, the Commission must determine whether the individual is eligible for a Tribal gaming license. During the pendency of such an investigation, the Commission may issue a Temporary Employment Authorization (TEA) which is valid for 90 days. Ordinance at § 306. If the Commission determines that an applicant or licensee is not eligible for such a license, the

Commission may deny, or suspend and/or revoke the license. The Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701 et seq. requires tribes which engage in gambling to adopt standards whereby "any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the damages of unsuitable, unfair, or illegal practices and methods and activities in the content of gaming shall not be eligible for employment", 25 U.S.C. 2710(2)(F)(ii)(II); 25 C.F.R. 558.2. Section 306 of the Gaming Ordinance contains such a provision.

Prescott is a member of Shakopee Mdewakanton Community. From January 1987 to January 1992, Prescott served as the Community Chairman, and from 1991 to 1994 he served as an officer of Little Six, Incorporated (LSI), a corporate arm of the Community government, first as COO and then as CEO and Chairman of the Board. Subsequently, Prescott was defeated in elections by the current Community Chairman Stanley Crooks.

In his role with LSI, Prescott fell within the definition of a Key Employee. On January 13, 1994 Prescott submitted an application for a Key Employee license, and on March 1, 1994, the Commission issued a TEA. On May 5, 1994, the Commission issued an Order Suspending Prescott's TEA. On July 1, 1994, after notice and a hearing, commencing on May 25 and concluding on June 15, 1994, the Commission issued its Findings of Fact and Conclusions (the July Decision) in which it revoked Prescott's TEA. Prescott did not seek a rehearing and did not attend a scheduled hearing on his application for a permanent Key Employee License. Instead, on July 8, 1994, Prescott filed an appeal to this Court.

During the review of Prescott's appeal, this Court received written correspondence from

Mr. Thomas Guthery[1] stating that the comments allegedly made by the Commission's Chairperson, Ms. Cherie Crooks-Bathel, daughter of the current Chairman, and a Commission member, Mr. Scott Campbell, indicated that they were biased against Prescott, and intended to revoke his license irrespective of the evidence presented at his hearing. On November 8, 1994, this Court remanded the matter to the Commission to develop its record on the issue of the alleged bias. The Commission provided a notice of hearing and subpoenaed witnesses, including Mr. Guthery and on February 21, 1995, the Commission conducted a hearing on the allegations of bias. Mr. Guthery did not attend the hearing and the hearing closed without his testimony being taken on the allegations. On January 19, 1996 the Commission issued its Finding of Fact (the January Decision) with respect to the allegations of bias.

The proceedings in this matter were stayed while the parties explored a settlement of their disputes. Those efforts, sadly, were not successful, and the parties then submitted Supplemental Briefs regarding the issues addressed on remand.

II.

THE COMMISSION'S DECISION

The Commission's July decision is comprised of 117 Findings of Fact and 11 Conclusions of Law. The Findings and Conclusions relate to six general issues:

1. **Findings 1-35, Conclusions 3 and 4; Findings 102-112, 115-117, Conclusion 9.**

   Whether Prescott converted assets of LSI for his and other's personal use.

2. **Findings 36-66, Conclusions 1 and 2.**

   Whether Prescott falsified license applications and provided false statements under oath.

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[1] Thomas Guthery is a former executive director for the Community Gaming Commission.

3. **Findings 67-86, Conclusions 5 and 6.**

Whether Prescott released confidential information regarding LSI and Community per capita payments without proper authorization.

4. **Findings 87-91, Conclusion 8.**

Whether Prescott violated Community policy regarding the employment of felons by not disclosing his own criminal record.

5. **Findings 92-96, Conclusion 7.**

Whether Prescott made unsubstantiated allegations that the Community's Chairman was engaged in criminal activity.

6. **Findings 97-101, Conclusion 10.**

Whether Prescott fabricated information and disseminated it to the public.

Based on its Findings and Conclusions contained in its July decision, the Commission made the following ruling:

> falsification of information under oath to state gaming officials, conversion of corporate assets, diversion of gaming proceeds, release of confidential information, violation of laws relating gaming, demonstrate that continued licensing of Leonard Louis Prescott will increase the dangers of unfair or illegal activity and practices in the conduct of gaming on the Shakopee Mdewakanton Sioux (Dakota) Community Reservation, and require the revocation of the Temporary Employment Authorization of Leonard Louis Prescott, pending the exercise of the right to a hearing before the Commission to Show Cause why Leonard Louis Prescott should be granted a permanent Key Employment license.

The Commission's January Decision consists of 10 Findings of Fact and 3 Conclusions of Law. Ultimately the Commission determined that the allegations of bias were unsupported by evidence and that the proceedings leading up to and including the July decision did not violate Prescott's due process rights.

III.

STANDARD OF REVIEW

This Court reviews Commission decisions pursuant to § 219 of the Tribal Gaming Ordinance. This Section provides that Commission Conclusions of Law are reviewed *de novo*. Commission Findings of Fact are reviewed based on an arbitrary and capricious standard, and applications of law to fact are reviewed based on an abuse of discretion/clear error of judgment standard. This Court must defer to the Commission's decision, unless it is shown to be an abuse of discretion or a clear error of judgment. The Court reviews that action based on a preponderance of the evidence.

Prescott asserts that this Court must reverse because "the record reveals no substantial evidence supporting the Gaming Commission's decision." (Brief at pp. 4-5, 6). This Court does not review Commission decisions on a "substantial evidence" standard, however. Rather, the Commission's review is based on an "arbitrary and capricious" standard based on a preponderance of the evidence.

The Commission argues that "The Court can overturn the Gaming Commission's action only if Prescott first demonstrates that he presented clear and convincing evidence proving his qualifications and demonstrating that he complied with all applicable law "(emphasis in original) (Brief at p. 12). The Court does not agree. It is not the role of this Court to determine whether Prescott met his burden of proof before the Commission. Rather, we must determine whether the Commission applied the appropriate standard of proof, and whether its determination of the sufficiency of his proof was an abuse of discretion or clear error of judgment, based on a preponderance of the evidence.

IV.

DUE PROCESS PROTECTIONS

At pp. 28-36 of his Brief, Prescott alleges that the Commission proceedings violated his due process rights.[2] Prescott separately alleges procedural (pp. 28-33) and substantive (pp. 33-36) due process violations. In order to invoke the protections of substantive and/or procedural due process, one must establish that the challenged proceeding affected either a property or liberty interest. U.S. Const. 5th and 14th Amendments; See also, Mathews v. Eldridge, 424, U.S. 319, 332 (1975). Accordingly, before evaluating whether the Commission's proceedings violated Prescott's due process rights, this Court first must determine whether Prescott has either a property or liberty interest which was affected by the Commission proceeding. If no such interest exists, the Court may evaluate the appropriateness of the Commission's Findings and Conclusions. However, if such an interest exists, the Court must determine whether the Commission's proceedings violated such an interest. In the event the Court finds a violation to have occurred, it will not review the Commission's substantive decision, but will remand the matter for further proceedings which are consistent with due process requirements. Concrete Pipe & Prod. of California, Inc. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2277 (1993).

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[2] Prescott asserts that because the Commission proceedings "parallel those found in Anglo-Saxon Society" federal Constitutional standards should be used by this Court. The Court need not reach this question, however, since the Shakopee Mdewakanton Sioux Constitution assures all members of the Community "freedom of worship, conscience, speech, press assembly, association and due process of law, as guaranteed by the Constitution of the United States. Const. Art. VI - Bill of Rights. To the extent this Court evaluates such rights, it only follows that, at a minimum, it must evaluate actions alleged to violate rights secured by the United States Constitution, in light of United States Supreme Court precedent on those issues.

A. Property Interest

Prescott argues that the Commission proceedings deprived him of a property interest in a Commission license. To so hold, this Court must find that a Commission - issued Temporary Employment Authorization creates a property interest in its holder. We are unwilling to make such a finding.

A property interest in a particular thing must be based on more than a "unilateral expectation." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). As the Court noted in Roth --

> property interests, of course, are not created by the Constitution. Rather, they are created, and their dimensions are defined, by existing rules or understanding that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. See also, Bishop v. Wood, 426 U.S. 341, 345 n.7. The Commission argues that because the Gaming Ordinance defines a Commission license as a "revocable privilege" (§ 324), Prescott *A fortiori* cannot demonstrate a property interest. The Court disagrees. In determining whether a property interest exists in a benefit, the Court will not be guided solely by how a benefit is denominated in the relevant law, but will look to the nature of the interest, as defined by relevant laws, rules and understandings. Bell v. Burson, 402 U.S. 535, 539 (1971)

The Court, after considering the relevant laws, rules and understandings, finds that the TEA does not create a property interest in its holder. A TEA is in essence a pre-licensing work permit, which has no effect once a full background investigation -- required by federal law -- is completed and the Commission determines whether licensure is justified. Federal and Tribal law does not permit licensing of persons until a full background investigation is conducted and a persons suitability has been determined by the appropriate tribal regulatory body. Neither

federal nor tribal law in any way indicates that the grant of the TEA has any effect on the Commission's ultimate licensing determination. Here Prescott was issued a TEA which was revoked 60 days later, and he never was issued a permanent license. TEA's are permitted by federal law, for up to 90 days, in part to allow Tribes to staff and operate casinos while conducting the federally-mandated investigations. Whether or not a Commission license creates a property interest (Appellants Brief at 30; Appellees Brief at 36-37) is irrelevant, inasmuch as a TEA is not a Commission license, and nothing indicates that a TEA shares the status of a permanent license.

Based on the foregoing, it is the Court's opinion that Prescott cannot demonstrate a property interest in the TEA.[3]

B. Liberty Interest

Prescott also argues that the Commission proceedings deprived him of a liberty interest in his good name, reputation honor and/or integrity. Relying on Board of Regents v. Roth, 408 U.S. 564 (1972) and Wisconsin v. Constantineau, 400 U.S. 433 (1971), Prescott contends that the Commission's July decision stigmatized him in both the Indian and non-Indian communities and besmirched his integrity. (Appellants Brief at 29). As a result, Prescott alleges that he was denied a liberty interest without due process of law. The Commission suggests that Prescott has no such liberty interest, and if he does, the proceedings did not offend that interest because the basis for the decision to revoke was kept confidential (Appellee's Brief at 35 n. 14).

While the United States Supreme Court in Constantineau seemed to suggest that there is an independent liberty interest in good name, reputation, honor and/or integrity, subsequent

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[3] The Court expresses no opinion as to whether a "permanent" Commission license, or a TEA that continues in effect for more than 90 days from issue, creates a property interest in its holder.

Supreme Court precedent has clarified what must be shown to give rise to a liberty interest. Paul v. Davis, 424 U.S. 693 (1976), developed what has become known as the "stigma plus" analysis. In Paul, the Plaintiff sued for being "posted" as an "active shoplifter". The Plaintiff argued that his liberty interest in reputation, honor or integrity had been denied without due process of law and that the posting threatened his future access to stores and his future ability to get work. The Sixth Circuit, relying on Constantineau, found the Plaintiff to have a liberty interest and the proceeding to have violated that interest.

The Supreme Court reversed, noting that simple defamation by the state without some additional alteration or extinguishment of a "right" or "status" previously recognized by law was insufficient to implicate a liberty interest, but probably gave rise to a state law defamation suit:

> The stigma resulting from the defamatory character of the posting was doubtless an important factor in evaluating the extent of harm worked by that act, but we do not think that such defamation, standing alone, deprived Constantineau of "liberty" protected by the procedural guarantees of the Fourteenth Amendment. This conclusion is reinforced by our discussion of the subject a little over a year later in Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d at 548 (1972)...
>
> While Roth recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defamation, its language is quite inconsistent with any notion that a defamation perpetrated by a government official, but unconnected with any refusal to rehire, would be actionable under the Fourteenth Amendment: "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community..."Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Id., at 573, 92 S.Ct., at 2707, 33 L.Ed.2d, at 558 (emphasis supplied).

Id. at 708-09.

Though Paul v. Davis, and its "stigma plus" standard, have been criticized extensively as too stringent and "at odds with our ethical, political, and constitutional assumption about the

worth of each individual"[4], even under this standard the Court finds that Prescott demonstrates that a protectable liberty interest was at stake in the Commission proceeding. There can be little doubt that the Commission's July Decision impugns Prescott's integrity; in fact, it specifically states that he is a person whose connection with the Community Gaming Operations threatens the integrity of gaming by increasing "the danger of unfair or illegal activity or practices". This is not a small or insignificant statement and, beyond doubt, stigmatizes Prescott. Yet, under the "stigma plus" test this is insufficient unless Prescott demonstrates the alteration of a right or status.

We find that three distinct results of the revocation of Prescott's TEA create a sufficient alteration of a right or status to meet the "stigma plus" standard. A TEA -- or "permanent" license as the case may be -- is a necessary prerequisite to employment at an Indian gaming establishment. So, by revoking Prescott's TEA -- whether it is a privilege or right -- the Commission not only has altered Prescott's status as an "authorized" employee, it has ended his eligibility for employment with LSI or any other gaming-related employer on the Shakopee Reservation. Moreover, as is more fully discussed below, the revocation of Prescott's TEA, and the reasons for that action, must be reported by the Commission to the National Indian Gaming Commission (NIGC) which will share that information with any gaming tribe to whom Prescott applies for employment in the future. Such a report may well keep him from obtaining employment anywhere in the field of Indian Gaming. The Court finds that revoking Prescott's TEA, effectively terminating his employment with LSI, and rendering a decision which will affect his future employability in Indian gaming, collectively represent a significant alteration

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[4] David Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv.L.Rev. 293, 324-328 (1976); Henry Monaghan, of "Liberty" and "Property", 62 Corn.L.Rev. 405 (1977).

of Prescott's status which is sufficient to meet the requirement under Paul v. Davis.

The Commission suggests that any liberty interest Prescott might possess in his reputation, honor, or integrity was not offended by the Commission's proceedings, because the Commission's reasons for its decisions were kept confidential (Appellee's Brief at 35 n 14, citing Bishop v. Wood, 426 U.S. 341, 348 (1976)). We disagree for two reasons. First, in Bishop-- and Roth upon which the Court in Bishop relies -- the Supreme Court noted that it would stretch the concept of liberty too far to find a deprivation of liberty where a person is not rehired by a school, but remains free and eligible to seek other positions (Roth), or where an "at will" employee is terminated and the reasons for the termination are not disclosed to the public. Bishop, 426 U.S. at 348. The logical basis for such a ruling as is plainly stated by the Court in Roth, is that no stigma attaches to a person who simply has not been rehired, or to one who is terminated from an at will job without any indication of cause.

The situation in the present case is considerably different from those existing in Roth or Bishop. Unlike Roth, this action involves the revocation of a gaming license for cause. The effect of this action will be devastating on Prescott's future employability in Indian gaming, whereas the Court in Roth rightly found that not rehiring an untenured professor, at worst, would make that Plaintiff "somewhat less attractive to other employers..." Id. Unlike Bishop, there will be disclosure of this information. Federal law requires the Commission to disclose Key Employee and Primary Management official license revocations to the NIGC. Although the reasons for the revocation may not be available to the general public as the result of a Freedom of Information Act [5] request to the NIGC -- although this is not certain -- the

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[5] 5 U.S.C. 552, Exemption 6 (personal privacy reasons), Exemption 7 (information compiled for law enforcement purposes); 25 CFR 517.4(a)(6) and 517.4(a)(7).

information certainly will be disclosed to any Indian tribe which requests it as part of a pre-employment screen, or pre-licensing background investigation. The continued confidentiality of this information, then, will depend on the rules, practices and procedures of all Indian tribes involved in gaming, which are impossible to predict. This situation is far different from Bishop where the reason for termination was communicated orally to the employee, and was not disclosed publicly until the employer was compelled, in the context of civil litigation, to respond to discovery propounded by the employee.

The Court also finds the Bishop decision inapplicable to present situation because Federal law requires that Indian tribes adopt standards in their gaming ordinances whereby persons who threaten the integrity of gaming either are denied licenses or have their licenses revoked. 25 U.S.C. 2710(b)(2)(f)(ii)(II). The Community adopted this standard at § 306 of the Ordinance. Accordingly, even though the Commission has not officially disclosed to the public the reasons for revoking Prescott's license, the act of revocation necessarily implies that the person is of a type described in federal and tribal law. In short, the universe of possible reasons for revocation is finite, and the reasons all are derogatory. Unlike the "at will" employee in Bishop, who could be terminated for any reason -- which breadth of reasons makes stigma virtually impossible -- revocation of a Commission license means that the former licensee's "past activities, criminal record, reputation, habits and associations...pose a threat to the public interest or to the effective regulation of gaming, or creates or enhances the damages of unsuitable, unfair, or illegal practices and methods". Plainly put, revocation means the person is, to one degree or another, "shady". The Court finds that this passive disclosure of the reason for revocation renders Bishop distinguishable from the present case.

This case -- and the interests implicated therein -- must ultimately be viewed in the

context of the political and social setting of the Shakopee Community. The Community is a federally recognized Indian tribe with a small enrollment. Its size has led, in large part, to both the Community's success in gaming and also to its relatively polarized politics.

The Appellant and the current Tribal Chairman are, and have been, bitter political rivals and the effect of this rivalry is a polarization of the Community down extended family lines. Given this context the Court must be ever vigilant that the power of Tribal government is not used to reward those who are in political favor and to punish those who are not. As a corollary of this charge, the Court must also look at Prescott's claimed liberty interest with a more lenient eye, so as to ensure that this process has not been the working of a spoils system.

VI.

COMMISSION PROCEEDINGS & PRESCOTT'S DUE PROCESS RIGHTS

Having determined that Prescott has a liberty interest at issue in this matter, the Court next must determine whether the Commission's proceedings afforded him the proper procedural and substantive due process. The distinction between procedural and substantive rights is an indefinite concept, the two having been described as "intimately related" (F. Esterbrook, Substance and Due Process, 1982 The Supreme Court Review 85, 112) and "intertwined". Arnett v. Kennedy, 416 U.S. 134 (1974). Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances". Cafeteria Workers v. McElroy, 367, U.S. 886, 895 (1961). Morrissey v. Brewer, 408 U.S. 471, 481 (1972)("Due process is flexible and calls for such procedural protections as the particular situation demands"). With the facts of this particular case in mind, once the Court has determined that due process is required, it must ask "what process is due[?]" Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

Although proper procedure, in light of the private interest at stake, is important, procedure is not determinative. Rather, a "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner". Mathews v. Eldridge, 424 U.S. 319, 313 (1975), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965) and Grannis v. Ordean, 234 U.S. 385, 394 (1914). See also, Anti-Fascist Committee v. McGrath, 341 U.S. 123, 164 (1950) (Frankfurter), quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("The hearing, moreover, must be a real one, not a sham or a pretense"). A meaningful hearing is required in all cases, regardless of the political or social winds, since "the heart of the matter is that democracy implies respect for the elementary rights of people, however suspect or unworthy", (Anti-Facist Committee, 341 U.S. at 170) for "it is procedure that spells much of the difference between rule by law and rule by whim or caprice" Id. at 179.

With these concepts in mind, the Court must evaluate the Commission's proceedings to determine whether they afford Prescott procedural and substantive due process.

A. Procedural Due Process.

The amount of procedure due an individual is indefinite and driven by the particular facts of the case. Since what may be fair in one situation may be unfair in another, the concept of fair procedure "cannot be tested by mere generalities or sentiments abstractly appealing". Anti-Facist Committee, 341 U.S. at 163. In Goldberg v. Kelly, 397 U.S. 254 (1970) and Mathews v. Eldridge, 424 U.S. 319 (1975), the Supreme Court refined some of the relevant procedural due process considerations enunciated by Justice Frankfurter in Anti-Facist Committee to a three point comparative analysis of -- :

> 1) The private interest to the affected; 2) the risk of erroneous deprivation based on the procedures used, and the probable value of additional procedural safeguards; and, 3) the Government's interest, including the function involved and

the burdens of additional procedures.

Goldberg, 397 U.S. at 263-71; Mathews, 424 U.S. 334-35.

The first element can be treated in fairly short order. As has been noted above, the interest of any individual is great in a proceeding which carries with it the possibility of such a derogatory finding. The denial or revocation of a license in the context of Indian gaming is devastating, and may well render such an individual unemployable. Moreover, in this particular context, a finding that Prescott had provided false statements on state gaming documents and had converted LSI proceeds exposes him to the possibility of state and federal civil and criminal proceedings. Certainly, these are important private interests.

The second and third elements relate to the sufficiency of the Commission's procedures. The Tribal Gaming Ordinance provides that written notice and an opportunity for a hearing shall be given to any Key Employee or Primary Management Official whose license has been suspended. (§ 309) The notice advises the licensee of the suspension and the proposed revocation of the license, as well as the time and place set for a hearing on the proposed revocation. The hearing is a full on the record adjudicatory hearing wherein the Licensee can call witnesses, offer evidence and make arguments. (§ 209(b)) The Commission issues a written decision after hearing (§§ 212 and 213) which -- based on this proceeding -- apparently includes findings of fact, conclusions of law and a decision. Prescott's hearing spanned eight days, during which 19 witnesses testified and 143 exhibits were received. Prescott was represented by counsel who was allowed to examine and cross-examine all witnesses and to make legal and factual arguments and objections.

The Court finds that the Commission's procedures more than amply provide safeguards against erroneous deprivation of rights. Only in emergency circumstances is the Commission

authorized to suspend a license without a hearing. Even after such a suspension, a licensee is entitled to an on the record, pre-revocation/hearing. The Court cannot imagine any further procedural safeguard which would further reduce the likelihood of erroneous deprivation. The Commission's procedures represent the greatest degree of administrative procedure available to an individual under the Federal Administrative Procedures Act 5 U.S.C. §§ 554-557, and only in Goldberg v. Kelly 397 U.S. 254 (1970) has the Supreme Court held that a proceeding resembling the Commission's proceedings was necessary to ensure procedural due process. Accordingly, the Court finds that the Commission's procedures afford proper procedural due process.[6]

Prescott alleges that he did not receive sufficient notice of the reasons for the suspension of his TEA and the matters to be addressed at the hearing. The Court cannot agree. As the Commission points out, and the Commission's record reveals, Prescott received a Notice of Hearing, pursuant to § 309 of the Ordinance, which had attached to it an eleven point Finding of the Commission -- stating the areas of concern supporting suspension, and forming the outline of the noticed hearing -- and the Commission's Resolution in which it documented its decision to suspend Prescott's TEA. While it may be that the issues at the hearing ebbed and flowed with the evidence presented, the Court is unpersuaded that Prescott was not sufficiently notified of the basis for suspension or the matters to be addressed at the hearing. Rather, the record reflects that the Commission's proceedings, and ultimately its July decision, did not deviate, to any great degree, from the matters identified in the Commissions Notice of Suspension.

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[6] The determination that the Commission's proceedings provide sufficient procedural due process is supported by the fact that the procedures provided to licensees were provided to Prescott, a holder of a Temporary Employment Authorization. The Ordinance does not expressly require such procedures for temporary licensees.

The Court, likewise, is unpersuaded that the use of two documents not offered into evidence at the Commission hearing denied Prescott procedural due process. The use of a letter authored by Prescott does not raise serious questions of due process deprivation, especially when Prescott's counsel could have objected to its use until it had been reviewed for authenticity and content. Likewise, the Court does not find the use of LSI corporate documents denied Prescott procedural due process. At bottom, Prescott alleges that the use of such documents violated his right to procedural due process, but doesn't explain how. The procedural rights afforded to Prescott gave him ample opportunity to object to and ultimately to appeal these issues. The Court feels that these two instances, taken individually or collectively, do not rise to the level of constituting a procedural due process violation.

B. Substantive Due Process.

The Court also must also consider whether Prescott was afforded substantive due process in the Commission proceedings, since no amount of procedure is meaningful if the procedure is conducted by a biased arbiter. As the United States Supreme Court has stated --

> ...due process requires a 'neutral and detached judge in the first instance'...Before one may be deprived of a protected interest, whether in a criminal or civil setting...one is entitled as a matter of due process of law to an adjudicator who is not in a situation...which might lead him [or her] not to hold the balance nice, clear and true...even appeal and a trial *de novo* will not cure a failure to provide a neutral and detached adjudicator.

Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for Southern California, 508 U.S. 602, 617-18 (1993) (citations omitted). In fact, an unbiased tribunal has been ranked as the most important element of a fair hearing. Friendly, Some Kind of Hearing, 123 U.Pa.L.R. 1267, 1279 (1975). As the Supreme Court has noted, this substantive due process demands impartiality in fact and appearance. Concrete Pipe, 508 U.S. at 618. ("Justice,

indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties.")

In Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667 3rd Cir. (1991) the United States Court of Appeals for the Third Circuit noted that a claim of substantive due process violation may be supported by an allegation that the governmental action was 'motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons..." Id. at 683. While Midnight Sessions involved a different setting than the current case (e.g. a city council decision to deny a permit to operate a business), we find the sound reasoning of the Third Circuit no less compelling. In fact, that Court's analysis is even more compelling when applied to a formal adjudicatory process like the Commission's license revocation proceedings. It would seem that avoidance of the appearance of bias is more appropriate the more the challenged proceeding resembles a court trial.

In this case, the Court has determined that Prescott's substantive due process rights were violated by the Commission proceeding in the face of allegations of bias against its Chairperson and one of the Commissioners. There is serious doubt as to whether Chairperson Crooks-Bathel, the daughter of the Tribal Chairman, a political foe of Prescott, should have participated in any aspect of this proceeding, including the investigation, deliberation and decision regarding the suspension of Prescott's Temporary Employment Authorization. But, certainly, the Chairperson should have examined her impartiality before conducting the revocation hearing and participating in the July decision. Central issues supporting suspension and revocation relate to disputes which have simmered for years between Prescott and Chairman Crooks. The Court finds that Chairperson Crooks-Bathel would be hard pressed to demonstrate actual impartiality;

however, she would be incapable of overcoming an appearance bias.

The Commission's January decision regarding the allegations of bias do not cure, at a minimum, the appearance of bias. In fact, each of the three conclusions may well constitute clear errors of judgment. However, the Court does not reach this issue[7], since even if they are accepted, they do not justify the Chairperson and Commissioner Campbell's failure to recuse themselves. Whether or not the allegations are "credible" or "supported by evidence", they raise serious and unresolved issues of the appearance of bias, so significant that the Chairperson and Commissioner Campbell should have recused themselves from further proceedings and vacated the July decision.

Recusal in this matter was plainly appropriate given the appearance of political and personal bias on the part of the Chairperson and Commissioner Campbell. However, it is magnified by the fact that this is the Commission's first revocation proceeding. It is the first time the Community and, indeed, those outside the Community will judge the integrity and professionalism of the Commission. Good sense, and the good of the Community and of the Commission dictates that Commission proceedings be actually, and in appearance, beyond reproach, and certainly to be free of the taint of political motivation. Nothing could be more damaging to the credibility of the Commission than to have its first regulatory proceeding appear to be the work of political forces, whether or not that is the case.

The effective regulation of Gaming on the Shakopee Reservation depends on the confidence that the regulated have in the fairness and impartiality of the regulator. Affirming the Commission's decision in the face of swirling allegations of bias would not promote such

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[7] With the exception of conclusion 3, which does constitute a clear error of judgment. inasmuch as this Court has determined that Prescott's due process rights were violated.

confidence. Based on the foregoing, the Court has determined that the Commission proceedings violated Prescott's substantive due process rights, and has ordered this matter remanded for further proceedings which are consistent with those rights.

IT IS HEREBY ORDERED,

1. That the Appellant, Leonard Louis Prescotts' appeal of the revocation of his Temporary Employment Authorization is **GRANTED**;

2. That the Respondent, Shakopee Mdewakanton Sioux (Dakota) Gaming Commissions' request to affirm the revocation of Leonard Louis Prescotts' Temporary Employment Authority is **DENIED**;

3. That the matter is remanded to the Shakopee Mdewakanton Sioux (Dakota) Gaming Commission and that Chairperson Crooks - Bathel and Commissioner Campbell are hereby recused from hearing any further matter relating to the Prescott license proceeding.

BY THE COURT

Henry M. Buffalo, Jr.
Judge of Tribal Court

IN THE COURT
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Marcia Brass,

Plaintiff,

vs.

Shakopee Mdewakanton Sioux
(Dakota) Community/Little Six, Inc.,

Employer,

and

Meadowbrook Insurance
Group,

Administrator.

Court File. 072-96

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the appeal by Ms. Marcia Brass an employee of SMSC/Little Six, Inc. from an Order of Dismissal initially issued November 1, 1996 and a subsequent Order of Dismissal filed on November 5, 1996.

Upon a review of the Orders of Dismissal the Court has determined the only change between the second order dated November 5, 1996, from the original order dated November 1, 1996, is the following language found in the November 5, 1996 Order:

> "The decision of the hearing examiner on factual issues is final. A decision of the hearing examiner concerning legal issues is final unless either party files a written request for appeal (form attached) with the Shakopee Mdewakanton Sioux (Dakota) Judicial Court within thirty (30) days of the

date of the findings and order. The Judicial Court may remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate. The decision of the Judicial Court is final."

The employer asserts in their Objection to the Request for Appeal that the claimant has not met the thirty (30) day filing period since the original order of dismissal is dated November 1, 1996 and the claimant filed her appeal December 3, 1996. The hearing examiner issued a subsequent order of dismissal on November 5, 1996 with only clerical differences from the original order of dismissal. The Court must rely on the record and therefore accepts the November 5, 1996 Order of Dismissal as the last and final order in this matter which would place the Request for Appeal within the thirty (30) day time for filing such a request. The Hearing Examiner for whatever reasons issued a subsequent order dated November 5, 1996 and for this reason the Court must give the claimant the benefit of the doubt that the thirty (30) day filing period tolls from the last order issued therefore the Request for Appeal filed within thirty (30) days of the final order was in fact filed in a timely basis.

As a second part of their Objection to the Request for Appeal, the emloyer further asserts the claimant's Request for Appeal does not meet the requirement that only legal issues may be appealed and the claimant's appeal is clearly a statement of factual issues as opposed to an appeal based on legal issues. Upon an examination of the filed Request for Appeal form and the language contained therein the Court agrees there are no legal

issues stated therein for the Court to consider. For all that is contained in the request is the following statement:

> "The employee appeals the dismissal of her claim. She has a new attorney. It further appears that the insurance company has received all the information that they requested. The employee wants an opportunity to present her claim."

Even in the Court's attempt to grant the claimant latitude in her appeal, upon examination of the Request for Appeal, the Court cannot determine or identify a legal basis for the appeal which is clearly a requirement outlined in the November 5, 1996 Order of Dismissal and the Request for Appeal form itself reads: "The specific legal issues being appealed and a brief recitation of the reasons for the appeal are as follows: ..". There are no acceptable legal arguments or reasons put forth to support her appeal rather she simply states the fact that the claimant has a new attorney and "wants an opportunity to present her claim" which are in the Court's opinion non-legal arguments. There are no legal issues or reasons stated countering the Order of Dismissal. The Court cannot accept the claimant's appeal when there are no legal issues stated on appeal.

The third and final basis for the employer's objection to the appeal is the Order of Dismissal issued by the Hearing Examiner was that her order was lawful and in accordance with the authority vested in her pursuant to the Shakopee Mdewakanton Sioux (Dakota) Community Ordinance F. 13. The Court upon an examination of the complete record in this matter concludes the Hearing Examiner diligently performed her duties and responsibilities in this matter.

The record is replete with correspondence to the claimant and her attorney regarding failure to abide by her requests for information and stating failure to respond to the reasonable discovery requests would result in dismissal. The record reflects repeated correspondence and warnings to the claimant and her attorney in which a deadline date of October 30, 1996 was set and the Hearing Examiner informed the parties that if the information was not received by that date that the Employee's Claim Petition would be dismissed.

The hearing examiner had to issue a finding that the Employee and her attorney did not comply with the request which then subsequently resulted in the dismissal of the Employee's claim. The aforementioned Ordinance at F.13 provides:

> "In addition to the right of the Administrator to request and obtain authorizations from the Employee whether party may engage in pre-hearing discovery, including, but not limited to, requests for medical and employment records, depositions of parties or witnesses, requests for statements and identification of witnesses and exhibits expected at hearing. Such discovery shall be conducted in an informal manner. Refusal to respond to reasonable discovery request may result in the imposition of sanctions, including delay or dismissal of claims or defenses, in the discretion of the court."

The Examiner dismissed the Employee's claim based on her and her attorney's failure to respond to the request for information. Dismissal is clearly appropriate in this matter.

It is essential in order to proceed that the parties respond to the reasonable requests for information by the Examiner. The Employee's failure to respond to the reasonable requests for information by the examiner especially when forewarned that failure to respond would result in dismissal is an indication to the Court that dismissal is a consequence of which the parties were put on notice and despite repeated requests and warnings still failed to comply with the requests. The Employee cannot now be allowed to move forward with their claim on remand by this Court. Therefore the Court now affirms the Order of Dismissal the Request for Appeal is therefore denied.

BY THE COURT,

Date: March 4, 1997

Robert A. Grey Eagle, Judge

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., et al. Plaintiffs, vs. Leonard Prescott, et al., Defendants.	)	File No. 048-94

MEMORANDUM AND ORDER

Both Defendants in this action have moved for summary judgment. For the reasons set forth herein, the Court herewith grants Mr. Prescott's motion in part and denies it in part; and the Court denies Mr. Johnson's motion on its stated grounds, but grants Mr. Johnson summary judgment with respect to certain counts where the record discloses no facts upon which Mr. Johnson could be held liable.

The Plaintiffs seek damages against the Defendants for actions which the Defendants took, or allegedly took, during a period of time when the Defendants were the two senior officers of Little Six, Incorporated ("LSI"). LSI is a corporation chartered by the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community") under the provisions of the Shakopee Mdewakanton Sioux Community

Corporation Ordinance, Ordinance No. 2-27-91-004 ("the Corporation Ordinance"). Under the Corporation Ordinance, LSI was granted Articles of Incorporation ("the LSI Charter") on March 18, 1991. The LSI Charter provides that LSI shall issue one share of stock, which shall be wholly owned by the Community, and that each Member of the Community shall have the right to one vote on any matter properly before the Members of the Corporation. In issuing the LSI Charter, the Community explicitly granted to LSI the sovereign immunity from suit which the Community possesses, subject to certain express limitations which are discussed below.

At the time the LSI Charter was issued, Mr. Prescott was Chairman of the Community and, therefore, a member of the Community's Business Council ("the Business Council"). Constitution of the Shakopee Mdewakanton Sioux Community, Art. III. Section 7.3 of the LSI Charter provides that LSI's Board of Directors ("the LSI Board") shall consist of seven members, three of whom shall be the members of the Business Council. So, Mr. Prescott became a member of the LSI Board when the corporation was created. The Board then elected him its first Chairman, and selected him as the corporation's first President. On June 10, 1991, Mr. Prescott was succeeded in the latter position by Mr. Johnson. Eventually, Mr. Prescott became LSI's Chief Executive Officer ("CEO"); and thereafter he served as both Chairman of the Board and Chief Executive Officer until he was suspended, on May 5, 1994, and ultimately removed, on September 29, 1994.

Mr. Johnson was initially hired by the LSI Board as the

corporation's first CEO and second President. When he was succeeded by Mr. Prescott as CEO, on September 2, 1993, he became the corporation's first Chief Operating Officer ("COO"); and thereafter he served as President and COO until he, too, was suspended on May 5, 1994. Mr. Johnson then resigned both positions, on June 8, 1994.

The Plaintiffs contend that Mr. Prescott and Mr. Johnson exceeded the authority which they possessed in their corporate offices, and that they expended corporate funds for unauthorized purposes. During Mr. Prescott's and Mr. Johnson's tenure with LSI, the LSI Board created an Executive Committee ("the Executive Committee"), and delegated to it certain of LSI Board's responsibilities. Many of the points of dispute between the Plaintiffs and Mr. Prescott and Mr. Johnson concern the scope of the authority which the LSI Board gave to the Executive Committee; the actual manner in which the Executive Committee did or did not exercise its authority; and the correctness and completeness of representations made to the LSI Board concerning the actions of the Executive Committee.

Rule 28 of the Rules of Civil Procedure of the Court of the Shakopee Mdewakanton Sioux (Dakota) Community adopts the provisions of Rule 56 of the Federal Rules of Civil Procedure, with respect to motions for summary judgment. Under Rule 28, therefore, summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law". Fed. R. Civ. Pro. 56.

Motions for summary judgment in this matter were filed on June 25, 1996, by the Mr. Prescott, and on August 20, 1996, by Mr. Johnson. The motions were briefed and argued thereafter; but this Court's consideration of the motions was suspended pending the decision of the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community in appeals by Mr. Prescott and Mr. Johnson from this Court's denial of their motions to dismiss. When the Court of Appeals issued its decision, the motions for summary judgment were reinstated on this Court's docket.

Mr. Prescott's motion asserts that he is entitled to summary judgment on three grounds: First, he contends he is entitled to absolute immunity from this action, because his service on the LSI Board resulted directly from the fact that, when LSI was created, he was Chairman of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community")--a position which he maintains possesses absolute immunity from suit. Second, he asserts that, even if he is not entitled to absolute immunity for some or all of the actions which he took while he served LSI, still he should be protected by "official immunity"--the qualified immunity which attends the actions taken by government officials in good faith--because, he maintains, LSI is a governmental entity. Third, he contends that as the record in this matter has been developed through the discovery process, no factual basis has appeared for any of the allegations against him.

Mr. Johnson's motion is made on the grounds that he, too, is entitled to official immunity--that although he was an employee and officer of LSI, he asserts that he is entitled to the immunity that would protect a government official making good faith decisions within the scope of his responsibility.

In the view of the Court, neither Mr. Prescott nor Mr. Johnson is entitled to the sorts of immunity they claim, given the provisions of the Corporation Ordinance and the LSI Charter. The Court is not unmindful of the need to protect the decision-making process which corporate officers and employees must engage in. A corporate officer who acts in the good faith belief that he or she is authorized by his or her employer to take a certain course of action should not lightly be subjected to future liability, by the employer or the employer's owners, for that course of action. The Court will bear that need in mind, as this case proceeds.

But that protection, afforded to business officials, is not what Mr. Prescott and Mr. Johnson claim. They claim legal immunities arising out of the governmental nature of the Community, and the fact that the Community created and owns LSI; and those claims are untenable, under the particular circumstances of this case.

1. <u>The claims of absolute and qualified immunity from suit</u>.

Mr. Prescott's claim of absolute immunity is based on a cause-effect argument: he asserts that he was Chairman and CEO of LSI only because he was Chairman of the Community; and, he asserts, the

Chairman of the Community possesses absolute immunity from suit.

Mr. Prescott's and Mr. Johnson's claims of qualified immunity, on the other hand, are based on the contention that LSI is an arm of the Community's government, and on the assertion that officials of LSI therefore are government officials who are possess the sort of "good faith" immunity that attends the functions of government officials generally.

In the view of the Court, these arguments miss several points. First, Mr. Prescott's claim of absolute immunity is flawed because, from an early date, this Court has held that when the General Council of the Community adopted Ordinance No. 02-13-88-01 (the Community Court Ordinance), it waived the immunity--which otherwise is possessed by officers of the Community--for controversies, heard in this Court, pertaining to "the performance of their duty". Hove v. Stade, No. 002-88 (SMS(D)C Ct., July 15, 1988), at 5. Given this, it is difficult to see how Mr. Prescott could claim absolute immunity in litigation where the Community's basic claims against him are that he acted inconsistently with his duties under the Corporation Ordinance.

Perhaps even more importantly, neither Mr. Prescott nor Mr. Johnson, as officers of LSI, can claim an immunity any broader than that possessed by LSI itself under the Corporation Ordinance and the LSI Charter. The fact that Mr. Prescott may have become a member of the LSI Board because he was Chairman of the Community, and the further possibility that his ascent to the offices of Chairman and CEO of LSI also may somehow have been the result of

his governmental position, does not mean that his corporate position was not distinct from his governmental position. It was in his capacity as corporate officer that he acted when he made decisions for LSI, and it is under the Charter of that corporation that his immunity, or lack thereof, to litigation should be judged.

> The Charter contains the following provisions: ....
>
> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local taxes, regulation, and jurisdiction, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities, if it engaged in the activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that, to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent. Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community. Consent shall not be required for an action commenced by a Member of the Corporation to enforce the provisions of these articles or the Shakopee Mdewakanton Sioux Community Corporation Ordinance in the Judicial Court of the Shakopee Mdewakanton Sioux Community.
>
> ...
>
> Articles of Incorporation of Little Six, Inc., March 18 1991 (Emphasis added).

It seems clear that the first of these provisions, section 3.1, waived any immunity--including absolute immunity--which LSI or its officers might claim, as to actions brought by the Community or Members of the Corporation, in litigation brought in this Court.

It also seems clear that the Corporation Ordinance establishes a separate existence for corporate entities which are chartered under it. And from the LSI Charter it is evident that, although the Community is LSI's sole shareholder and possesses many powers which are unique to tribal entities, still LSI is a distinct entity, created to serve its Members. So, LSI's officers, acting in their corporate capacity, have a status and responsibility that is distinct from the status and responsibility which they might have as officers of the Community. Among these responsibilities, I believe--given the emphasized provision of section 3.2 of the Charter, quoted above--is the responsibility to answer litigation, brought by the Community or Members of the Corporation in this Court, under the Corporate Charter or the Corporation Ordinance. Therefore, neither Mr. Prescott nor Mr. Johnson has the sort of qualified immunity afforded government officials for this sort of action in this Court[1].

2. The record with respect to Mr. Prescott's expenditures and other alleged actions. In addition claiming immunity, Mr.

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[1] Clearly, the present litigation must be distinguished from instances where the plaintiff is neither the Community nor a Member of the Corporation. See e.g., Culver Security Systems, Inc. v. Little Six Inc., et al., No. 026-92 (SMS(D)C Ct., June 14, 1994): and Gavle v. Little Six, Inc., 555 N.W.2d 284 (Minn. 1996).

Prescott has argued that the factual record which has been developed in this matter through the discovery process, and as it is augmented with affidavits, requires the grant of his motion for summary judgment on all counts in the Complaint. But, upon review of the voluminous materials supplied to the Court, and mindful that the Court is obliged to make all inferences in the light most favorable to the non-moving party, Barry v. Barry, 78 F.3d 375 (8th Cir. 1996), as to most of these issues it is the Court's view that the record is not sufficiently unambiguous to permit the grant of summary judgment.

A. Payments allegedly made by or on behalf of Mr. Prescott.

The heart of the Plaintiffs' Complaint concerns (i) the amounts of compensation paid to Mr. Prescott (and to Mr. Johnson), which the Plaintiffs assert was at levels not authorized by LSI; and (ii) the payment of sums, allegedly at Mr. Prescott's or Mr. Johnson's behest, which the Plaintiffs assert were not for proper corporate purposes. The latter sorts of claims range from a skiing trip to Colorado and season tickets to the Minnesota Timberwolves basketball games to the payment of, or reimbursement of, attorneys' fees incurred in contesting the Community's Adoption Ordinance and assisting Mr. Prescott in defending his gaming license before the Community's Gaming Commission. With respect to each of these categories of expense, Mr. Prescott contends either that the Board of LSI approved the expenditures, or that an Executive Committee which the Board established approved the expenditures, or that he

was generally authorized to make the expenditures and the expenditures served a legitimate corporate purpose. And as to each, the Plaintiffs contend that neither the Board of LSI nor the Executive Committee explicitly approved the expenditures, or that if the Executive Committee and/or the Board approved the expenditures they were misled or without authority to do so, and/or that the expenditures served no legitimate corporate purpose.

In my view, the record before the Court, though it is voluminous--perhaps <u>because</u> it is voluminous--is simply not clear enough, on these points, to permit the granting of a motion for summary judgment. It may be, as Mr. Prescott contends, that the LSI may well have validly approved, <u>de jure</u> if not <u>de facto</u>, all of the expenditures in question. On the other hand, as to some expenses, such as the use of corporate funds to pay or defray legal fees attendant to challenging the validity of an Ordinance adopted by the Community's General Council, it may be that even if the LSI Board of Directors approved the expenditure, nonetheless the expenditure was inappropriate. But I think that, resolving all ambiguities in favor of the Plaintiffs, there is sufficient question in the record to require these issues to go to trial.

However, with respect to four categories of expenditures--Mr. Prescott's "surprise birthday party", his daughter's graduation party, fees paid to certain lobbyists and public relations firms, and a separation pay plan for a Mr. Gary Gleisner--it appears from the record that the Plaintiffs simply cannot hold Mr. Prescott liable for damages:

i. The birthday party. The record is clear that in June, 1993, a "surprise" birthday party was held for Mr. Prescott. The record also is clear that Prescott did not plan this party. It was, in fact, a surprise affair, instigated and planned by employees of LSI and at least one member of the LSI Board. The record also indicates that party served as an occasion to preview a corporate advertising campaign, and therefore may well have had a corporate purpose apart from the personal context. But in any case, Mr. Prescott simply had no responsibility for the party or for LSI's payment for the party, and therefore summary judgment is appropriate for Mr. Prescott on this issue.

ii. The graduation party. In contrast, it is clear that Mr. Prescott did plan and direct his daughter's graduation party, and that that event may well have served no purpose under LSI's Corporate Charter. But, whatever might result from those facts in another context, they have no consequence here because this is an action for money damages--for monies which Mr. Prescott owes the Plaintiffs--and Mr. Prescott has repaid LSI for the cost of the party. He therefore clearly owes the Plaintiffs nothing, on that score, and is entitled to summary judgment on that issue.

iii. Fees paid to lobbyists. The Plaintiffs allege that Mr. Prescott improperly utilized funds of LSI to pay fees to a lobbyist, Mr. Larry Kitto, and to a law firm, O'Connor & Hannan, and an advertising agency, Mona, Meyer, McGrath & Gavin. Mr. Prescott contends that nothing in the record suggests that those entities performed personal service for him; and in response the

Plaintiffs have tendered only materials indicating that LSI paid monies to the Democratic Congressional Campaign Committee. Under these circumstances, the Court must agree with Mr. Prescott: nothing produced by the Plaintiffs suggests that this category of expenditures was made to benefit Mr. Prescott rather than LSI. Accordingly, summary judgment for Mr. Prescott as to those expenditures is appropriate.

iv. Mr. Gleisner's separation pay. Mr. Prescott contends that he had no responsibility for the establishment of a separation pay plan for a Mr. Gary Gleisner, a former employee of LSI. The plan was raised in the Plaintiffs' Complaint; but they now have agreed with Mr. Prescott. Accordingly, summary judgment is granted as to that matter.

B. Other actions of Mr. Prescott. This case also contains claims by the Plaintiffs for damages not relating to his compensation or to his emoluments. The Plaintiffs claim to have been damaged by allegedly unauthorized release to the public, by Mr. Prescott, of certain financial information. The Plaintiffs also claim that Mr. Prescott misrepresented his personal history, when he applied for a gaming license from the Community's Gaming Commission, and that he caused actionable damage thereby. Mr. Prescott asserts that as to each of these allegations there is no genuine issue of material fact, and that as to each the Plaintiffs cannot show either that he acted improperly or that they have sustained any damage.

It must be said, in truth, that the causal connection between

Mr. Prescott's alleged actions and some clear compensable damage to the Plaintiffs is not bright and clear, on this state of the record. But again the Court is mindful that, when considering a motion for summary judgment, to prevail the movant must demonstrate that there is no issue of genuine material fact and that he or she is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). So, if there is something credible in the record that may support the Plaintiffs claim, the Court will not foreclose the Plaintiffs' opportunity to prove their damages.

The record indicates that the LSI Board approved Mr. Prescott's release of information to the public only after the fact, and that the approval was later rescinded. What the net effect of all of this may be, as to Mr. Prescott's authority or as to the Plaintiffs' damages, remains to be seen. But from the evidence on the record, the Court cannot say that as a matter of law Mr. Prescott was authorized to release the information or that LSI was not damaged by the release.

The record also indicates that Mr. Prescott did not disclose, on his application for a Community gaming license, that he had been the subject of successful criminal prosecution. The record further indicates that his criminal record had been expunged at a time considerably before his license application was submitted, and that he did not report the record on the application for that reason. But, although these facts are significant, the Court cannot now say as a matter of law that the omission on his license application was proper or that it caused the Plaintiffs no damage.

2. The record with respect to Mr. Johnson. The Court's holding with respect to Mr. Johnson's claim for qualified immunity disposes of Mr. Johnson's motion, since he sought summary judgment only on that ground. But it is clear that nothing in the record supports certain of the allegations which the Complaint makes against Mr. Johnson; and so the Court herewith grants Mr. Johnson summary judgment, sua sponte, on these matters:

A. Disclosure of information. Mr. Johnson has contended that he disclosed no corporate information to any person (other than his own salary), and the Plaintiffs have agreed. Therefore, Mr. Johnson is entitled to summary judgment as to that issue.

B. Authorization of parties. The Complaint alleges that Mr. Johnson participated with Mr. Prescott the aforementioned graduation party for Mr. Prescott's daughters. However, the Plaintiffs in their reply to Mr. Johnson's motion for summary judgment have agreed that the record contains no evidence that Mr. Johnson participated in any way in this matter. Therefore, Mr. Johnson should have summary judgment on that claim.

C. Fees paid to lobbyists. The state of the record as to fees paid to Mr. Larry Kitto, the O'Connor & Hannan law firm, and the Mona, Meyer, McGrath & Gavin advertising agency, discussed above with respect to Mr. Prescott, applies equally to Mr. Johnson. Nothing in the record indicates that those firms performed personal service for Mr. Johnson; and therefore summary judgment on those fees is appropriate as him.

With respect to some of the other allegations in the Complaint

pertaining to Mr. Johnson, the record at this point appears to be tenuous; and as to matters pertaining to his compensation and emoluments, matters stand much as they do with respect to Mr. Prescott. But as to all such issues, the Court concludes that the Plaintiffs have made enough of a showing to take the matter to trial.

ORDER

For the foregoing reasons, and based upon all the pleadings and materials herein--

1. the Defendant Leonard Prescott's motion for summary judgment is GRANTED with respect to claims by the Plaintiffs to recoup (i) the costs of the surprise birthday party held for the Defendant Leonard Prescott in June 1993; (ii) the costs of the graduation party held for the daughter of the Defendant Leonard Prescott; (iii) any fees paid by Little Six, Inc. to Mr. Larry Kitto, the law firm of O'Connor & Hannan, and the advertising agency of Mona, Meyer, McGrath & Gavin; and (iv) the separation pay plan established by Little Six, Inc. for Mr. Gary Gleisner.

2. the Defendant William Johnson is GRANTED summary judgment, sua sponte, as to claims by the Plaintiffs to recoup (i) any damages which the Plaintiffs claim in this litigation to have suffered from the disclosure of corporate information to any member of the public; (ii) any sums expended for the graduation party for Mr. Prescott's daughters; and (iii) any fees paid by Little Six,

Inc. to Mr. Larry Kitto, the law firm of O'Connor & Hannan, and the advertising agency of Mona, Meyer, McGrath & Gavin.

3. In all other respects, the Defendants' motions for summary judgment are DENIED.

April 1, 1997

John E. Jacobson
Judge

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

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

FILED APR 28 1997

CARRIE L. SVENDAHL
CLERK OF COURT

COUNTY OF SCOTT

STATE OF MINNESOTA

Patricia Kostelnik,

Plaintiff,

vs.

Little Six, Inc., d/b/a
Mystic Lake Casino,

Defendant.

Court File No. 064-96

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT

The above-entitled matter came on for Hearing before the Honorable Judge Grey Eagle, Judge of Tribal Court of the Shakopee Mdewakanton Sioux (Dakota) Community, on January 6, 1997 and the hearing was concluded on January 10, 1997. This matter is before the Court based on the complaint the Plaintiff, Patricia Kostelnik, seeking damages for personal injury alleged to have occurred at Mystic Lake Casino on April 27, 1993 to which Little Six Inc., d/b/a/ Mystic Lake Casino answered denying said complaint. The Plaintiff, Patricia Kostelnik was represented by attorney David O'Connor, O'Connor & O'Connor, 1500 Capital Center, 386 North Wabasha Street, St. Paul, Minnesota 55102-1317. The Defendant, Little Six, Inc. d/b/a/ Mystic Lake Casino was represented by Barbara R. Hatch and Daniel J. Trudeau, King & Hatch, P.A., 1500 Landmark Towers, 345 St. Peter Street, St. Paul, Minnesota 55102. Based upon the evidence presented, the arguments of counsel, the entire record and file, and the proceedings herein, Judge Grey Eagle makes the following:

C0064.009

JURISDICTIONAL STATEMENT

The Shakopee Mdewakanton Sioux (Dakota) Tribal Court having heard the above captioned case in accordance with the Shakopee Mdewakanton Sioux (Dakota) Community Tort Claims Ordinance Section 6. Jurisdiction which provides "The Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall have original and exclusive jurisdiction to hear claims brought pursuant to this Ordinance, subject to the terms of the Ordinance, and all claims not brought in the Shakopee Mdewakanton Sioux (Dakota) Tribal Court shall be deemed invalid." The Ordinance was duly adopted on November 12, 1996 by an affirmative vote of the General Council for Resolution No. 11-12-96-001.

This matter is brought pursuant to the Ordinance and therefore subject to scope of the Ordinance including the limited waiver of sovereign immunity, liability of the Community only to the extent over those matters covered by insurance policy as expressly provided in the Ordinance and to the enumerated, statute of limitations, limits, exclusions, defenses, and procedural language and conditions contained therein.

The Court upon an examination of Section 9. Statute of Limitations, of the Ordinance which provides "The statute of limitations for all claims brought against the Community is two (2) years and the right to bring a claim against the Community shall begin to accrue on the date of the act or omission giving rise to the claim, or on the date a reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community.", has determined that although the act complained of occurred on April 27, 1993 and the Plaintiff did not file her action until February 6,

1996 which upon initial inspection appears to have exceeded the two (2) year statute of limitations requirement which was not an issue in this case however the Court in review of the file has determined the matter needs analysis and findings and as such issues the following:

1. The defendant did in their answer dated March 1, 1996 at paragraph # 13 state "that this answering defendant alleges that the plaintiff's claim is barred by the applicable period of limitations."

2. The defendant raised a general statute of limitations defense prior to the adoption of the Tort Claims Ordinance which was not adopted until after the claim had been filed in the Tribal Court.

3 . The claim was filed February 6, 1996 and the Tort Claims Ordinance was not enacted according to the Court record until November 12, 1996.

4. The general rule is that once an Ordinance is adopted that Ordinance is in effect from the date of enactment forward, however the Court determines for this matter the Ordinance is applicable.

5. No subsequent motions for dismissal were filed with the Court on the issue of whether the claim should be dismissed based on the statute of limitations language contained in the Ordinance.

6. The parties to this action proceeded to adjudicate this matter without further mention of the statute of limitations issues.

Therefore the Court concludes that the Defendants in this action determined the secondary language of Section 9. of the Ordinance to be applicable which would allow a claim to have accrued once a

reasonable person under the same or similar circumstances would have known of the injury, loss or other damages incurred as a consequence of the act or omission of the employee of the Community. The Plaintiff during the year of 1993 beginning in April through December of that same year had continuing medical attention and so discovery of her alleged source of injury could reasonably be presumed to be after December 1993 into early 1994. The Plaintiff did file her claim in early 1996 on February 6, 1996 which is arguably within two (2) years in which a reasonable person under continuing medical care might at some point discover an alleged source of her injury. This case is in the opinion of the Court unique in that regard. Generally the cause and effect of act or omission resulting in injury should be relatively easy to detect. The medical testimony elicited in this matter pointed to the fact that the source of an injury such as the Plaintiff's is one that is not so easily detectable. The Court therefore concludes that the decision of the parties to adjudicate this matter on the merits of the case to be proper and within the jurisdiction authorized by the Ordinance. The Ordinance is deemed to have been applicable in this case since the alleged cause of action arose with the two (2) year statute of limitations or as in the case at hand within two (2) years of the time a reasonable person might discover injury or harm.

The Court upon an examination of all the records, files and proceedings herein finds jurisdiction over this matter to be proper and lawful as provided for in the Ordinance.

FINDINGS OF FACT

1. Plaintiff, Patricia Kostelnik, whose date of birth is October 25, 1936, was seated at the right end of a row of machines on the main floor of the Mystic Lake Casino near an area known as "bank 20" on April 27, 1993.

2. During at least a portion of the evening hours of April 27, 1993, Ms. Kostelnik was seated on a chair affixed to a slot machine.

3. The slot machine at which Ms. Kostelnik was seated was located at the right hand end of a bank of four slot machines.

4. The location on the casino floor of the slot machine at which Ms. Kostelnik was seated was designated by Mr. Fairbanks on Defendant's Exhibit 41.

5. Sometime between 10:30 p.m. and 11:20 p.m. on April 27, 1993, a money cart being escorted by two Mystic Lake employees came in contact with the back of the slot machine chair on which Ms. Kostelnik was seated.

6. Ms. Kostelnik did not see the money cart prior to the time ~~at which~~ it came in contact with her chair, and therefore cannot state the speed of the money cart prior to the time of the contact and cannot state anything as to the conduct of the operator of the money chart prior to the contact.

7. At the time of this contact between the money cart and Ms. Kostelnik's chair, the front end of the money cart was being pulled by Mystic Lake employee Troy Akerman and the back end of the money cart was being pushed by Mystic Lake employee Chris Fairbanks.

8. At the time of this contact between the money cart and Ms. Kostelnik's chair, Ms. Kostelnik was seated squarely on the chair, with both of her feet placed squarely in front of her, flat on the metal base of the chair, pointing toward the slot machine.

9. At the time of the contact Mr. Fairbanks and Mr. Akerman were maneuvering the cart at a normal walking speed of less than one mile per hour.

10. The only contact between the money cart and Ms. Kostelnik's chair occurred when the middle portion of the cart brushed against the back of Ms. Kostelnik's chair.

11. At no time did any portion of the money cart come in contact with, land upon, cut or scratch Ms. Kostelnik's foot.

12. Following this contact, Mr. Fairbank's looked at Ms. Kostelnik and excused himself. When Mr. Fairbank's looked at Ms. Kostelnik, she did not appear to be in any distress and she continued to play the slot machine.

13. Following this contact, Ms. Kostelnik did not say anything to either of the Mystic Lake employees.

14. The contact between the money cart and the back of the chair was approximately .6 g's, producing approximately the same feeling as an elevator coming to a stop.

15. Following the contact between the money cart and Ms. Kostelnik's chair, another Mystic Lake employee called for a Mystic Lake EMT.

16. Mark Barrie, then a Mystic Lake EMT and security officer, responded to the call.

17. When Mr. Barrie arrived on the scene, Ms. Kostelnik as still playing the slot machine, exhibiting no obvious signs of distress.

18. Mr. Barrie performed a primary survey of Ms. Kostelnik in the location of the slot machine by asking her what had happened and examining her looking for signs of injury.

19. As a part of his primary survey, Mr. Barrie specifically examined Ms. Kostelnik's feet.

20. Based upon his primary survey, Mr. Barrie found no obvious signs of injury, and specifically saw no cut, laceration, scratch or blood on her right foot.

21. Mr. Barrie took Ms. Kostelnik to the Mystic Lake first aid room and performed a secondary survey, which included another examination of Ms. Kostelnik's neck, right foot and right ankle.

22. As a part of secondary survey, Mr. Barrie took off Ms. Kostelnik's right shoe and sock.

23. Mr. Barrie did not observe any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot or ankle.

24. At no time did Ms. Kostelnik ever tell Mr. Barrie that the money cart had run over, landed upon, cut or scratched her foot.

25. Mr. Barrie did not place an ace bandage upon Ms. Kostelnik's right foot.

26. The ambulance run sheet (Defense Exhibit 5) describes Ms. Kostelnik's complaint of injury, as well as the results of their physical examination of Ms. Kostelnik, and does not document the presence of any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot.

27. The emergency room records from St. Francis Hospital also detail Ms. Kostelnik's complaint of injury, as well as the results of their physical examination, and does not document any cut, laceration, scratch or other bleeding injury to Ms. Kostelnik's right foot.

28. X-rays taken of Ms. Kostelnik's right foot in the St. Francis Emergency room does not show the presence of an ace bandage on the right foot or ankle.

29. Following the date of the accident, Ms. Kostelnik did not observe any pussing in the area of her right foot.

30. Ms. Kostelnik had suffered from a history of neck pain, the treatment for which dated back to 1982.

31. Over the eleven (11) years from that initial treatment to the date of the accident at Mystic Lake, Ms. Kostelnik had received numerous treatments for her neck from both orthopedic surgeons and physical therapist, as reflected in Defense Exhibits 8 through 24.

32. Prior to April 27, 1993, Ms. Kostelnik was diagnosed as having a degenerative condition in her neck at the C5-C6 level of her cervical spine.

33. Ms. Kostelnik reported to medical personnel at the Ramsey county Mental Health Clinic on April 19, 1993, that she had suffered from neck pain which caused her to be "in bed" for four days beginning on April 14, 1993. See Defense Exhibit 25.

34. When Ms. Kostelnik returned to the Ramsey County Mental Health Clinic on May 10, 1993, she reported to the medical personnel the accident which occurred at Mystic Lake Casino on April 27, 1993, and did not mention any injury to or infection of her right foot as a result of that accident. See Defense Exhibit 7.

35. In June, 1993 Ms. Kostelnik was diagnosed as having vertebral osteomyelitis caused by a staph infection in her neck at the C5-C6 level.

36. Ms. Kostelnik was predisposed to developing vertebral osteomyelitis given her age and the degenerative condition of her neck which existed prior to April 27, 1993.

37. In the majority of cases of vertebral osteomyelitis, the exact mechanism by which the staph infection enters the body cannot be determined.

38. If a staph infection enters the body through a cut or soft tissue injury, the person would develop an infection in the area of this cut or soft tissue injury which would produce obvious signs of an infection, including pussing.

39. Ms. Kostelnik's complaint of neck pain beginning on or about April 14, 1993 is consistent with the development of her vertebral osteomyelitis as of that date.

CONCLUSIONS OF LAW

1. That the mere fact of an accident is not alone sufficient evidence to establish negligence, and Ms. Kostelnik has not sustained her burden of proof in showing that the employees of Mystic Lake Casino failed to exercise reasonable care when operating the money cart at the time of the accident of April 27, 1993.

2. That Little Six, Inc. d/b/a Mystic Lake Casino was not negligent with respect to the accident involving Ms. Kostelnik which occurred on April 27, 1993.

3. That Ms. Kostelnik did not suffer an injury to her foot as a result of the accident which occurred at Mystic Lake Casino on April 27, 1993.

4. That Ms. Kostelnik did not suffer an injury to her neck as a result of the accident which occurred at Mystic Lake Casino on April 27, 1993.

5. That Ms. Kostelnik's vertebral osteomyelitis, which is real and the Court is truly sympathetic to Ms. Kostelnik's pain and suffering; her injury; and medical condition were not caused by the accident which occurred at the Mystic Lake Casino on April 27, 1993.

C0064.009

6. Ms. Kostelnik has not met her burden of proof that she sustained any injury as a result of the accident which happened at Mystic Lake Casino on April 27, 1993.

ORDER FOR JUDGMENT

IT IS HEREBY ORDERED,

1. That the Plaintiff take nothing by her Complaint;

2. That the Complaint is dismissed with prejudice; and

3. That the Defendant, Little Six, Inc. d/b/a/ Mystic Lake Casino is entitled to recover its costs and disbursements.

Dated:

BY THE COURT,

Robert Grey Eagle

Robert A. Grey Eagle, Tribal Court Judge

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

COUNTY OF SCOTT
STATE OF MINNESOTA

In Re Request for Advisory Opinion by
the Secretary-Treasurer

MEMORANDUM
& ORDER

On May 1, 1997, the Secretary-Treasurer of the Shakopee Mdewakanton Sioux (Dakota) Community filed a Request for Advisory Opinion with this Court. The Request sets forth two separate, but related questions involving the voting rights of Community members in a General Council meeting which proposes to amend the Community's Adoption Ordinance No. 11-30-93-002 ("the Adoption Ordinance"). The Memorandum filed in support of the Secretary-Treasurer's Request suggests that there are other items on the agenda for the Community meeting, but does not disclose what these other items are, and this Opinion should not be viewed as addressing any other business the Community may take up at the meeting. The meeting is scheduled to take place on May 13, 1997.

This Community took a courageous step in 1988 when it enacted Resolution Number 02-13-88-01 which created this Court. The intent of the Community, as expressed in the Resolution, was clear. The purpose of the Court is to resolve disputes arising from a broad range of actions, interactions of tribal government, tribal members and those who engage in relationships on the Reservation.

Today, the Secretary-Treasurer seeks the Advisory Opinion of this Court to two questions:

(1) Could persons on the voters list for the Regular General Council meeting

scheduled for May 13, 1997, who are at least 18 years of age, who meet the residency requirement for voting, and who have become enrolled members of the Shakopee Mdewakanton Sioux (Dakota) Community by one of the methods sanctioned in In Re Election Ordinance No. 11-14-95-004, be prohibited from voting at the meeting on any matter, including whether to amend Adoption Ordinance No. 11-30-93-002, because the Department of the Interior has found them ineligible to participate in a Secretarial Election?

(2) Could persons on the voters list for the Regular General Council meeting scheduled for May 13, 1997, who are at least 18 years of age, who meet the residency requirement for voting, and who have been adopted pursuant to Adoption Ordinance No. 11-30-93-002, which was approved by the Department of Interior on February 17, 1995, be prohibited from voting on any matter, including whether to amend Adoption Ordinance No. 11-30-93-002, because certain aspects of the approval of that ordinance have recently come under review by the Department of the Interior?

In the relatively short history of this Court, it has entertained only one other request for an Advisory Opinion. The Secretary-Treasurer argues that this Court has jurisdiction to provide an Advisory Opinion pursuant to Section II of Ordinance Number 02-13-88-01. With this we agree, however it must be noted that we do so with great reluctance because the procedure by which these opinions are provided is fraught with difficulty. There is no opportunity for presenting views whether they be in support or in opposition, and questions are presented in an abstract and hypothetical context.

This Court in Case No. 037-94 stated that "the Court's function is to hear cases and controversies -- that justiciability and the adversarial process alone produce the sort of complete record which permits good decisions." Id at 3. The Court also stated that a "governmental crisis of constitutional proportion may make advisory opinions appropriate." Id at 4. Here, the Secretary-Treasurer urges the Court to grant her Request "because the Business Council wishes to ensure a valid vote on the amendments to the Adoption Ordinance, and to avoid protracted litigation about whether the proper persons were allowed to vote on whether to amend the Adoption Ordinance. . . . for these are significant questions of tribal law, which only this Court can answer". Memorandum in Support of Request for Advisory Opinion at page 5. It is our view that avoiding protracted litigation is not a sufficient ground to grant this Request. Nor is it appropriate to grant the Request on the basis of ensuring a valid vote on the amendments to the Adoption Ordinance. It is unclear to this Court how any response to the questions presented will rise to a level of such assurance. This is best left to the adversarial process. Moreover, the fact that these questions pose significant questions of tribal law argues more toward holding our views until such time that a controversy arises for it is in that environment that significant questions of tribal law can be answered.

It is also our view that responses to these questions are unnecessary.

This Court, in its Advisory Opinion issued in Case Number 037-94, pointed out that the Community could not make payments under the Amended Business Proceeds Distribution Ordinance No. 12-29-88-002 to individuals who became members under the Community's Adoption Ordinance until and unless the Adoption Ordinance was approved by the Secretary of Interior as required by Article II, Section 2 of the Community's Constitution. Although, in this

instance, the question arises with respect to the right to vote instead of the receipt of payment under the Amended Business Proceeds Distribution Ordinance, the controlling fact seems to be that the Secretary has approved the Adoption Ordinance, and the individuals who have become members pursuant to the procedures set forth in that Ordinance are members who are entitled to vote at the General Council meeting if they meet the associated requirements (age, residency,. etc...).

The Court in its decision in Smith, Feezor, et al. v. SMSC, Court File 038-94, went to great lengths to set out its view of the complex history surrounding the Community's practices involving membership. The issues presented -- centering around the meaning of Article II of the Community Constitution -- are similar to those raised by the Secretary's question. In its order the Court specifically dealt with motions for preliminary relief and the case was ultimately terminated prior to full adjudication. However, it is worthwhile noting that the Court strongly affirmed the sacred right of the Tribe to determine its own membership. The Court found, in its Dataphase analysis, that the tribal practice of "voting in" members, and the acquiescence of the Secretary of Interior in that practice, presents a likelihood of success on meeting Constitutional muster for those members voted in prior to 1994. In addition, the Court found that those members voted in subsequent to 1993, pursuant to the Community's Adoption Ordinance, may be barred from membership until and unless the Ordinance was approved by the Secretary. Here, it appears that the Interior Board of Indian Appeals has reversed the disapprovals of the Community's Adoption Ordinance, and the Area Director has approved the Community's Adoption Ordinance thereby giving rise to the full benefits of membership, including and especially the right to vote, for those individuals granted membership by the

Adoption Ordinance. (See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 I.B.I.A. 163 (February 8, 1995), Letter of Area Director to Shakopee Mdewakanton Sioux Community Approving Adoption Ordinance No. 11-30-93-02, dated February 17, 1995.).

IT IS HEREBY ORDERED, that the Secretary's Request for Advisory Opinion is DENIED.

BY THE COURT,

Dated: May 9, 1997

John E. Jacobson,
Tribal Court Judge

Henry M. Buffalo, Jr.,
Tribal Court Judge

Robert A. Grey Eagle,
Tribal Court Judge

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

FILED MAY 2 9 1997

CARRIE J. SVENDAHL
CLERK OF COURT

cls

TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Jeffrey Bryan,

Court File No. 073-97

Plaintiff,

v. ORDER

Shakopee Mdewakanton Sioux
(Dakota) Community, and
Meadowbrook Insurance Group,

Defendant.

JURISDICTION

This action arises from the Findings and Order issued by the Hearing Examiner on January 30, 1997. On February 24, 1997 the Meadowbrook Insurance Group Administrator, filed this appeal seeking to reverse the Hearing Examiner's Order. The appeal was timely filed pursuant to Section F.8 of the Community's Workers Compensation Ordinance, (Approved, SMSC Resolution 11-08-94-01, November 8, 1994) (hereinafter "Ordinance"), and is therefore properly before this Court.

FACTS

Jeffrey Bryan was employed by the SMSC/LSI as a blackjack dealer. Mr. Bryan claims to have incurred an injury to his arm, upper back and neck. Further, he claims that these injuries were the result of performing his duties as a blackjack dealer. This claim was submitted to the Hearing Examiner on August 28, 1996. A hearing was held on November 15, 1996. The

J0860.005

record was left open until December 31, 1996. Mr. Bryan was represented by counsel at the hearing. The Hearing Examiner issued her Findings and Order on January 30, 1997 in which she sets forth and identified eight separate issues. In summary, Hearing Examiner found that Mr. Bryan sustained a work related injury and that he should be compensated for these injuries pursuant to the Ordinance. It is not necessary for purposes of this appeal to recite the Findings or the additional issues of the Order.

On appeal the Administrator asserts that Mr. Bryan's injury is a result of a degenerative pre-existing condition and as such the claim should be denied pursuant to Section C.3.n. of the Ordinance.

DECISION

This Court's review of Findings and Orders issued by the Hearing Examiner is narrow. The Ordinance, in Section F.8, sets forth the Court's authority as follows:

> **F.8. Appeal**
>
> There shall be no further review of factual decisions made by a hearing examiner. A decision by a hearing examiner concerning legal issues, whether the result of an evidentiary hearing or more, may be appealed by either party to the Shakopee Mdewakanton Sioux (Dakota) Judicial Court. The appeal must be filed with the Judicial Court in writing within 30 days of the date of the appeal and shall be served on all parties. The Judicial Court may remand the matter to the hearing examiner for additional factual determinations if the Judicial Court determines that the factual record is inadequate. The decision of the Judicial Court shall be final.

The Hearing Examiner under paragraph number 4 of the Issues, states as an issue, "whether the employee's claims are excluded under the pre-existing condition section of the Ordinance, C.3.n.". She then goes on to make the Finding in paragraph 4 that "[T]he Employee is not precluded from benefits under Ordinance C.3.n. on these facts."

It appears that the basis for Finding number 4 lies in the fact that neither Dr. Heller or

Dr. McGrail "do not opine a degenerative, pre-existing condition". Findings and Order p. 3.

Upon review of the record it appears that there was pre-existing back pain as disclosed by Mr. Bryan (See Progress Notes 8/1/96 and Page 3 Dr. Thomas Report dated September 23, 1996) Further, Dr. Mark Thomas, opines that Mr. Bryan's condition is a result of natural degenerative processes, are not work related and that it is considered a pre-existing condition. (See Dr. Thomas report p. 7). The report of Dr. Thomas was completed on September 23, 1996. The reports of both Dr. McGrail and Dr. Heller were made subsequent to the report of Dr. Thomas and both fail to address the opinion of Dr. Thomas relative to the pre-existing condition. In total, the record is inadequate to support the Hearing Examiner's Finding in paragraph 4.

IT IS HEREBY ORDERED:

1. That the factual record is inadequate to support the finding of no pre-existing condition;

2. That the request by Meadowbrook Insurance Group, Administrator to reverse the decision of the Hearing Examiner on the issues of Pre-existing condition is **GRANTED**; and

3. That the matter is remanded to the Hearing Examiner for further proceedings on the issue of degenerative, pre-existing condition.

BY THE COURT

Date: 5/29, ~~1996~~ 1997

Henry M. Buffalo, Jr.

J0860.005

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

FILED MAY 3 0 1997
CARRIE L. SVENDAHL
CLERK OF COURT

IN THE CHILDREN'S COURT OF THE SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

In re the Matter of [redacted]

Maxine Woody,
Petitioner,

and

Tracy Swartz and
Keith Wisnewski,

Respondents.

File No. 07L - 96

(Formerly Children's Court File No. 006-97)

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

On May 29, 1997, a hearing was held on the Petition of Maxine Woody for sole physical and legal custody of the minor child, [redacted]. Based on the testimony adduced at that hearing, and on all of the files and records herein, the Court makes the following Findings of Fact:

1. The minor child, [redacted], born June 21, 1987, is the biological daughter of the Respondents Tracy Lee Swartz and Keith Peter Wisnewski.

2. The Petitioner is the maternal great aunt of the minor child, [redacted].

3. The Petitioner is a member of the Shakopee Mdewakanton

Sioux (Dakota) Community. Her residence is 32451 Sweetgrass Circle, Shakopee, Minnesota. The minor child, [redacted] has lived with the Petitioner, at the request and with the consent of the Respondent, Tracy Lee Swartz, since August, 1996.

4. The Respondent Tracy Lee Swartz was born April 8, 1969, and resides at 123 East 18th Street, Hibbing, Minnesota. The Respondent Keith Peter Wisnewski was born January 16, 1963, and his residence is unknown to any of the other parties.

5. The Respondent, Tracy Lee Swartz, was served with the Petition in this matter, and attended the hearing held on May 29, 1997. She was not represented by counsel. Upon the filing of an affidavit of the Petitioner, service of process upon the Respondent Keith Peter Wisnewski was waived by Order of this Court on December 5, 1996.

6. The Respondent Tracy Lee Swartz and the Respondent Keith Peter Wisnewski were divorced on August 3, 1995, in Scott County, Minnesota, and Tracy Lee Swartz was awarded sole physical and legal custody of [redacted].

7. Since the time of the divorce, the Respondent Keith Peter Wisnewski has made no attempt to contact or see his daughter, [redacted] and has provided no child support or comparable financial contribution.

8. The Respondent Tracy Lee Swartz and the minor child, [redacted] have experienced problems living together, which prompted the Respondent Tracy Lee Swartz to request the Petitioner to take the minor child, [redacted], into her home in

August, 1996.

9. The minor child, [redacted], has lived continuously with the Petitioner since August, 1996; has been attending school in Shakopee, Minnesota; has made good progress in her studies; has been working with a child counsellor to deal with the grief she has experienced from the death of one of her brothers; and participates regularly in the social and cultural events of the Shakopee Mdewakanton Sioux (Dakota) Community.

10. During the time that the minor child, [redacted] has lived with the Petitioner, she has maintained regular contact, by telephone and in person, with her mother, the Respondent Tracy Lee Swartz.

11. At the hearing held in this matter on May 30, 1997, the Respondent Tracy Lee Swartz expressed the hope that at some time in the future she and her daughter, the minor child, [redacted], may be able to reconcile, and that the Respondent Tracy Lee Swartz may be able to reobtain physical and legal custody of her daughter. The Respondent Tracy Lee Swartz also expressed the opinion that the Petitioner's present request for physical and legal custody of the minor child, [redacted], was probably for the best.

12. The Petitioner has established an excellent relationship with the minor child, [redacted], who calls her "grandmother". The Court, off the record but in the presence of counsel and the Clerk of Court, talked to the minor child, [redacted], on May 30, 1997. As a result of that talk, the

Court is convinced that [redacted] understands the nature of these proceedings, is happy living with the Petitioner, and has a good chance to thrive and have a healthy childhood, while continuing an open relationship with the Respondent Tracy Lee Swartz, if the Petition is granted.

Based on the foregoing, the Court makes the following Conclusions of Law:

1. Although this matter was filed in the Children's Court of the Shakopee Mdewkanton Sioux (Dakota) Community, upon review of the Petition and all of the evidence adduced at the hearing held on May 30, 1997 the Court concludes that the minor child, [redacted], is not delinquent or in need of protection, and therefore this matter should be filed in the Court's general docket, as a proceeding under Article IV, Section 5 of the Domestic Relations Code of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Domestic Relations Code"). The Court file will be renumbered accordingly.

2. This Court has jurisdiction to hear this matter under the provisions of Chapter I, section 1 of the Domestic Relations Code, which provides in pertinent part "[t]he Community shall have original jurisdiction over the domestic relations of its members".

3. It is appropriate, under the Article IV, Section 5.d. of the Domestic Relations Code, to modify the custody provisions that were contained in the Respondents' divorce decree, entered by the District Court for Scott County, Minnesota on August 3, 1995, in

Court file No. 95-06019, because a change has occurred in the circumstances of the child and of the custodian since that order was entered, and that the modification is necessary to serve the best interests of the child.

4. The conditions established for a change in custody, by Article IV, Section 5.d. of the Domestic Relations Code have been satisfied, in this matter, because Tracy Lee Swartz, the previous custodian of the minor child, has not objected to the change in custody, and the minor child has been integrated into the family of the Petitioner with the consent of Tracy Lee Swartz.

For the foregoing reasons, it is herewith ORDERED:

1. Physical and Legal Custody of the minor child, [redacted] is awarded to the Petitioner, Maxine Woody; and

2. The Respondent, Tracy Lee Swartz, shall be entitled to liberal visitation with the minor child, [redacted]; and

3. Any future visitation between the minor child, [redacted], and the Respondent Keith Peter Wisnewski shall be supervised by the Petitioner.

Dated: May 30, 1997

John E. Jacobson
Judge

X0860.045

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

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

FILED JUN 16 1997

CARRIE L. SVENDAHL
CLERK OF COURT

Kenneth Brown, Employee, vs. Shakopee Mdewakanton Sioux (Dakota) Community/Little Six, Inc., Employer, and Meadowbrook Insurance Group, Insurer,	)	File No. 074-97

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the appeal by Kenneth Brown, an employee of Little Six, Inc., from a decision the Hearing Examiner denying his claim petition for coverage under the worker's compensation plan of the Shakopee Mdewakanton Sioux (Dakota) Community.

Mr. Brown was assigned as a supervisor in the Mystic Lake Casino facility. His employment required him to walk considerable distances. On or about November 7, 1996, Mr. Brown complained of pain in his left foot. A substantial body of Mr. Brown's medical records appear in the claim file, but the only portion of the file which bears upon his claim is a chart note made by Dr. John Kipp,

on November 11, 1996, which states that "[w]ork relatedness is not clear".

The Administrator of the Employer's Worker's Compensation Plan initially denied Mr. Brown's claim on the ground that he has a pre-existing congenital condition of paralysis on the left side of his body, from which the Administrator decided the Employee's injury arose--an issue with respect to which the burden of proof is on the Employer, under the Community's Worker's Compensation Ordinance and Plan.

Mr. Brown sought review of the Administrator's decision; and, on February 27, 1997, Hearing Examiner Tamara G. Garcia denied coverage, noting Dr. Kipp's statement and holding that Mr. Brown had not proven that his injury was work-related. She did not reach the question of Mr. Brown's pre-existing condition.

In this appeal, and before the Hearing Examiner, Mr. Brown has asserted that he had never had any problems with his feet until he was obliged to do the required walking in his Mystic Lake Casino employment.

The Court agrees with the Hearing Examiner that the pertinent medical record here is barren. The Court is not satisfied, however, that the record could not usefully be supplemented. Mr. Brown suffered from plantar fascitis, tendinitis. The record does not include information as to the medical causes for that ailment. It therefore is unclear, to the Court, whether the legal conclusion of the Hearing Examiner--that Mr. Brown has not proved work-relatedness--is correct.

It is significant, of course, that the only medical evidence pertinent to the question is a statement that work-relatedness is "unclear"; but it may be possible for additional clarity to be added, based on an examination of the nature of the Employee's injury, and a comparison between that nature and the Employee's job-related activities and his non-job-related activities.

ORDER

For the foregoing reasons, and based on all the files and materials herein, this matter is remanded to the Hearing Examiner for further findings with respect to the medically recognized causes of the Employee's injury, and with respect to the whether those causes add any significant evidence pertinent to the issue of whether the Employee's injury was work-related. If the Hearing Examiner concludes that, with the addition of such evidence, the Employee has met his burden of proving work-relatedness, then she should proceed to decide whether the Employer has met its burden of proving that the injury resulted from a pre-existing condtion.

June 16, 1997

John E. Jacobson
Judge of Tribal Court

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

FILED JUL 29 1997

CARRIE L. SVENDAHL
CLERK OF COURT

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Kimberly Amundsen, et al. Plaintiffs, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Enrollment Committee, et al., Defendants.	)	File No. 049-94

MEMORANDUM AND ORDER

On July 15, 1997, the Court heard oral argument on the plaintiffs' motion to reopen, amend and enforce the Order entered in this matter on September 16, 1996. That September 16, 1996 Order granted the Defendants' motion for summary judgment in all respects but one: it denied the motion for summary judgment of the Enrollment Officer ("the Enrollment Officer") of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), and it directed the Enrollment Officer to process the plaintiffs' applications for membership in the Community, and to make recommendations to the Community's Enrollment Committee with respect to them, by October 16, 1996.

The Enrollment Officer complied with the September 16, 1996 Order: she made recommendations to the Enrollment Committee, as to

each of the plaintiffs' applications, within the specified time.

Thereafter, however, the process apparently stalled. The Enrollment Committee did not act, one way or another, upon the Enrollment Officer's recommendations for a considerable period of time. That inaction prompted the plaintiffs to move that the matter be reopened the September 16, 1996 Order be amended in a fashion that would direct the Enrollment Committee to process the membership applications[1].

Then, after the plaintiffs' motion was filed, but before it was heard, the Enrollment Committee met and decided that each of the twenty plaintiffs' applications be denied. Two grounds were stated, in the Enrollment Committee's decision: (1) each of the plaintiffs was enrolled in another Indian tribe, and had not relinquished that enrollment, and (2) none of the plaintiffs met the membership requirements specified by the Constitution of the Community.

On January 17, 1996, this Court held that the Community's Ordinance No. 6-08-93-001 ("the 1993 Enrollment Ordinance"), is the law which governs the processing of the plaintiffs' membership applications. That Ordinance mandates that the Enrollment Officer "shall" process enrollment applications within a thirty day time period; and that word--"shall"--formed the basis for the Court's

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[1] The Plaintiffs also asked that the Court grant certain relief with respect to the General Council of the Community. The Court is uncertain what, if any, authority it might have been given to enter relief against that body; but clearly, in the context of this case, no such relief would be appropriate--even ignoring issues of ripeness--inasmuch as the General Council of the Community was never named by the plaintiffs as a party defendant.

conclusion, on September 16, 1996, that the Enrollment Officer had a duty to make a recommendation to the Enrollment Committee. The Court made it clear that it did not intend, in any way, to suggest what the Enrollment Officer's recommendation should be. Rather, the Enrollment Officer's duty was simply to make a timely recommendation.

On September 16, 1996, the Court also held that a February 13, 1996 resolution, adopted by the General Council of the Community, directing the Enrollment Officer not to process enrollment applications received from persons who are members of other Indian tribes, until those persons have relinquished their earlier tribal membership, should not apply retroactively to the plaintiffs' applications. The rationale for that aspect of the Court's decision was that the Enrollment Officer should have processed the plaintiffs' applications in 1994, when they first were received; and so the Enrollment Officer's duty, in 1996, was to give the plaintiffs the procedural treatment they should have received in 1994, before the February 13, 1996 resolution was in effect.

As has been noted, the Enrollment Officer complied with the Court's order. But the plaintiffs argued, during the July 15, 1997 hearing, that the Enrollment Officer was not alone in having an enforceable duty, under the 1993 Enrollment Ordinance. Section 6 of the 1993 Enrollment Ordinance says, in pertinent part, that the Enrollment Committee "shall approve or reject all enrollment applications based on the record presented and other evidence deemed acceptable by said Committee" (emphasis added). And during

the July 15, 1997 hearing, the Court indicated that it was sympathetic to the argument that the word "shall", in that section, implied that the Committee had an obligation to approve or reject an application within some finite time. The 1993 Enrollment Ordinance does not create an explicit time frame, as it does with respect to the Enrollment Officer's obligation to process applications; but it seems probable that the Committee is obliged to act within some reasonable time, considering all the circumstances.

But the fact is that the Enrollment Committee now has acted upon the plaintiffs' applications; and in the Court's view, that action makes the plaintiffs' motion moot. The plaintiffs argued strenuously that the Committee had not acted until after they made their motion, and that this presented the Court with the possibility of a wrong which is susceptible of recurring, and which is without a remedy unless the Court granted their motion. But that argument leaves the question: what relief should be ordered? Should a timeframe be established for the processing of all other applications? Although the Court is concerned about the amount of time the processing of the plaintiffs' applications has taken, the Court is not convinced that the situation presently warrants that action; nor is it clear that the plaintiffs desire it. Rather, it seems that the plaintiffs wish the Court to insert itself into the merits of the consideration of their applications for membership, and that would be completely inappropriate, under the

circumstances[2].

The 1993 Enrollment Ordinance states that, whether the Enrollment Committee accepts or rejects an application for membership, an appeal lies, to be processed by the Business Council and ultimately presented to the General Council. At the conclusion of the July 15, 1997 hearing, the Court directed counsel for the defendants to advise the Court and plaintiffs' counsel, in writing, when the plaintiffs' appeals were received, and the likely timeframe for their processing. Between that date and this, counsel complied with that direction. Accordingly, and for the foregoing reasons, it is herewith ORDERED that the plaintiffs' motion is denied as being moot.

July 28, 1997

John E. Jacobson
Judge

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[2] The Court is somewhat troubled by the fact that the Enrollment Committee chose to use "dual enrollment" as a reason for rejecting the plaintiffs' applications, given the Enrollment Officer's duty to ignore that factor. But whether or not the Court would have the authority to direct the Committee to reconsider its rejection--and the Court makes no decision on that point--those concerns, too, are mooted by the fact that there was an independent reason for the Committee's rejection, and also are mitigated by the fact that the plaintiffs have an appeal to the General Council.

X0860.001

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

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., et al.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 048-94
	)	
Leonard Prescott, et al.	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Plaintiffs Little Six, Inc., et al. (LSI) sued defendants Leonard Prescott and F. William Johnson alleging that in their former positions with LSI they expended monies for improper purposes and without authorization. This court granted Defendant's motion for summary judgment in part, and they appealed by filing proper Notices of Appeal. Subsequently, Plaintiff filed a Motion to Amend its Complaint, dropping some counts, adding a new count, and modifying some of its factual allegations.

Plaintiff now asks this court to act on its Motion to Amend while this same action is pending on appeal. A properly filed Notice of Appeal, however, divests the trial court of jurisdiction over those aspects of the case involved in the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982); Harmon v.

Farmers Home Administration, 101 F.3d 574, 587 (8th Cir. 1996). Since the Defendants have filed proper Notices of Appeal appealing the entire judgment of this court, and the Court of Appeals is currently considering this matter, this court does not have jurisdiction to consider the merits of Plaintiff's claims or to rule on its Motion to Amend.

ORDER

For the foregoing reasons, briefing and consideration of Plaintiff's Motion to Amend is stayed pending the resolution of the appeal in this case.

October 5, 1997

John E. Jacobson
Judge

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

FILED AUG 07 1998

CARRIE L. SVENDAHL
CLERK OF COURT

IN THE TRIBAL COURT OF THE

SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

Kimberly L. Gatzke,

Petitioner,

v.

Scott Campbell,

Respondent.

Court File 300-98

ORDER

This matter comes before the Court on a Petition for Enforcement of Foreign Judgment filed by the petitioner on June 7, 1998. A summons was issued on July 6, 1998 to the Respondent which has not been answered within the requisite time period of twenty (20) days allowed. A review of the complete file of this action in the Shakopee Mdewakanton Sioux Dakota Community Tribal Court included an "Affidavit of Service" dated July 10, 1998 sworn to by Jeffrey P. Comer of Metro Legal Services which states "that on the 7th day of July, 1998 at 7:55 p.m. (s)he served the attached Summons and Petition for Enforcement of Foreign Judgment upon Scott C. Campbell therein named, personally at 2997 West Woodland Trail, Shakopee, County of Scott, State of Minnesota, by handing to and leaving with John Doe, whose true and correct name is unknown, a true and correct name unknown, a true and correct copy thereof." The Rules of Civil Procedure Court of the Shakopee Mdewakanton Sioux Community 6. (b) Same: How Made. specifically provides in service of process in ".....leaving it at his dwelling house or usual place of

C0064.009

abode with some person of suitable age and discretion then residing therein. ...". The Petitioner in this instance describes the person the Summons and Petition was delivered upon to be a "John Doe, whose true and correct name is unknown..". There is no assertion in the "Affidavit of Service" that such person was of suitable age or discretion and a resident therein as the rules require. The Court therefore in accordance with Rule 34 Enforcement of Foreign Judgments will require the Petitoner in this matter to meet the requirements of effective service of process. The question is of a fundamental nature wherein the Respondent should have the opportunity to be heard and that cannot occur if the service of process was defective or did not meet the basic requirements as provided in the rules of the Court. Effective service of process can be made through various methods including "Service by mail is complete upon mailing.", which the Petitioner may want to attempt otherwise the Court will schedule additional proceedings on the request to issue an "Order Enforcing a Foreign Judgment". At this point the Court is not satisfied with a "John Doe" service of process especially where there is no assertion that said "John Doe" is of suitable age, discretion or a resident therein. The Petitioner may attempt "service by mail" which should include some means of verifying this is the correct mailing address of the respondent or other effective service of process. The Court has discretion to require additional proceedings on cases of this nature which is based in part on whether the Respondent has responded to the Petititon. Should there be effective service of process and the Respondent does not respond to the Petition in this Court then the matter is less problematic and similar to a default or acquiescence. In the same instance should there be a response as provided for in Rule 34 giving rise to a substantial question of jurisdiction or regularity of the proceedings in the foreign court

then the Court may require aditional proceedings. The Court hereby instructs the Petitioner to satisfy the requirements of effective service of process within (7) seven days of the issuance of this order and file with the Court the requisite pleadings and forms applicable to the service of process issue. Should the Petitioner want to proceed without meeting such requirement then the Court will schedule a hearing on this matter consistent with rule 34 of Court Rules of Civil Procedure. The Clerk of Court will ascertain which option the Petitioner chooses and docket the Court schedule accordingly. So Ordered.

Date: August 7, 1998

Robert Grey Eagle
Robert A. Grey Eagle
Tribal Court Judge

C0064.009

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

FILED AUG 2 4 1998

CARRIE L. SVENDAHL
CLERK OF COURT

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Winifred Feezor, Cecelia M. St. Pierre, Plaintiffs,	)	
vs.	)	Court File No. 311-98
Shakopee Mdewakanton Sioux (Dakota) Community Business Council; Stanley R. Crooks, Glynn Crooks, and Susan Totenhagen individually and in their official capacities; Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and in their former capacities as designated officers of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council; and various unnamed individuals, Defendants.	)	

MEMORANDUM AND ORDER

This matter comes before the Court on Plaintiffs' Motion for Temporary and Preliminary Relief. Plaintiffs ask this Court for a temporary restraining order preventing Defendants from making any future per capita distributions from the Community's net gaming revenues or from providing any other benefits of Community membership to various unnamed defendants. Plaintiffs also request

a Writ of Mandamus seeking information regarding the unnamed Defendants, a preliminary injunction preventing the distribution of future per capita payments to the unnamed defendants, and another Writ of Mandamus directing that the per capita payments barred by the injunction be put into escrow. Plaintiffs' motion was accompanied by a complaint.

Normally, a motion for a temporary restraining order would be considered first, and a motion for a preliminary injunction would be entertained at a later date. See SMS(D)C Rule of Civil Procedure 29. Given the intertwined nature of Plaintiffs' requests, however, this Court will consider all aspect of Plaintiffs' motion at this time.

The main thrust of Plaintiffs' Complaint is that the unnamed Defendants are people who are not properly qualified for Community membership, but who, nonetheless, have enjoyed the benefits of Community membership since approximately 1992.

With their motion, Plaintiffs have not submitted any affidavits to support the factual allegations in their Complaint. Plaintiffs have attached to their motion, however, an opinion by the Solicitor's Office for the United States Department of the Interior relating to the status of a case currently pending before the Assistant Secretary for Indian Affairs.

The federal case referenced in the Solicitor's opinion was brought by at least some of the same Plaintiffs as here, seeking review in federal court of the decision by the United States

Department of the Interior to approve two ordinances passed by the Community's General Council. Those ordinances provide for the adoption of certain people into the membership of the SMS(D) Community. It is the position of the Plaintiffs in that litigation that the decision of the Secretary of the Interior to approve those ordinances should be reversed. The United States District Court has not decided the validity of the ordinances or the validity of the Secretary's decision to approve them. Instead, after it heard arguments by the parties, that court remanded the cause back to the United States Department of the Interior to supplement the record and to consider additional aspects of the dispute, including the validity of the earlier approved ordinances. See Feezor v. Babbitt, 953 F.Supp. 1 (D.C. 1996). The case is currently pending before the Assistant Secretary for Indian Affairs on remand from the federal district court.

It is important to note that the ordinances in question have been approved by the United States Department of the Interior, and neither the Department of the Interior nor the United States District Court have reversed the decision to approve those ordinances at this point in time. In addition, neither the district court nor the Department of the Interior have taken any steps that this Court is aware of to try to suspend the effect of those ordinances during the pendency of the federal court proceedings. The Solicitor's opinion attached to Plaintiff's complaint addresses whether the federal remand is moot, and does

not address whether the ordinances in question were properly approved. In any event, even if the Solicitor's opinion had concluded that the ordinances were invalid, Plaintiffs conceded at oral argument that the Solicitor's opinion, by itself, is not binding on this Court.

I. AMENDMENT OF THE PLEADINGS

As an initial matter, the Court has before it a rather technical issue of pleading. Plaintiffs filed their Complaint and Motion for Temporary and Preliminary Relief on August 13, 1998. A hearing was set for August 18, 1998. On August 17, 1998, the Defendant Shakopee Mdewakanton Sioux (Dakota) Community Business Council filed a response to Plaintiffs' motion, but did not file an answer to the complaint. Then, on August 18, 1998, approximately two hours before the hearing on this matter, the Court received from Plaintiffs an Amended Motion for Temporary and Preliminary Relief, and an Amended Complaint.

At the hearing, counsel for Plaintiffs indicated that there was no substantive difference between the original and amended motions and complaints. However, when compared with the original motion, the amended motion seeks additional information under one of the Writs of Mandamus, and expands the scope of the injunction requested. When compared with the original complaint, the amended complaint contains an additional allegation of jurisdiction,

additional factual allegations, and an additional prayer for relief.

Plaintiffs argued that even if there were substantive differences in the amended filings, Plaintiffs were entitled to amend their pleadings once as a matter of right. Plaintiff is correct that under Rule 15(a) of the SMS(D)C Rules of Civil Procedure a party may amend it pleadings once as a matter of right before a responsive pleading is filed.

There is, however, a difference between a pleading and a motion. A pleading is a formal allegation by a party as to their claims, such as a complaint, an answer, a reply to a counter claim, a response to a cross claim, a third party complaint, or a third party answer. See, e.g., Fed. R. Civ. Pro. 7(a). A motion, on the other hand, is simply an application to the Court for an order. See, e.g. SMS(D)C R. Civ. Pro. 8(b). The rules of this Court do not allow a party to unilaterally amend a motion. To do so after the opposing party has already responded to the original motion, as Plaintiffs have attempted to do so here, seems particularly inequitable. The Plaintiff's Amended Motion for Temporary and Preliminary Relief is therefore stricken.

For the purpose of considering Plaintiff's original Motion for Temporary and Preliminary Relief, the Court will rely on the Plaintiff's original Complaint. While Plaintiffs are free to amend their Complaint under Rule 15, it would not be fair to consider their motion on the basis of a complaint that some of the

Defendants, and this Court, received only hours before the scheduled hearing, and after some of the Defendants had responded on the basis of the original Complaint.[1] Those seeking relief in equity, as Plaintiffs do here, must approach this Court with clean hands, or risk the denial of their claims. See, e.g., Brooks v. SMS(D)C, et al., No. 57-96 (SMS(D)C Tr. Ct. June 28, 1995).

In sum, the Court will evaluate Plaintiffs' motion in reference to the original Complaint, but the purpose of the proceedings hereafter, the parties should consider Plaintiffs' Amended Complaint as properly filed on August, 18, 1998.

II. PRELIMINARY RELIEF

Plaintiffs have requested a temporary restraining order and preliminary injunction preventing the benefits of Community membership from being conferred to anyone who is not qualified under Art. II, Sec. 1 of the Community's Constitution. Temporary restraining orders and preliminary injunctions are extraordinary remedies and are normally only used to preserve the status quo until an adjudication on the merits can be reached. See, e.g., Wright & Miller, 11A Federal Practice and Procedure § 2948 (1995).

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[1]The record does not even indicate whether all of the Defendants have received notice of the original complaint and motions, let alone the amended complaint and motions. The Court has not received or seen any certificates of service on any of the Defendants. A failure to properly serve notice on all Defendants is sufficient to prevent a preliminary junction from issuing. See SMS(D)C R. Civ. P. 29.

The four factors considered in a decision for preliminary relief are (1) whether irreparable harm will befall the plaintiffs in the absence of preliminary relief, (2) whether the plaintiff is likely to succeed on the merits, (3) the extent of the injury experienced by the defendants if relief is granted, and (4) the public interest. Welch v. Crooks, No. 003-88 (SMS(D)C Tr. Ct. Dec. 16, 1998).

As an initial matter, Plaintiffs have not filed any affidavits or other verified documents, providing support for their factual claims. Rule 29 of the SMS(D)C Rule of Civil Procedure incorporates Rule 65 of the Federal Rules of Civil Procedure. Rule 65 clearly requires that a motion for a temporary restraining order be accompanied by an affidavit or verified complaint attesting to the veracity of the factual allegations reference by the motion. The serious nature of some of Plaintiffs' allegations demonstrates the importance of providing sworn verification of factual allegations in a motion for preliminary injunctive relief. For example, Plaintiffs allege that unnamed persons are not qualified to receive the benefits of Community membership, and that Community officials have knowingly and willfully violated Community law by treating these people as members. Yet, as the record stands at this moment, the Court has no evidence before it to support these allegations because Plaintiffs have provided none. Counsel for Plaintiff stated at oral argument that the facts in this case are uncontroverted, and there is no need for affidavits to support

their factual allegations. But Defendants have not stipulated to any facts, nor have they even presented an answer, so the need to provide some sort of factual support at this early stage of the litigation is paramount, especially given the drastic relief the Plaintiffs request. The Court is of the opinion that the lack of affidavits alone in this case would be sufficient to deny the motion for temporary restraining order, and given the intertwined nature of Plaintiffs' other requests, to deny those requests as well.

However, Plaintiffs have also failed to demonstrate that the four factors considered for preliminary relief weigh in their favor. For a substantial part of their claims, Plaintiffs fail to establish that they will be irreparably harmed in the absence of preliminary relief. The main thrust of Plaintiff's allegations are that the distribution of per capita payments to people who are not qualified under the Constitution deprives rightful members of a certain amount of money. This Court, however, has noted in the past that the mere payment or non-payment of money generally does not create the possibility of irreparable harm. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Feb. 4, 1994). In Welch, this Court denied a request for preliminary relief from someone who alleged that they had stopped receiving per capita because they had been improperly disenrolled. The Court noted that even if the Plaintiff was correct on the merits, he had only alleged a financial harm and he could be made whole at a later date with proper compensation.

The harm he alleged, therefore, was not "irreparable," and preliminary relief was denied.

Similarly, the Plaintiffs here allege a financial harm for which compensation can be obtained later. Section 12 of the Business Proceeds Distribution Ordinance, No. 12-29-88-002, and Section 14.9 of the Gaming Revenue Allocation Amendments, No. 10-27-93-002, both state:

> Any person who wrongfully receives, distributes or intentionally refuses to distribute funds or benefits as mandated by this Ordinance, shall be subject to civil penalties up to three times the amount wrongfully received, distributed or withheld. Actions pursuant to this Section may be brought before the Judicial Court of the Shakopee Mdewakanton Sioux Community . . . by any person receiving benefits who has a good faith reason to believe that benefits have been wrongfully paid or distributed to another.

Under this section, any per capita payments improperly distributed can be returned to the Community by Court order. This is, in fact, the provision of Community law under which Plaintiffs seek damages. Since preliminary relief is not necessary to prevent irreparable harm to Plaintiffs in a financial sense, their request for a temporary restraining order and a preliminary injunction should is denied as to those claims for relief. See Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Feb. 4, 1994).

At oral argument, Plaintiffs also argued that allowing people to vote who are not qualified as members under the Constitution, dilutes their voting rights, and this in turn constitutes irreparable harm. While the jurisdictional basis for these claims

is not apparent in Plaintiffs' original Complaint, Plaintiffs' motion for a temporary restraining order does request an order prohibiting the distribution of per capita payments, or "any other benefits" of Community membership to the unnamed Defendants. Reading Plaintiff's written submissions in the most liberal light possible, the Court will entertain Plaintiffs' dilution of voting rights arguments.

Plaintiffs rely heavily on this Court's decision to grant preliminary relief preventing certain people from receiving the benefits of Community membership in Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June 10, 1994). Smith is not relevant to the issues here for at least two reasons.

First, in Smith this Court granted Plaintiff's motion for a voluntary dismissal without prejudice. See Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June 30, 1995). The order granting the dismissal specifically stated that all pending orders in the case were vacated. At the time of the dismissal, the preliminary injunction in that case was still in force. See Smith v. SMS(D)C Business Council, No. 11-97 (SMS(D)C Ct. App. Aug. 8, 1997). Therefore, the order granting preliminary relief was vacated by the June 30, 1995 order dismissing the case and is of no precedential value for Plaintiffs' present arguments to this Court.

Second, even if Smith was either binding or persuasive precedent on this Court, which it is not, the factual situation there was completely different than here. In Smith, the Court

based its decision on the fact that there was no indication that the United States Secretary of the Interior had approved the action making the disputed adoptees members of the Community. In contrast, here the Department of Interior has specifically approved both the 1993 and 1997 adoption ordinances. The preliminary injunction in Smith, therefore, was granted in very different factual circumstances.

Setting Smith aside and assuming, without deciding, that Plaintiff's dilution of voting rights theory demonstrates an actual threat of irreparable harm,[2] Plaintiffs have failed to show that the balance of harm weighs in their favor, that there is a reasonable likelihood that they would succeed on the merits, or that granting preliminary relief of the voting component of their claim is in the public interest.

The balance of harms does not weigh in Plaintiff's favor. If Plaintiffs are correct, the strength of their voting rights may be diluted to a certain extent. If Plaintiffs are incorrect, however, the unnamed Defendants who are otherwise entitled to vote will be

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[2]There is authority in American courts that the alleged denial of a constitutional right can serve to demonstrate irreparable harm. See, e.g., Wright & Miller, 11A Federal Practice and Procedure § 2948.1 (1995). Without further briefing on the subject, however, it is not clear that Plaintiff's dilution of voting rights states a constitutional claim under Community law. The Court wants to emphasize that it does not decide today whether Plaintiffs have stated a constitutional claim, or whether that an allegation of a violation of a constitutional right serves to demonstrate irreparable harm. The Court simply assumes as much for the purpose of deciding the motion presently before it.

improperly denied the right to vote for the pendency of this litigation. Viewed in this light, it becomes clear that Defendants risk greater harm if preliminary relief is granted than the Plaintiffs will risk if preliminary relief is denied.

In addition, at this stage of the litigation, Plaintiffs have not demonstrated a reasonable likelihood of success on the merits. The two adoption ordinances that Plaintiff refer to have apparently been voted on by the Community's General Council and approved by the Secretary of the Department of the Interior. This Court has indicated that Secretarial approval of at least one of the adoption ordinances would be sufficient to validate that ordinance as Community law. See In re: Election Ordinance 11-14-95-004, No. 76 (SMS(D)C Tr. Ct. May 9, 1997). Plaintiffs have not produced evidence of any subsequent decision binding on this Court that would invalidate those ordinances.

As to the allegations that other people have been adopted outside of the terms of these two ordinances, Plaintiffs have not yet produced any factual evidence to support those claims.

Lastly, Plaintiffs' general claim that only people qualified under Art. II, Sec. 1 of the Community Constitution may enjoy the benefits of membership is contrary to what the SMS(D)C Court of Appeals has held in the past. See, Smith v. SMS(D)C Business Council, No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997) (noting Community practice of voting in members under Art. II, Sec. 2 was a reasonable interpretation of Community law). Plaintiffs have not

made a clear showing that they are likely to succeed on the merits of their dilution of voting rights claim.

Granting preliminary relief here would also not be in the public interest. The Court appreciates that the allegations raised by the Plaintiffs are grave and serious matters. Membership issues have been an almost constant source of turmoil in the Community since its inception. However, the factual and legal record in this case is preliminary and undeveloped, and the issues raised by this litigation are far reaching in their effect. It is the view of this Court that the public interest would not be served at this point by radically altering the present status quo based on such a limited record.

That the Secretary may or may not be reconsidering his decision to approve the adoption ordinances is not a sufficient basis for this Court to suddenly act as if those ordinances were invalid, and to grant preliminary relief that would upset the present status quo. Plaintiffs may ultimately succeed on the merits of this case and demonstrate that the ordinances they object to are invalid. But on the basis of the Complaint and motion they have filed, this Court cannot say that they have made a clear showing that they are likely to suffer irreparable harm in a financial sense, or that they have met any of the other requirement for preliminary relief on their dilution of voting rights claim.

Since the Court denies Plaintiffs' requests for a temporary restraining order and for a preliminary injunction, it is not

necessary to consider Plaintiff's requests for the associated Writs of Mandamus.

ORDER

Based on a review of the submissions herein, and for the foregoing reasons,

Plaintiff's Motion for a Temporary Restraining Order is DENIED;

Plaintiff's Motion for a Preliminary Injunction is DENIED.

Plaintiff's Amended Complaint is treated as properly filed on August 18, 1998 and will govern the course of any further proceedings.

Dated: 8/24/98

Henry M. Buffalo, Jr.
Judge

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

COUNTY OF SCOTT STATE OF MINNESOTA

Keith B. Anderson, Barbara Anderson, Karen L. Anderson, John Feezor, Betty Anderson, and Stanton Quilt,	)	
Plaintiffs,	)	
vs.	)	No. 031-93
Shakopee Mdewakanton Sioux Community,	)	
Defendant.	)	

MEMORANDUM DECISION AND ORDER
AS AMENDED[1]

This matter was originally brought by ten plaintiffs--the above-named six persons, together with Lisa Beaulieu, Lori Beaulieu, Leslie Beaulieu, and Lori Stovern. However, those four last-named persons withdrew from the case during the course of the proceedings. And on April 6, 1995, received the Court received a copy of a letter from the Plaintiffs Betty Anderson, Barbara Anderson, Keith Anderson, and Karen Anderson ("the Anderson

[1] Technical amendments were made to this decision by Judge Jacobson, on his own motion, on September 15, 1998, to clarify the fact that the ordinances and proceedings which were at issue in this matter related to adoption into the Shakopee Mdewakanton Sioux (Dakota) Community, and not to enrollment.

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Plaintiffs"), to their counsel, informing him that his services no longer were required--but not making it clear whether they desired to continue to participate in the proceedings. The Court therefore has deemed the Anderson Plaintiffs as remaining parties in the case, for the purposes of this Memorandum Opinion and Order.

The Plaintiffs original Complaint was simple: it alleged that the Plaintiffs either were descendants of members of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), or were spouses of members, and had been denied benefits which members of the Community or spouses of members of the Community received, in violation of the Indian Civil Rights Act, 25 U.S.C. §1302 (1988)("the ICRA"). The Plaintiffs amended that Complaint as of right twenty-three days after it was filed; and while the Amended Complaint was considerably more extensive in its allegations than was the original, still when distilled down to its essence it was identical: the Plaintiffs were being denied benefits from the Community in a manner that violated the equal protection guarantees of the ICRA.

After this Court denied the Plaintiffs' motion for preliminary relief, and after the Community moved to dismiss the Complaint, the Plaintiffs filed a variety of motions, including a motion to file a supplemental Complaint and then a motion to file a second supplemental Complaint.

And during the pendency of this matter, the General Council of the Community voted to adopt the Anderson plaintiffs and John Feezor into membership in the Community. That action then was

challenged in Louise B. Smith, et al. v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, et al., No. 038-94; appeal pending, Ct. App. Nos. 001-94 and 002-94, and, because the Area Director of the Minneapolis Area Office, Bureau of Indian Affairs, at that time explicitly had disapproved the ordinance by which the adoption took place, a preliminary injunction was entered by the Court which at least through this date continues in effect as to those Plaintiffs. (Subsequently, based on proceedings of the Interior Board of Indian Appeals, the Area Director reversed her decision; and then, more recently, the Assistant Secretary of the Interior for Indian Affairs apparently has purported to vacate the Area Director's decision. The Court here expresses no opinion with respect to those proceedings).

The Community, throughout the proceedings in this matter, consistently has maintained that this Court has no jurisdiction to hear any of the allegations in original amended Complaint, or in any of the proposed supplemental Complaints. It has taken that position because, first, the Plaintiffs who claim that they qualify for membership in the Community based on their lineage did not allege that they had gone through the process mandated by a Bureau-of-Indian-Affairs-approved Ordinance, as is required by Article II, Section 2 of the Community's Constitution, and, second, the persons who claim benefits as spouses of members had no standing upon which to assert their claim.

This Court agrees with the Community.

The adoption processes of the Community have been beset for

nearly two years by a series of conflicting decisions of the Bureau of Indian Affairs. The record in this case and in the Smith matter establishes that, if nothing else. And while it may be that, in other proceedings pending before this Court, the Court may assist the Community on these issues in the near future, one thing has been absolutely clear throughout all of the cases which this Court has considered on the subject of enrollment and adoption: a person who seeks membership in the Community must do so within the framework of proceedings which are consistent either with Article II, section 1, or Article II, section 2, of the Community's Constitution. Bare allegations that one has a particular lineage, and that others similarly situated are members of the Community, without allegations that the Community's enrollment or adoption processes have been invoked and have operated improperly in some manner which this Court has been given the power to redress, do not state a cause of action under the ICRA. And it is simply those sorts of allegations which all of the Plaintiffs' pleadings--the Complaint, the Amended Complaint, the Supplemental Complaint, and the Second Supplemental Complaint--here involved.

And as to the Plaintiffs who do not claim eligibility for membership in the Community, the Community also clearly is correct when its maintains that when the Community's General Council identified a group of persons to whom it elected to provide certain relief--the spouses of particular members of the Community--it did not thereby give standing to all other persons, all other spouses, to insist on identical relief.

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ORDER

For the foregoing reasons, the Plaintiffs' Motions to file a supplemental Complaint, and to file a Second Supplemental Complaint, are denied, and the Community's Motion to Dismiss is granted.

May 30, 1995
as Amended September 15, 1998

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

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

FILED NOV - 5 1998

CARRIE L. SVENDAHL
CLERK OF COURT

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In re: The Petition of Paula Sutton Case No. 316-98

FINDINGS OF FACT AND ORDER

On October 5, 1998, Paula Sutton filed a Petition for a disbursement of funds, under the Gaming Revenue Allocation Amendments to the Business Proceeds Distribution Ordinance of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), Ordinance No. 10-27-93-002; and on November 3, 1998 a hearing was held, before the undersigned, on that Petition. The Petitioner was present during the hearing, as were the Petitioner's daughter and son, [redacted] and [redacted], and the Petitioner's infant grandson [redacted] Also present was William Hardacker, staff legal counsel for the Community. The Petitioner's son, [redacted], was not present. The Petitioner testified under oath, and verified the correctness of the statements made in her Petition. Mr. Hardacker informed the Court that the Business Council of the Community did not oppose the relief requested in the Petition.

Based upon the testimony submitted at the hearing, I find the following facts:

1. The Petitioner is the mother and legal guardian of [redacted] born April 16, 1984; [redacted], born April 16, 1985; and [redacted], born July 10, 1987. The

Petitioner is not a member of the Community. The Petitioner, her three children, and her grandson reside in Soudan, Minnesota, although the Petitioner's son [redacted] temporarily is staying in Duluth, Minnesota to attend school.

2. The father of was Alfred Crooks, who died on September 11, 1992. Alfred Crooks was a member of the Community.

3. [redacted] gave birth to a son, [redacted], on August 30, 1998.

4. The Petitioner was employed by the Bois Forte Band of Chippewa Indians until the birth of [redacted]. Her wages from the Bois Forte Band were approximately $800.00 per month, net. The Petitioner ended her employment to provide care for her grandson, to enable [redacted] to return to school.

5. The Petitioner receives social security benefits in the amount of $1,140.00 per month, which represents a payment of $380.00 for each of the Petitioner's three children.

6. [redacted], [redacted], and [redacted] each have been listed as participants in the Community's Children's Trust Fund since 1991. The Trust Fund therefore receives a payment for each of them each month. Those payments are in excess of the amount which the Petitioner seeks to assist her in the care of her children.

7. The Petitioner seeks to receive, from the payments that otherwise would go to the Trust Fund, the sum of $1,595.00 per month, or $531.66 from each of the funds of her three children. The Petitioner provided a budget with her Petition, outlining the manner in which she would use the payments she seeks, but the Petitioner did not include any calculation to reflect the increased income tax liability that the Petitioner may experience as a consequence of the receipt of the payments.

8. Section 14.6.A. of Ordinance 10-27-93-002 provides that, upon petition to this Court, and if the Court finds it necessary and appropriate, the Court may order that up to one hundred percent of the payments which would be made to the Children's Trust Fund may be made to the parent of an eligible minor, with whom the minor resides, and that if the eligible parent of such child or children has died, such payments made be made to a non-eligible surviving spouse or legal guardian with whom the child or children reside.

9. The amounts sought by the Petitioner are necessary and appropriate for enhancing the health, education and welfare of the Petitioner's three eligible children.

Therefore, it herewith is **ORDERED:**

1. The Community will work with the Petitioner to calculate what, if any, additional income tax the Petitioner will be obliged to pay as a consequence of receiving the payments contemplated by this Order, and will arrive at a gross amount of payments that, when aggregate and such projected tax payments are deducted, will yield the Petitioner a total net amount of approximately $1,590.00 per month.

2. When the calculation ordered by paragraph 1 has been made, the Community shall, pursuant to Section 14.6.A. of Ordinance No. 10-27-93-002, make monthly payments to the Petitioner, in the calculated gross amounts, from the available monthly net proceeds of the businesses of the Community that would otherwise have been paid into the Children's Trust Funds for [redacted], [redacted], and [redacted]. Such payments shall be taken in equal one-third shares from the amounts that otherwise would have been paid into each child's trust account.

3. Another hearing will be held at 1:00 p.m. on May 5, 1999, in the Courtroom of the

Community, at which time the Petitioner will provide a report to the Court on the manner in which the payments contemplated by this Order have been expended.

November 5, 1998

John E. Jacobson
Judge

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

COUNTY OF SCOTT
STATE OF MINNESOTA

In Re: Trust under Little Six, Inc. Retirement Plans

Court File No. 055-95

MEMORANDUM OPINION AND ORDER

Factual Background

This matter arises from a Petition, filed in this Court on April 6, 1995, by Robert A. Burns and John Somers (hereafter, "Petitioners"), two of the four persons named as trustees (hereafter, "Trustees") in a document dated March 25, 1993, captioned "Trust Under Little Six, Inc. Retirement Plans" (hereafter, "the Trust"). Little Six, Inc. (hereafter, "LSI") is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community (hereafter "the Community") and wholly owned by the Community.

The Trust recites that it was created as a "grantor trust", to assist LSI in meeting its liability to various deferred compensation plans (hereafter, "the Plans") that had been established for the benefit of various management and highly compensated employees (hereafter, "the Beneficiaries") of LSI. Under the Trust, LSI was to deliver to the Trustees a payment schedule, pursuant to which the Trustees were to make payments to the Plans for the benefit of the Beneficiaries.

The Petition states that when the Trust was executed, the Petitioners believed that it had

been approved by the Board of Directors of LSI. The Trust instrument was signed, on behalf of LSI, by Mr. Leonard Prescott and Mr. F. William Johnson, then respectively the Chairman of the Board of LSI and the Chief Executive Officer of Little Six., Inc.. The Petitioners relate, however, that in February, 1995 they received copies of resolutions, adopted on January 12, 1995 by the Board of Directors of LSI, reciting that there was no prior action of the Board of Directors adopting or approving the Trust, that the Board declined to approve the Trust, and that the Petitioners and the other Trustees named in the Trust were directed to return to LSI all assets held by the Trust.

The Petition states that the Petitioners were of the view that some of the Beneficiaries would take the position that the Trust in fact was duly and properly approved by the Board of Directors of LSI, and the Petition recites that requests indeed had been made by some of the Beneficiaries for distribution trust assets to them. The Petition notes that these claims directly conflict with the direction of LSI to return all assets. The Petitioners state the view that if the Trust were properly approved when it was established, it now is irrevocable and its assets cannot be returned to LSI (absent circumstances which do not presently exist -- basically, LSI's insolvency), but if the Trust was not properly created it is revocable and its assets can be reclaimed by LSI.

So, the Petitioners seek the assistance of this Court. They note that section 8(a) of the Trust states that "in the event of a dispute between [LSI] and a party, Trustee may apply to a court of competent jurisdiction to resolve the dispute", and the Petitioners assert that this Court is such a Court. They request instructions from this Court with respect to whether to honor the direction of LSI to return the trust assets, or whether to honor various requests from the

Beneficiaries for distributions; they provide an accounting of their transactions, and requested an order approving their actions in the administration of the trust; and they request an order broadly discharging them from liability for actions they have taken while serving as trustees.

More or less contemporaneously with the filing of the Petition, four of the Beneficiaries -- Leonard Prescott, F. William Johnson, Peter Riverso, and Gary Gleisner[1] -- filed two civil actions in the United States District Court for the District of Minnesota, under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001 - 1500 (1994), seeking declaratory and injunctive relief against LSI and the Petitioners. They pointed out that the Federal Courts have exclusive jurisdiction to award equitable relief under ERISA, and therefore they asserted that this Court would have no jurisdiction over the disputes between the Beneficiaries and LSI as to the appropriate distributions of assets held by the Trustees.

However, on August 31, 1995 the United States District Court (Kyle, J.) held that the exclusivity of the jurisdiction of Federal Courts over ERISA matters did not extend to questions of whether an ERISA plan exists (citing International Association of Entrepreneurs of America v. Angoff, 58 F.3d 1266, 1269 (8th Cir. 1995). The District Court noted that the Beneficiaries had not attempted to exhaust their remedies in this Court, and therefore, citing National Farmers Union Insurance Co. v. Crow Tribe of Indians, 471 U.S. 845 (1985) and Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1995), cert. denied 115 S.Ct. 779 (1995), the District Court dismissed the Beneficiaries' actions, stating that after any remedies in this Court have been exhausted the Federal Courts retain authority to review this Court's interpretations of Federal law de novo.

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[1] Subsequently, Gleisner and LSI filed a Stipulation with this Court, to the effect that Gleisner's claims had been settled and that he no longer is an interested party in these proceedings.

Procedural Developments Subsequent to Filing of Petition

Until recently this Court has regarded the issues raised by the Petition as being of a piece with the massive ongoing proceedings attending Little Six, Inc. v. Prescott and Johnson, SMS(D)C Tr. Ct. 048-94 (April 1, 1997), reversed in part, SMS(D)C Ct. App. 017-97 and 018-97 (April 17, 1998). In pleadings and briefs, that larger litigation appeared to put at issue the validity and legal effect of a wide range of actions taken, or purportedly taken, by LSI and by Leonard Prescott and F. William Johnson during their tenure as officers of LSI -- actions that included the establishment of the Trust and the Plans. It thus had seemed altogether likely that the resolution of that larger litigation necessarily would bring in train a resolution of this matter, and so, with this Court's encouragement, the Petition stood without formal response from LSI or the Beneficiaries.

But the belief that the Prescott and Johnson litigation will resolve the matters raised by the Petition now appears to be forlorn. The Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community has held that even if Mr. Prescott and Mr. Johnson did not actually have the authority to take the various actions complained of in that case, they both were officials of the Community who are entitled to qualified immunity from civil actions against them, and that the Community had not waived that immunity, even for actions brought against them by the Community itself. Little Six, Inc. v. Prescott and Johnson, SMS(D)C Ct. App. 017-97 and 018-97 (April 17, 1998). On remand, therefore, the issues which the Prescott and Johnson case now will resolve may well be different than the issues which must be decided in this one. Here, the fundamental question is not whether Mr. Prescott and Mr. Johnson could have believed in good faith that they had the authority to set up the Trust, but whether the Trust in fact was properly

and legally established under the laws of the Community.

As a result, counsel for Prescott, Johnson and Riverso very properly prodded the Court to move this matter forward, and in a telephone conference with counsel on September 24, 1998 the Court directed non-petitioning parties to file responsive pleadings by October 26, 1998. In response, Prescott, Johnson, and Riverso filed motions to intervene and to dismiss together with a supporting memorandum, and LSI filed a letter brief, urging the Court to take jurisdiction over this matter and to issue a declaratory judgment confirming the Trustees' accounts, validating their transactions, and discharging them.

The Motion to Intervene.

In support of their motion to intervene, Prescott, Johnson and Riverso contend that granting their intervention is mandated by Rule 19(a) of this Court's Rules of Civil Procedure, because each of them is so situated as perhaps to be adversely affected by a distribution of property that may be ordered by the Court; and they contend that even if their intervention is not mandated, nonetheless it is permissible under our Rule 19(b), because their claims present issues of fact and law that are common to those raised in the Petition.

Clearly, they are correct on both counts. Their financial stake in this matter is obvious: at the conclusion of this litigation and any subsequent proceedings in Federal Court, the assets that are held by the Trust, and that are the subject of the Petition, will go either to the Beneficiaries or to LSI. And the fundamental issue raised by the Beneficiaries' claim to those assets is the same as that raised by the Petitioners: under the law of the Community, was the Trust properly created?

The Motion to Dismiss

In support of their motion to dismiss, Prescott, Johnson, and Riverso make several arguments. First, they contend that the actions which the Petitioners ask this Court to rule upon are "off-reservation trust account activities", and that this Court has been given no jurisdiction over such matters, either by Ordinance 12-13-88-001, by which this Court was created, or by any subsequent action of the General Council of the Community. Second, they argue that the Petitioners mischaracterize the relief they seek as a "trust accounting" -- that what the Petitioners really seek is a declaratory judgment, and that the rules of this Court do not provide for such relief. Third, they contend that this matter is not properly pleaded--that our rules require all actions to be commenced by the filing of a Complaint (SMS(D)C R. Civ. P. 4), which must be served on all defendants (SMSC R. Civ. P. 5), who may answer or present their objections within twenty days (SMSC R. Civ. P. 8(a) and 12). Absent this framework, they contend, the rigorous exposition of facts and law that follows from case and controversy requirements is lacking.

I believe are wrong on all points. Whatever may have been the scope of the jurisdiction which this Court was given by the Community's General Council, when the Court was created in 1988 by Ordinance No. 12-13-88-001, our jurisdiction has been significantly expanded since that time. Specifically, for present purposes, I believe that sections 10.01 and 10.02 of Ordinance No. 3-27-90-003 provide sufficient jurisdiction and authority to hear this matter, if the hearing of it has not been pre-empted by ERISA. Ordinance No. 3-27-90-003 provides:

> 10.01 Jurisdiction. The jurisdiction of the Tribal Court as set forth in Shakopee Mdewakanton Sioux Community Ordinance No. 02-13-88-01 is hereby expanded to include the following:

(a) Subject matter jurisdiction over all cases, controversies and proceedings, to the maximum extent permitted by law, including, but not limited to those involving the ownership, possession, use or occupancy of Reservation lands, including without limitation all proceedings authorized by other provisions of this Ordinance; and

(b) Personal jurisdiction over all persons, to the maximum extent permitted by law, including but not limited to, lessees, occupants, guests and persons in possession of, and all persons having or claiming any interest in or right to, Reservation lands, whether Indian or non-Indian; and over all other persons who voluntarily submit themselves to the jurisdiction of the Tribal Court in actions brought by or against Community members, residents, or the Community.

10.02 Authority. With respect to matters within its jurisdiction, the Tribal Court shall have all of the inherent powers of a court of general jurisdiction in the State of Minnesota, including but not limited to the power to issue orders, injunctions, decrees, subpoenas or writs necessary to implement its decisions, the power to punish for contempt, the power to administer oaths or affirmations, the power to enforce its decisions by a personal command to the party or parties or to the Community Sheriff or other appropriate officer, and the power, in its discretion, to declare the respective rights, status and other legal relations of the parties to any action, whether or not further relief is or could be claimed.

Hence, personal jurisdiction over the Petitioners, the Trustees, and the Beneficiaries would not appear to be an issue here: the Petitioners and Trustees have contracted with LSI, a corporation wholly owned by the Community, and the Petitioners have voluntarily placed themselves before this Court. Their contacts with the Community clearly are "consensual relationships with the tribe or its members, through commercial dealing, contracts ... or other arrangements". Montana v. United States, 450 U.S. 544, at 565 (1981). So, too, are the contacts of Messrs. Prescott, Johnson and Riverso, each of whom have moved to intervene, and each of whom is a former employee of LSI who worked on the Shakopee Reservation and who is claiming benefits relating to that employment. All other Beneficiaries also are either present or former employees of LSI whose claim to the assets of the Trust would derive from their

employment on the Reservation. LSI has not yet pled, but inasmuch as it urges the Court to hear this matter, it would seem likely that the corporation will not urge that we do not have personal jurisdiction over it in this context.

And although the case's procedural posture is somewhat unusual, I do not think it requires that the matter be dismissed. The opinions of this Court have stressed the importance of a "case or controversy" to our adjudicatory process, and we have been very reluctant to grant "advisory opinions". See generally, In re Advisory Request from the Business Council -- Payment of Revenue Allocation to Thirty One Members, No. 37-094 (SMS(D)C Tr. Ct., Feb. 11, 1994). But this not a case where the Petitioners merely are requesting this Court's advice. They are the very real subject of conflicting claims made to assets which they control. And although the argument that this Court's Rules of Civil Procedure do not comprehend a pleading such as the Petition has some force, at bottom what the Petition says is simply that the Petitioners are subject to competing, incompatible claims to the same property -- the assets of the trust are being claimed by LSI and by the Beneficiaries -- and they ask this Court to sort out those claims. If the Petitioners had styled their pleading as a Complaint in Interpleader, under our Rule 18, which incorporates Rule 22 of the Federal Rules of Civil Procedure, then I think there would have been no question as to the propriety of their pleading.

Hence, I do not think that dismissal is warranted for any of the reasons stated in the motion filed by Prescott, Johnson and Riverso.

But I do think there remains a question with respect to the subject matter jurisdiction of this Court. Although the General Council has given us broad authority, we clearly cannot be given authority which the General Council does not possess. In my view, that includes authority

to adjudicate any action brought by the trustees of a plan that is subject to ERISA. Such jurisdiction appears to me to be exclusively in the Federal Courts, under 29 U.S.C. §1132(e) (1994). So, if the Trust is subject to ERISA, I think this Court likely has no jurisdiction to grant the Trustees any relief.

LSI has argued that even if the Trust was properly created, still ERISA would not apply to it because the assets of the Trust would not be considered "plan assets" under ERISA because, pursuant to the Trust instrument, the Trust's assets remained subject to the claims of LSI's general creditors. But that argument is troubling. ERISA broadly covers any plan that is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. See 29 U.S.C. §1003 (1994). At least at first blush, both the Plans and the Trust would appear to fall within this definition. Cf. Kulinski v. Medtronic Bio-Medicus, 21 F.3d 254, at 257 (8th Cir. 1994). The fact that the Trust was intended to fund a "top hat plan", providing deferred compensation to a select group of management or highly compensated persons, means that it would not appear to be included in ERISA's funding, participation, vesting, or fiduciary requirements. See Duggan v. Hobbs, 99 F.3d 307 (9th Cir. 1996); 29 U.S.C. §1101(a)(1), 1081(a)(3), and 1051(2). But "top hat plans" are not completely exempt from ERISA -- they still are covered by ERISA's reporting, disclosure, administration, and enforcement provisions. See Miller v. Heller, 915 F. Supp. 651 (S.D.N.Y. 1996). So, while LSI can point to particular ERISA provisions from which their Plan may be exempt, it still seems likely that, if it was validly created, the plan will be subject to ERISA's basic requirements and to the exclusivity of the Federal Courts' jurisdiction.

On the other hand, if the Trust was not properly approved under Community law, as LSI

urges, then it is not subject to ERISA, and I believe that under section 10.01(a) of Ordinance No. 3-37-90-003 I will have jurisdiction to hear this matter. And under section 10.02 of Ordinance No. 3-37-90-003 it seems to me that I can fashion orders of the sort that Minnesota courts would give under Minn. Stat. §501B.16, et seq..

In short, the issue of this Court's subject matter jurisdiction, and the principal substantive question raised by the Petition, appear to be identical. If the Trust was not properly established under the law of the Community, then I have jurisdiction, but if the Trust was properly established, then I do not have jurisdiction. And from the present state of the record, I cannot make a determination on that fundamental issue. In 1995, LSI's Board of Directors adopted a resolution to the effect that the Trust was never properly approved, but that resolution is purely conclusory -- it does not provide any underlying information with respect to LSI's records. Similarly, the Petitioners state that, at the inception of the Trust, they gave to LSI a set of resolutions which would have served to approve the Trust; but there is no information available to the Court with respect to what, if anything, happened to those documents.

Therefore, it will be necessary for the Court to hold an evidentiary hearing, limited to the issue of whether the Trust was properly approved by LSI. If it was, then in all likelihood I will grant a motion to dismiss this case for want of jurisdiction. If it was not, then I will proceed to consider what relief is appropriate for the parties.

In the meantime, I am going to direct the Petitioners to amend their Petition to read as a Complaint in Interpleader, and to serve it under our rules on LSI and each Beneficiary. Once that is accomplished and responsive pleadings have been filed, an evidentiary hearing will be scheduled.

ORDER

For the foregoing reasons, and based on all of the pleadings and materials filed herein, it is herewith ORDERED:

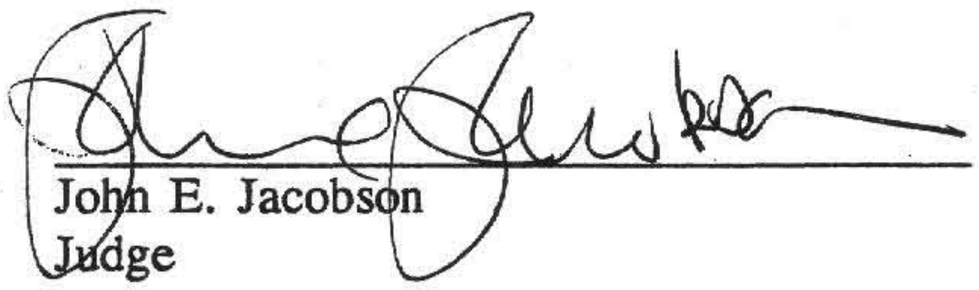
1. Within thirty days from the date hereof, the Petitioners shall amend their pleadings by filing a Complaint in Interpleader and shall serve LSI and all Beneficiaries

2. The Motion of Leonard Prescott, F. William Johnson and Peter Riverso to intervene in these proceedings is GRANTED;

3. The Motion of Leonard Prescott, F. William Johnson, and Peter Riverso to dismiss is DENIED; and

4. An evidentiary hearing, limited to the issue of whether the Trust was validly created, will be set for at a time convenient to the Court and the parties.

Dated: January 19, 1999



John E. Jacobson
Judge

IN THE COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT **STATE OF MINNESOTA**

Kimberly L. Gatzke,

Petitioner,

v.

Scott Campbell, an Individual and Scotties Knickerbockers Bar & Cafe, Inc., A Minnesota Corporation,

Respondent.

Court File No. 300-98

ORDER

This matter came before the Court pursuant to the Judgment Creditor Kimberly L. Gatzke's Motion to hold Judgment Debtor, Scott Campbell, in contempt of court for his failure to comply with the Court's September 28, 1998 Order. The Motion was briefed by the parties, and the parties also submitted supplemental briefs on the issue of the Court's authority to find litigants in civil contempt. Based on the arguments of Counsel, as well as all of the files and records herein, the Court finds the Judgment debtor, Scott Campbell, in contempt of court and hereby imposes and orders the following civil fine:

1. Beginning on the tenth day after the date of this Order, for each day Scott Campbell does not comply with the Court's September 28, 1998 Order, he will be fined an amount of five hundred ($500.00) dollars. Payment of said fine shall be made to the Court Administrator of the Tribal Court;.

2. If at any time in the next three months Scott Campbell comes into compliance with the Court's September 28, 1998 Order, he may apply to this Court for a refund or application to the judgment debt of any amount paid to the Court pursuant to this Order;

3. This Court shall retain jurisdiction over this matter.

BY THE COURT,

Date: March 9, 1999

Robert Grey Eagle

Robert A. Grey Eagle
Tribal Court Judge

COURT OF THE SHAKOPEE MDEWAKANTON
SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

Little Six, Inc., et al. Plaintiffs, vs. Leonard Prescott and F. William Johnson, Defendants.	)	File No. 048-94

MEMORANDUM OPINION AND ORDER

Summary of Procedural History

In this case, Little Six, Inc. ("LSI") and its Board of Directors ("the Board") seek money damages against Leonard Prescott ("Prescott") and F. William Johnson ("Johnson"), two former employees and officers of LSI. LSI is a corporation chartered under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community ("the Community"), and the single share of stock that it has issued is owned by the Community. Prescott was Chairman of the Community, and first President and later the Chairman of the Board of Directors of LSI. Johnson was LSI's first Chief Executive Officer, and later succeeded Prescott as the corporation's President.

In their Complaint, LSI and the Board allege that, during their tenure with LSI, Prescott

and Johnson unjustly enriched themselves, imprudently expended corporate funds in a variety of ways, and improperly took control of LSI from the Board through the creation of an "executive committee" and various of corporate officers. The Plaintiffs also assert that Mr. Prescott improperly disclosed confidential corporate information and misled the Board with respect to his background, and that Mr. Johnson breached an employment contract by accepting more compensation than he had agreed to receive. These alleged actions -- save, as I understand it, the issue raised by Johnson's alleged contract -- are asserted to have been in violation of the Shakopee Mdewakanton Sioux Community Corporation Ordinance, Ordinance No. 2-27-91-004 ("the 1991 Corporation Ordinance"), the Articles of Incorporation of LSI ("the LSI Articles"), a Code of Ethics adopted by LSI in September, 1993 as part of the corporation's Casino Policies, the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701 - 2721 (1988) ("the IGRA"), and the Community's Gaming Ordinance. LSI and the Board seek money damages from both Defendants.

After discovery, Prescott and Johnson moved for summary judgment, asserting inter alia that they were shielded from LSI's claims either by absolute immunity or qualified immunity. On April 1, 1997, I granted the Defendants summary judgment on several of the Plaintiffs' claims, but denied their motions with respect to the majority of the claims; and I specifically held that neither Defendant could assert an immunity defense in an action brought against them by LSI.

Prescott and Johnson appealed, to the Court of Appeals of the Shakopee Mdewakanton Sioux (Dakota) Community, those portions of my order that denied them summary judgment; and on April 17, 1998 the Court of Appeals reversed my judgment in part. The Court of

Appeals agreed that no claims of absolute immunity could be made on behalf of either Prescott or Johnson, but held that both Prescott and Johnson possessed qualified immunity and that the 1991 Corporation Ordinance did not waive that immunity as to any litigation -- even litigation brought by LSI and the Board. The Court of Appeals remanded the matter to me to determine whether the Defendants were entitled to summary judgment on the basis of their qualified immunity.

I requested that the parties brief the summary judgment issue in light of the Court of Appeals holding; and today I decide the issues which were remanded to me.

The Mandate from the Court of Appeals

The Court of Appeals gave precise instructions with respect to the task which I am to undertake:

> [I]n order to succeed with a qualified immunity defense, an official must raise that defense in a timely manner and demonstrate that undisputed material facts reveal that his or her actions were objectively reasonable in light of the clearly established Community law [footnote omitted]. If the official is able to do this, he is entitled to immunity from suit, and the case should be dismissed.
>
> The first task of the trial court in this inquiry is to determine if the law was clearly established at the time the official acted. If it was not, the official could not be reasonably expected to anticipate subsequent legal developments and could not either actually or constructively "know" that his actions were illegal. [citation omitted]. In such a case, summary judgment for the official would be appropriate.
>
> If, on the other hand, the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the trial court should them determine if the material facts are undisputed. [citation omitted]. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law. If, however, there is a dispute over the material facts concerning whether the official violated a clearly

established right, then summary judgment is not appropriate, and the case should move forward toward trial.

> Leonard Prescott and F. William Johnson v. Little Six, Inc., et al., Ct. App. No. 017-97 and 018-97, at 13 - 14 (decided April 17, 1998).

It is important to note here that the qualified immunity which the Court of Appeals held applicable to Prescott and Johnson and other officers of the Community "does not precisely mimic the federal law regarding qualified immunity". Ibid at 14. Specifically, the Court of Appeals said--

> Relying on federal law, Appellants argue that "Community law" should only extend to rights established either by statute or by the Community Constitution, and should not include the common law causes of action alleged by Appellees. This Court, however, is not concerned with preserving a federalist system of government as are the federal courts, nor does this Court have an explicit statute, such as 42 U.S.C. §1983 to interpret. Therefore, a Community official may be held liable for a violation of any clearly established right under Community law, whether that right is statutory, constitutional, or common law.

Ibid at 13, n. 4 (emphasis added).

In the briefing that was submitted after the Court of Appeals rendered its decision, the Plaintiffs and the Defendants disagreed with respect to whether a cause of action that is implied in the law, rather than expressly described in a statute or regulation, can survive an assertion of the qualified immunity defense in this jurisdiction. As I read the opinion of the Court of Appeals, it seems clear to me that, on this point, the Plaintiffs are correct: the emphasized language in the foregoing quotation, which states that a cause of action in this jurisdiction can be founded on the "common law", must mean that a cause of action which is not directly based on a statute or regulation can be asserted against a person who possesses official immunity, provided that the Community's common law was sufficiently clear at the time of the acts

complained of.

The first step in the analysis which I must conduct is to determine what violations of law Prescott and Johnson are alleged to have committed, and whether the Community's Constitution, ordinances, regulations, and common law prohibited such actions at the time the actions are alleged to have occurred.

The Allegations in the Complaint

The Complaint contains eight numbered counts, but one count -- Count I -- contains no less than fifteen sub-counts, of which thirteen still are alive. (I granted summary judgment to the defendants as to Count I, subcounts 66.H.and 66.N. on April 1, 1996). The thirteen live subcounts in Count I allege that the Defendants breached duties owed to LSI and the Board by creating the Executive Committee; by giving to that entity powers which should have been reserved to the Board; by creating corporate officer positions which should have been approved by the Board; by utilizing the Executive Committee to approve payments to themselves and others of large sums through salaries, bonuses and benefits, which should have been approved by the Board; by expending corporate funds for trips and athletic events which should have been approved by the Board; by utilizing corporate funds to pay allegedly personal legal fees; by allegedly misrepresenting personal background (as to Prescott) in a gaming license application and expending corporate funds to defend individual gaming licenses; by disclosing confidential information; and by presenting allegedly inaccurate or misleading information to the Board and to the Executive Committee. (Complaint, ¶¶66.A. - 66.O.).

Count II alleges that the Defendants prevented the Community from being the "sole

operator, conductor and owner of all gaming enterprises on the Reservation" (Complaint, ¶76), and that those actions created a cause of action for damages under the IGRA, the Tribal-State Compact[1], and the Community's Gaming Ordinance. Counts III, IV, V, VI, and VII all appear to be common law claims: Count III alleges a civil conspiracy between Prescott and Johnson to commit the acts and omissions described in Count I; Count IV alleges that the funds spent by virtue of the acts described in Count I constituted conversion; Count V alleges that these acts and omissions resulted in the unjust enrichment of the Defendants; Count VI alleges that in or about June, 1993 Prescott and Johnson committed fraud by misrepresenting the level of their compensation to the Community's Business Council and General Council; and Count VII alleges that in or about June, 1993 Prescott and Johnson negligently misrepresented their compensation to the Business Council and the General Council. Finally, Count VIII appears to be a common-law breach of contract claim, alleging that when Johnson accepted the salary increases, bonuses, and perquisites described in Count I, he violated the terms of an employment contract into which he and LSI had entered in June, 1991.

The Applicable Law at the Time of the Matters Complained Of

In the Complaint and in the briefing materials that have been submitted following the Court of Appeals decision, the Plaintiffs cite a number of sources of written Community law which they deem to be pertinent to the claims in their Complaint, although the Counts and

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[1] There are two Tribal-State Compacts between the Community and the State of Minnesota, the first dating from 1989, governing video games of chance, the second dating from 1992, governing blackjack. The Complaint does not specify which of these Compacts is at issue. For the purposes of this decision, both Compacts will be considered.

Subcounts themselves do not identify the specific legal requirements that the specific actions allegedly violated. The sources of written law which the Plaintiffs have identified are:

> -Article V of the Community's Constitution;
>
> -Sections 4.02, 4.017, 4.12, 21.0, 21.1, 31.0, and 36.0 of the 1991 Corporation Ordinance;
>
> -Sections 3.2, 7.2, 7.3., 7.7, 7.8, 8.1, 8.41(C), 8.6, and 9.0 of the LSI Articles; and
>
> -the Code of Ethics adopted by LSI on September 9, 1993.

I therefore will set forth and examine each of these provisions.

The Plaintiffs' allegations with respect to the Community's Constitution are that certain actions and payments authorized by Prescott and Johnson usurped the lawmaking power which the Community's Constitution delegates to the Community's General Council. So, although it is not clearly stated in the Plaintiffs' materials, the pertinent portion of the Constitution therefore likely is Article V, which states, in part--

> Section 1. Enumerated Powers. The general council shall exercise the following powers and may delegate such powers to the elected business council, subject to any limitations imposed by the Constitution or Statutes of the United States, and subject further to all expressed restrictions upon such powers contained in this constitution.
> ...
>
> (h) To promulgate and enforce ordinances which are intended to safeguard and promote the peace, safety, morals and general welfare of the community by regulating the conduct or trade and the use and disposition or property upon the reservation, providing that any ordinance directly affecting non-members shall be subject to review by the Secretary of the Interior.

The various sections of the 1991 Corporation Ordinance which the Plaintiffs have cited, in various contexts, are as follows--

> 4.0 General Powers. Subject to any limitations provided in any other laws of the Community, or in a Corporation's articles, each corporation shall have

power:

...

4.02 Subject to the provisions of section 4.12 in the case of corporations wholly owned by the Community, To sue and be sued, complain and defend, in its corporate name, except that the extent of the corporation's liability shall be limited to the assets of the corporation and shall be subject to the limitations contained in Section 11 of this Ordinance.

...

4.017 To establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation.

...

4.12 A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial court of the Community, and other courts of competent jurisdiction, provided, however, that any recovery against such corporation shall be limited to the assets of the corporation, and that to be effective, such corporation, only upon action of the Board of Directors, must explicitly consent to be sued in a contract or other commercial document which specifies the terms and conditions of such consent.

...

21.0 Board of Directors The business and affairs of the corporation shall be managed by a board of directors, subject to any limitations set forth in the articles of incorporation. The articles of incorporation or bylaws may prescribe qualifications for directors. A director need not be a member of the Shakopee Mdewakanton Sioux Community unless the articles of incorporation or bylaws so prescribe.

...

21.1 Special Committees. An affirmative vote of a majority of the board may establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution. Committees may include a special litigation committee consisting of one or more independent directors or other independent persons to consider legal rights or remedies of the corporation and whether those rights or remedies should be pursued. Committees other than special litigation committees are subject at all times to the direction and control of the board. The committees shall consist of one or more persons, who need not be directors.

...

31.0 Director Conflict of Interest. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has an interest. A conflict of interest transaction is not voidable by the corporation solely because of the director's interest in the transaction if

any one of the following is true:

(1) the material facts of the transaction and the director's interest were disclosed or known to the board of directors or a committee of the board of directors and the board of directors or committee authorized, approved, or ratified the transaction by a majority of the board or committee; but the interested director or directors shall not be counted in determining the presence of, or required number to constitute, a quorum and shall not vote.

(2) the material facts of the transaction and the director's interest were disclosed or known to the shareholders entitled to vote and they authorized, approved, or ratified the transaction by a majority of the shares entitled to vote that are owned by persons other than the interested director or directors; or

(3) the transaction was fair to the corporation at the time it was approved.

...

36.0 General Standards for Directors and Officers. Directors and officers shall discharge their duties:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner they reasonably believe to be in the best interests of the corporation.

The portions of the LSI Articles which the Plaintiffs have cited are these--

3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that, to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent. ...

...

7.2 Duties and Powers. The Board of Directors is hereby vested with all powers necessary to carry out the purposes of the Corporation and shall have control and management of the business and activities of the Corporation. The Directors shall in all cases act as a board. The Directors may adopt such rules and regulations for the conduct of their meetings and the management of the Corporation as they

may deem proper, not inconsistent with the Shakopee Mdewakanton Sioux Community Business Corporation Ordinance and other tribal laws, or these Articles of Incorporation.

7.3 Election, Number and Tenure. Subject to the provisions of Section 7.5 of these Articles, which shall otherwise control, the Board of Directors established by of Incorporation shall consist of the three members of the Shakopee Mdewakanton Sioux Community Business Council, and no more than four (4) additional members, elected by a majority of the Board, for a maximum total of (7) seven. Notices of the election of any Director shall be sent by first class mail to the Members of the Corporation within 2 business days of the election.

...

7.7 Action of the Board. The vote of the Directors shall be the act of the Board, and each Director shall have one vote. The Board of Directors may take any required or permitted action without meeting, provided that the action is taken by at least a quorum and that consent to the action is evidenced in writing by at least a quorum of Directors including the Chairman, and the consent is included in the corporate minutes and records.

7.8 Quorum. A majority of Directors shall constitute a quorum for the transaction of business in any regular or special meeting. The quorum must either include the Chairman, or the action taken must occur with the written consent of the Chairman. The act of a majority of a quorum of Directors including the Chairman or on his written consent, shall be the act of the Board.

...

8.1 Number. At its initial meeting, the Board of Directors shall appoint a President, Vice-President, Secretary and Treasurer. Other officers and assistant officers and agents deemed necessary may be appointed by the Board of Directors. Individuals may hold multiple offices, but the offices of President and Vice-President may not be jointly held.

...

8.41.C. The President shall appoint, discharge and fix the compensation of all employees and agents of the Corporation other than the duly appointed officers by the Board of Directors, subject to the approval of the Board of Directors.

...

8.6 Compensation of Officers. The officers shall receive such salary or compensation as may be fixed by the Board of Directors. No officer shall be prevented from receiving compensation by reason of the fact that the officer is also a Director of the Corporation.

...

9.0 Distribution of Net Profit to Community Required. Any Net Profits or Dividends of the Corporation shall be delivered to the Community for distribution as provided by the Shakopee Mdewakanton Sioux Community Business Proceeds Distribution Ordinance No. 12.29-88-002, in the same manner as has occurred when the gaming businesses of the Community were operated directly by the

> Community. If the Corporation fails to make timely delivery of such Net Profits or Dividends as a result of any action or inaction by the Board of Directors, or officers and employees [sic] of the Corporation under their direction and control, and such failure is certified by the auditors for the Community or the Corporation, that certified failure shall be deemed to be sufficient cause for removal, pursuant to Article 7.15, 7.152, or 7.153, of the responsible Directors.

The Code of Ethics adopted by LSI on September 9, 1993 provides, with respect to confidential information (the aspect of the Code which the Plaintiffs deem relevant in their briefing materials), as follows--

> B. Confidential Information
>
> 1. As a result of their relationship with the Company, Directors, Officers and employees may have access to confidential information.
> 2. Nonpublic information of a financial, technical or business nature is not to be released to any outside person or entity except in the performance of corporate duties or with the express consent of the Executive Committee.

Finally, Section 11(a)(2)(A) of the IGRA, to which the Plaintiffs refer, mandates that any Indian tribe that conducts Class II or Class III gaming have a gaming ordinance that provides that "the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity." 25 U.S.C. §2710(a)(2)(a). And section 501 of the Gaming Ordinance which the Community's General Council voted on March 31, 1993 and April 19, 1993 contains exactly such a provision.

As I understand it, these are the provisions of the Community's Constitution, ordinances, and regulations that imposed clear legal requirements which the Plaintiffs allege were ignored by Prescott and Johnson.

Answering the Threshold Question: Did the Law Clearly Prohibit the Acts which the Defendants Are Alleged to Have Committed?

The Court of Appeals made it clear that, although the law pertaining to qualified immunity in this jurisdiction "does not precisely mimic" the Federal law, still the analytical steps which our courts must take are those described in Harlow v. Fitzgerald, 457 U.S. 800 (1982). Harlow described the "threshold" question to be whether the law was clear at the time of the events at issue:

> On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. [Footnote omitted]. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.
>
> 457 U.S., at 818 (1982).

I will begin this threshold analysis with the live subcounts in Count I. Each is alleged to constitute a "breach of fiduciary duty". (Complaint, ¶66). Several of the subcounts concern either the creation of the Executive Committee or actions which were approved by the Executive Committee: Paragraph 66.A. alleges that the creation of the Executive Committee "usurped" functions committed by law to the Board, and paragraphs 66.C., 66.D., 66.E., 66.F. allege that the compensation, bonuses and benefits paid to Prescott and Johnson and allegedly approved by the Executive Committee were improper because they lacked Board approval. Other subcounts allege that Prescott and Johnson created officer positions and authorized expenditures which by law required Board approval: paragraph 66.B. alleges that officer positions were improperly created; paragraph 66.I. alleges that payment of Prescott's personal attorney expenses was improperly approved; paragraph 66.J. alleges that payment for ski trips were improperly approved; and paragraph 66.K. alleges that payment for the use of a Target Center suite, for public events, was improperly approved.

In my view, the threshold question for each of these subcounts is whether, at the time the events took place, Community law clearly and unequivocally prohibited the creation and operation of an entity like the Executive Committee. It was the Executive Committee which evidently approved, at least in gross, all of the programs, plans and budgets at issue in these subcounts; and if the law clearly prohibited the Committee's creation or functioning, then I am obliged to continue my analysis; but if the Community's law was not clear with respect to the appropriateness of the Committee's creation and functioning, then the Defendants are entitled to summary judgment on these subcounts.

Having reviewed the pertinent provisions of the Community's Constitution, the 1991 Corporation Ordinance, the LSI Articles, the IGRA, and the Community's Gaming Ordinance, I conclude that the Community's law indeed was not clear with respect to whether the Executive Committee's creation and functioning was proper. It is true, as the Plaintiffs point out, that section 21.0 of the 1991 Corporation Ordinance provided that "[t]he business and affairs of the corporation shall be managed by a board of directors...", and section 8.6 provided that "officers shall receive such salary or compensation as may be fixed by the Board of Directors". But section 4.017 of the 1991 Corporation Ordinance permitted the Board to "establish committees of the board of directors, elect or appoint persons to the committees, and define their duties and fix their compensation", and section 21.1 authorized a Board to "establish committees having the authority of the board in the management of the business of the corporation only to the extent provided in the resolution". Likewise, section 7.2 of the LSI Articles permitted the Board to "adopt such rules and regulations for ... the management of the Corporation as they may deem proper, not inconsistent with the Shakopee Mdewakanton Sioux Community Business

Corporation Ordinance and other tribal laws, or these Articles of Incorporation".

The Executive Committee originally was established by Board Resolution No. 10-23-91-28, and its authority was purportedly modified and increased by Board Resolution No. 2-19-92-003. (In neither proceeding did Prescott vote). Resolution No. 2-19-92-003, in pertinent part, purported to grant the Executive Committee "the authority to manage the business and affairs of the Corporation subject to the authority of the full Board of Directors". The Executive Committee was composed of five members, four of whom also were members of the Board: Prescott, together with Allene Ross, Melvin Campbell and James St. Pierre. (Johnson was the fifth Executive Committee member).

In light of the terms of sections 21 and 4.017 of the 1991 Corporation Ordinance, and of section 7.2 of the LSI Articles, and given the fact that I see nothing in the other provisions of Community law that the Plaintiffs have cited which clearly prohibits the creation and operation of the Executive Committee, I simply cannot say that the Executive Committee's creation and its operation, including the manner in which it oversaw the expenditure of LSI funds and the administration of corporate programs, was contrary to clear Community law. Therefore, as to subcounts 66.A., 66.B., 66.C., 66.D., 66.E., and 66.F., 66.I, 66.J., and 66.K., I believe summary judgment must be granted to the Defendants. Simply put, as to none of these subcounts was the Community's law, in the period 1991 through 1994, sufficiently clear regarding to the authorization of expenditures to survive Prescott and Johnson's assertion of their qualified immunity defense.

It must be understood here that I am not holding that all or any of the actions taken by

the Executive Committee were, in fact, legal and properly authorized by Community law[2]. Rather, I am holding that at the time the actions were taken the pertinent portions of the Community's law was not clear.

Subcounts 66.G., 66.L., 66.M. and 66.O. stand on a different footing from the subcounts just discussed. Subcount 66.G. arises from Johnson's alleged breach of his contract, and my treatment of it will follow from my discussion of Count VIII, below.

Subcount 66.L. relates to allegedly unauthorized disclosure of information by Prescott. As to that allegation, the threshold Harlow question is: did the Community law, at the time of the disclosure, clearly prohibit the disclosure? As I have noted, the pertinent Community law appears in the above-quoted section B of the Code of Ethics. That section permitted the disclosure of confidential information by an officer of LSI "...in the performance of corporate duties". Given this standard, I cannot say that the law of the Community was clear with respect to whether Prescott's disclosure was or was not prohibited, and therefore Prescott is entitled to qualified immunity and summary judgment as to subcount 66.L.

Subcounts 66.M. and 66.O. allege misrepresentation of facts -- by Prescott, in his gaming license application, and by Prescott and Johnson, generally with respect to information given to the Executive Committee and the Board. I think it is clear that the Community's law during the pertinent period prohibited Community officers or employees from misrepresent facts to the

---

[2] A question as to whether particular actions of the Executive Committee, relating to the purported creation of a deferred compensation retirement plan for high-level executives of LSI may well be presented in another case that is before me, and it therefore is doubly essential that my holding in the instant case be understood only to be that the law of the Community did not clearly prohibit the creation and operation of the Executive Committee, for purposes of a qualified immunity analysis.

Board or to the Executive Committee -- the "General Standards" imposed upon officers and directors by section 36 of the 1991 Corporation Code must be interpreted to have this content. Therefore, as to subcounts 66.M. and 66.O., my Harlow analysis will proceed to a second stage, below.

First, however, I must apply the threshold Harlow question -- the state and clarity of the Community's law as it applies to the Plaintiff's allegations -- to Counts II, III, IV, and V; and, as to Counts VII and VII, I must correct an omission that I made when I last considered the Defendants' summary judgment motion.

Count II alleges that the acts described in Count I were inconsistent with section 11(a)(2)(A) of the IGRA and with the Community's Gaming Ordinance, because those acts deprived the Community of the measure of control over its gaming facilities. Hence, in the qualified immunity analysis the threshold question for Count II is: was it clear that the IGRA and/or the Community's Gaming Ordinance prohibited the sorts of conduct complained of by the Plaintiffs. And again, for the same reasons that I have just discussed, I must conclude that the law on this point was not clear. The creation and operation of the Executive Committee, the appointment of corporate officers, and the nature of the oversight which the Board gave to LSI's operations were not clearly contrary to Community law, and did not clearly remove control of LSI from the Community. Therefore, the Defendants are entitled to summary judgment on Count II.

The next three counts are subject to a common analysis, I think: Count III alleges that the actions which Prescott and Johnson conspired to obtain various approvals from the Executive Committee; Count IV alleges that Prescott and Johnson converted corporate funds to their own

use; and Count V alleges that Prescott and Johnson unjustly enriched themselves at LSI's expense. Clearly, Community law during the relevant period must be read to have prohibited conspiracy, conversion, and unjust enrichment. But I think that answering the threshold Harlow question involves more than that, as to these counts -- it involves answering the question whether the Community law was clear that the types of acts that the Plaintiffs complain of constituted conspiracy, conversion, and unjust enrichment. The pleading in the Complaint could be more specific, but I understand that the acts which are the subjects of Counts III, IV, and V are the same acts as those which are the subject of subcounts 66.A., 66.B., 66.C, 66.D., 66.E., 66.F., 66.I, 66.J., and 66.K. of Count I, as to which I have already concluded summary judgment for the Defendants is appropriate. So the same reasoning leads me to the same conclusions as to Counts III, IV, and V: given the provisions of the 1991 Corporation Ordinance and the LSI Articles, I do not believe that the Community's law clearly prohibited the acts complained of, and therefore summary judgment is appropriate for Counts III, IV, and V.

Counts VI, VII, and VIII

Given the state of the record in this matter, Counts VI, VII and VIII present a somewhat different situation that do the foregoing matters. Counts VI and VII allege, respectively, that Prescott and Johnson committed fraud and negligent misrepresentation upon the Community's Business Council and the General Council by misrepresenting their compensation in or about June, 1993. But the recitations of the Complaint -- that is, paragraphs 1 - 63 -- contain nothing with respect to representations made to the Business Council or the General Council in or about June, 1993; and the list of Exhibits submitted by the Plaintiffs in response to Prescott's and

Johnson's summary judgment motion does not identify any minutes or other documents reflecting Business Council or General Council meetings, or any submissions by Prescott or Johnson to those bodies. Accordingly, as to Counts VI and VII, I hold that summary judgment is appropriate simply because, resolving all doubtful matters in favor of the Plaintiffs, there appears to be no issue of material fact and the Defendants are entitled to judgment as a matter of law.

Count VIII, and paragraphs 33 - 35 of the Complaint, allege that in 1991 Johnson and LSI entered into a written employment contract which established a ceiling for Johnson's compensation, and that Johnson breached that agreement by accepting additional payments. In his Answer, Johnson denied that he entered into any written contract with LSI, asserted that any agreement he had with the corporation was oral, and denied that he breached any agreement. Evidently, the extensive discovery engaged in by the parties did not turn up a written agreement, because the record submitted to the Court by the parties in connection with the motions for summary judgment contains nothing of the sort, and no explanation for its absence. Accordingly, I conclude that, as to the alleged written employment agreement there is no material issue of fact in dispute, and that Johnson is entitled as a matter of law to summary judgment on Count VIII.

I note, ruefully, that the state of the record as to Counts VI, VII and VIII is unchanged from the time when I first decided the Defendants' summary judgment motions. I simply did not then focus on the absence of any allegations or documents with respect to the General Council, the Business Council, or the Johnson contract document. Having now noted those matters, I think I clearly am obliged to rule upon their legal effect.

The Misrepresentation Allegations

Subcount 66.M. of Count I of the Complaint alleges that Prescott misrepresented his background in his gaming license application, and subcount 66.O. of Count I alleges that Prescott and Johnson generally misrepresented facts to the Board and the Executive Committee. As I have said, during the period that is pertinent to this case the Community's law clearly did not allow LSI's officers to misrepresent facts to the Board or to other corporate entities. So, the following guidance from the Court of Appeals applies with respect to subcounts 66.M. and 66.O.:

> If...the Community law is clearly established, a reasonably competent official is presumed to know the law governing his conduct, and the trial court should then determine if the material facts are undisputed. [Citation omitted]. Summary judgment should be entered for the official only if there are no disputed material facts, and those facts show the official did not violate any established right as a matter of law. If, however, there is a dispute over the material facts concerning whether the official violated a clearly established right, then summary judgment is not appropriate, and the case should move forward toward trial.
>
> Leonard Prescott and F. William Johnson v. Little Six, Inc., et al., supra, at 14.

My examination of the record indicates that there are material facts at issue with respect to representations allegedly made by Prescott and Johnson on two discrete issues. A member of the Board has testified under oath that she relied on false statements made by Prescott and Johnson concerning the amount of compensation the two Defendants were receiving (Transcript of the November 28, 1995 deposition of Allene Ross, at 150-151). And the same person has testified that she supported a decision by the Board (later rescinded) to reimburse Prescott and Johnson for the expense of defending their gaming licenses suspension proceedings (Id, at 109) because of allegedly false statements made to her concerning the matters at issue in those proceedings.

Prescott and Johnson deny making any misrepresentations on any matter. But on the two issues just described I believe that there are material disputed facts which preclude the grant of summary judgment.

For the foregoing reasons, it is herewith ORDERED:

1. That as to subcounts 66.M. and 66.0. of Count I of the Plaintiffs' Complaint, the Defendants' motion for summary judgment is DENIED; and

2. As to all other Counts in the Plaintiffs' Complaint, the Defendants' motion for summary judgment is GRANTED.

April 8, 1999

John E. Jacobson
Judge

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

FILED APR 12 1999

CARRIE L. SVENDAHL
CLERK OF COURT

TRIBAL COURT OF THE SHAKOPEE
MDEWAKANTON SIOUX (DAKOTA) COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

In Re the Matter of:

Nancy M. Texidor,

Petitioner (Judgment Creditor)

vs.

Silas M. Cleveland,

Respondent (Judgment Debtor).

Court File No.: 348-99

SUPPLEMENTAL ORDER

This matter is an action for the enforcement of a foreign judgment -- a judgment for child support from the Trial Court, Probate and Family Court Department, Middlesex Division, of the Commonwealth of Massachusetts. Under this Court's Rule 34, a Petition for the Enforcement of Foreign Judgment and supporting materials is to be served upon the person against whom the Petitioner seeks to enforce the judgment, who shall have twenty days from the date of service within which to respond. In instances where the Petition is served by mail, the date of mailing is not counted and our rules provide that an additional three days is added to the service period, in computing the time within which a response may be filed.

In this case, the Petitioner's counsel certified that she mailed a copy of the Petition to the Respondent on March 16, 1999. Hence, the first day of the Respondent's twenty days was March 20, 1999, and the last day was April 8, 1999; and on that day, this Court entered an

Order directing that the judgment of the Massachusetts court be enforced in this jurisdiction. The Court received a Response, dated April 9, 1999, from the Respondent. The Response contained three allegations. Of the three, only one could possibly have any bearing on this Court's enforcement of the Massachusetts judgment: the Respondent alleged that the Massachusetts Court had no jurisdiction over the child whose support is at issue. Specifically, the Respondent alleged that the child was a Native American, and the Respondent asserted that for that reason the Indian Child Welfare Act deprived the Massachusetts Court of jurisdiction.

However, the Indian Child Welfare Act does not automatically deprive a state court of jurisdiction over Indian children; and there is nothing in the record of this matter which suggests that the Massachusetts court improperly exercised jurisdiction. And given the Respondent's late filing, this Court declines to reopen the matter or to modify its April 8, 1999 Order. The Order of the Massachusetts court should be given full faith and credit in the jurisdiction of the Shakopee Mdewakanton Sioux (Dakota) Community.

BY THE COURT,

Date: April 12, 1999

John E. Jacobson, Judge

C0348.003

COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY
COUNTY OF SCOTT **STATE OF MINNESOTA**

Winifred Feezor and Cecelia M. St. Pierre, Plaintiffs, vs. The Shakopee Mdewakanton Sioux (Dakota) Community Business Council; Stanley R. Crooks, Glynn Crooks, and Susan Totenhagen individually and in their official capacities; Stanley R. Crooks, Kenneth Anderson, and Darlene Matta, individually and in their former capacities as designated officers of the Shakopee Mdewakanton Sioux (Dakota) Community Business Council; and various unnamed individuals, Defendants.	)	Court File No. 311-98

MEMORANDUM AND ORDER

I. INTRODUCTION

Plaintiffs filed this lawsuit on August 13, 1998, seeking injunctive and declaratory relief. The Plaintiffs allege that the unnamed defendants are not properly qualified members of the Community, and that the other defendants are responsible for improperly distributing the benefits of Community membership to them.

In order to understand the allegations made by the Plaintiffs, a short review of the law governing Community membership is necessary. "One of an Indian Tribe's most basic powers is

the authority to determine questions of its own membership," and "a tribe has power to grant, deny, revoke, and qualify membership." Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995). The SMS(D)C Constitution and Enrollment Ordinance govern the standards and procedures for membership applications. Cermak, et al. v. Shakopee Mdewakanton Indians d/b/a Mystic Lake Casino and Dakota Country Casino, et al., 039-94 (SMS(D)C Tr. Ct. Apr. 11, 1995); see also Welch, et al. v. SMS(D)C, et al., No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994). In the SMS(D)C, the ultimate authority for membership determinations is vested with the Community's governing body, the General Council, not with this Court. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995). Unless something is out of the ordinary in the manner in which the General Council makes its determinations, this Court will refrain from interfering with membership determinations of the General Council and the enrollment process. Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994, aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995)

Article II, Section 1 of the Community Constitution provides that membership in the Community shall consist of (a) persons of Shakopee Mdewakanton Sioux blood who were on the 1969 charter roll, (b) children of enrolled members who are at least ¼ degree Shakopee Mdewakanton Sioux Blood, or (c) descendants who are at least ¼ degree Shakopee Mdewakanton Sioux Blood and can trace their ancestry to the 1886 base roll. Section 2 of Article II grants the General Council "the power to pass resolutions or ordinances, subject to

approval of the Secretary of the Interior, governing future membership, adoptions, and loss of membership."

This Court has specifically held in the past that the General Council's historical practice of "voting in" or adopting new members by ordinance under Article II, Section 2, without requiring that hose persons demonstrate that they possess one-fourth Mdewakanton Sioux blood, is a reasonable and permissible interpretation of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Such ordinances are reviewed by the Secretary of the Interior under the terms of Article II, Section 2.

Plaintiff's Complaint in this action essentially challenges the validity of two adoption ordinances passed by the Community pursuant to Article II, Section 2. This is not the first time that these (or similar) Plaintiffs have brought these same (or similar) issues to the attention of this Court. In 1994, Plaintiffs filed a complaint alleging that 31 persons had been improperly admitted to membership under the terms of the 1993 Adoption Ordinance involved in this suit. Although this Court initially issued a limited injunction, Plaintiffs subsequently voluntarily dismissed the suit, and this Court then held that any preliminary orders in that case were vacated. Smith v. SMS(D)C Business Council, No. 038-94 (SMS(D)C Tr. Ct. June. 10, 1994), vacated (SMS(D)C Tr. Ct. June 30, 1995); see also Feezor v. SMS(D)C Business Council, et al., No. 311-98 (SMS(D)C Tr. Ct. Aug. 24, 1998).

In 1995, Plaintiffs filed another complaint alleging that per capita payments were being made to people who were not members, including persons adopted under the same 1993 Adoption Ordinance in this suit. This Court dismissed Plaintiff's complaint, Smith v. SMS(D)C Business Council, No. 060-95 (SMS(D)C Tr. Ct. Dec. 19, 1996), and the Court of Appeals aff'd. Smith v. SMS(D)C Business Council, No. 011-96 (SMS(D)C Ct. App. Aug. 7, 1997).

The validity of the 1993 Adoption Ordinance is also at issue in an action now pending in federal district court. See Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C . 1996) ("Babbitt"). Babbitt began as a challenge under the Administrative Procedures Act ("APA") to the decision of the Interior Board of Indian Appeals ("IBIA") to approve this ordinance under the Community Constitution. See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (1995). In 1996 the federal district court held that gaps in the administrative record prevented the court from ruling on the issues raised in the case and remanded the case to the Department of the Interior for answers to three questions. Babbitt, 953 F. Supp. at 6. On February 2, 1999 Kevin Gover, Assistant Secretary - Indian Affairs, responded, and shortly thereafter, this court ordered the parties to submit briefs explaining the effect of the Assistant Secretary's action on this case. Order, SMS(D)C Tr. Ct., February 9, 1999. Both parties subsequently briefed this issue. After reviewing the briefs submitted in response to the February 19, 1999 order, this court ordered the parties to submit supplemental briefs on whether the BIA Area Director had acted on the 1993 Ordinance within the ten day period required by the SMS(D)C Constitution . In addition, the order invited Plaintiffs' response to the issues raised by the Third Affidavit of Susan Totenhagen. Finally, the order scheduled oral argument on Defendants' motion for summary judgment for May 5, 1999. Order, SMS(D)C Tr. Ct., March 31, 1999. Both parties filed supplemental briefs in response to this order, and oral arguments were heard by this court as scheduled.

It is in this context that the Court turns to the merits of the present dispute.

II. FACTUAL BACKGROUND

According to the submissions of the parties, the undisputed facts are as follows. On November 30, 1993, the Community passed an adoption ordinance, No. 11-30-93-002 ("the 1993 Ordinance"), that allowed individuals who would not necessarily qualify under Article II, Section 1 of the Constitution to become members of the Community if they were (1) lineal descendants of tribal members, (2) not members of another tribe, and (3) except for minor children, had a land assignment on the Reservation. The certification adopting the ordinance indicates that it was passed by a vote of 33 for, 32 against, 6 abstentions, and 1 spoiled ballot. On December 13, 1993, the Acting Minneapolis Area Director of the BIA disapproved the ordinance because it allowed individuals of less than 1/4 degree blood to become members, which in the Area Director's opinion was contrary to the Community Constitution. See Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, 27 IBIA 163, 168 (1995).

The Community appealed the Area Director's decision to the IBIA, which reversed the Area Director's decision to disapprove the adoption ordinance. The IBIA reasoned that the conflicting interpretations by the Community and the Area Director were both reasonable, and therefore the Bureau should adopt the Community's interpretation of its own Constitution out of deference to tribal self government. Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163, 171 (1995).

As Noted above, some of the same Plaintiffs in this case then filed suit in federal district court challenging the IBIA's decision to approve the adoption ordinance. After concluding it could review the dispute, the district court remanded the case to the Department of the Interior for consideration of three issues; (1) whether the IBIA improperly exceeded the 90 day limit for

review of a decision by an Area Director, (2) whether the Community's appeal of the Area Director's decision was properly authorized, and (3) whether the adoption ordinance was validly enacted. See Babbitt, 953 F. Supp. at 6 (D.C. 1996).

While on remand, the Community passed another adoption ordinance, No. 5-13-97-02, ("the 1997 Ordinance"). The resolution adopting the 1997 Ordinance indicates it was passed by a vote of 47 for, none against, and no abstentions. This vote included the votes of 13 people who had become members by virtue of the 1993 Ordinance. Third Totenhagen Aff., ¶5. The voter sign-in sheet for the May 13, 1997 General Counsel meeting at which the 1997 Ordinance was adopted contained the names of 113 persons. Second Totenhagen Aff., Ex. 10. Forty-nine of these people, including 13 of the 27 persons who were adopted pursuant to the 1993 Ordinance, attended the meeting. Id.; Third Totenhagen Aff., ¶ 5. Two of the 49 did not vote. The Chairman was one of these, but, the balloting being secret, the identity of the other non-voter is unknown. Second Totenhagen Aff., Ex. 9.

On May 23, 1997, the Area Director then approved the 1997 Ordinance, reasoning that facially it was not materially different from the 1993 Ordinance currently in effect. After the approval of the 1997 Ordinance, the Community argued to the Department of Interior that the remand from the District Court on the 1993 Ordinance was moot. The May 22, 1998 memorandum from the Office of the Solicitor attached to Plaintiff's Complaint in this action addresses to the issue of mootness. The Solicitor concludes that the controversy was not mooted by the approval of the 1997 Ordinance, and that administrative briefing before the Department of Interior should be ordered on the validity of the ordinances. The Assistant Secretary concurred and, as noted above, issued his response to the remanded questions on February 2, 1999. As to

whether the IBIA could exceed the 90-day constitutional time limit for Secretarial review of tribal adoption ordinances, he concluded that this deadline "places a jurisdictional limitation on the authority of the Secretary to approve an ordinance initially disapproved by the Area Director...." In re Feezor v. Babbitt Remand of the Shakopee Mdewakanton Sioux (Dakota) Community Ordinance No. 11-30-93-002 (Second Adoption Ordinance) (United States Department of the Interior, Office of the Secretary, February 2, 1999) at 7 (the "Gover Decision").

Assistant Secretary Gover did not answer the second remanded issue, i.e., whether the Community's appeal to the IBIA was properly authorized by the General Council. This issue, he concluded, was moot "in light of the fact that the jurisdictional issue regarding the 90-day period for Secretarial review is dispositive with respect to determining the status of the Second [i.e., 1995] Adoption Ordinance", because his decision on that issue "affords the relief they [the Plaintiffs] sought in Babbitt, and, finally, because to address this question would be "unnecessarily deciding an issue of tribal law, contrary to the strong policy of avoiding unnecessary federal intrusion into tribal affairs." Id. at 12. As a result, he declined "to consider the second remanded issue further. Id.

Although he recognized that his decision on the 90-day issue, also made it "unnecessary to address" the question of whether the 1993 Ordinance was enacted by a proper majority of tribal " members, he nevertheless did so on the ground that the question is "one that is likely to recur", and, therefore, appropriate "in order to set forth a Departmental position and provide appropriate guidance to the BIA." Id. at 13. After a detailed discussion of the proper role of the BIA in acting pursuant to tribal law, the Assistant Secretary concluded that "as a general matter,

it is not appropriate for the Department to review internal tribal disputes concerning voter eligibility when exercising ordinance review or approval authority pursuant to tribal law." Id. at 14. In this case he found no reason to depart from this general rule because he found no "'distinct federal interest' that requires the examination of voter eligibility in deciding whether or not to approve an election ordinance." Id. at 16.

While the remand to Interior was pending, Plaintiffs filed this action in the SMS(D)C Trial Court seeking injunctive relief and damages. Essentially, Plaintiffs ask this Court to suspend the per capita payments and voting rights of people who have been adopted into the Community, including those adopted under the 1993 and 1997 ordinances, until the validity of those ordinances is settled in the federal courts. The Amended Complaint also describes Plaintiffs' desire for a quick resolution to these issues. The balance of the Complaint requests (1) an order declaring that the defendants have distributed per capita payments in violation of the Business Proceeds Distribution Ordinance, and (2) damages for past per capita payments distributed in violation of the Business Proceeds Distribution Ordinance. All of the Plaintiff's claims, however, turn on the validity of the 1993 and 1997 ordinances, and upon the ability of the Community to adopt members under Art. II, Sec. 2.

Plaintiffs filed a Motion for a Temporary Restraining Order and Preliminary Injunctive Relief on the same day they filed their complaint. After a hearing, this Court denied Plaintiff's motions on August 24, 1998. The Plaintiffs had filed no affidavits to support their request for preliminary relief, and this Court concluded that upsetting the present status quo without any factual showing of wrongdoing would be inappropriate. Feezor v. SMS(D)C Business Council, et al., No. 311-98 (SMS(D)C Tr. Ct. Aug. 24, 1998).

Defendants then filed an answer and counterclaims to Plaintiff's Complaint on August 31, 1998. The counterclaims generally seek a declaration concerning whether persons adopted into the Community are in fact members of the Community entitled to the full benefits of membership.

On November 11, 1998, Defendants moved for summary judgment on its counterclaims. Pursuant to SMS(D)C Rule 33, a hearing was scheduled for December 9, 1998.

On November 20, 1998, Plaintiff filed a Motion for a Stay of the Proceedings, or in the Alternative for a Continuance. This Court granted Plaintiffs' motion for a continuance, and rescheduled the hearing date for December 14, 1998.

In their response to Defendants' Motion for Summary Judgment, Plaintiffs attached pleadings from the proceedings before the United States Department of the Interior. Defendants responded and also included their pleadings from the same proceedings.

At the summary judgment hearing, Plaintiff presented new documents to the Court to include in the record, despite the fact that Rule 33 requires that responsive documents be filed at least nine days before the summary judgment hearing. In an unsolicited letter sent to this Court on January 15, 1999 (over a month after the summary judgment hearing), Plaintiffs' attorney explained he did not include these documents in his responsive pleading because he had been out of town and did not have time to adequately prepare a response to the Defendants' Summary Judgment Motion. The Court finds this explanation puzzling since Plaintiffs initiated this action and asked for expedited consideration, the summary judgment motion was noticed and scheduled in accordance with Rule 33, and this Court had already granted Plaintiff one continuance. Against the Court's better judgment, however, it will take notice of the documents presented at

the hearing and include them in the record. The Court has carefully reviewed all of the filed materials in reaching its decision below.

III. LEGAL DISCUSSION

A. Standard of Review

The Defendant's Motion for Summary Judgment on its counterclaims is now before the Court. Rule 28 of the SMS(D)C Rules of Civil Procedure requires that summary judgment only be entered for the moving party if there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Welch v. SMS(D)C, No. 036-94 (SMS(D)C Tr. Ct. Nov. 27, 1995). When considering a motion for summary judgment, it is the duty of the court to view the factual evidence in the light most favorable to the non-moving party and to give that party the benefit of all reasonable inferences drawn from the factual evidence. Barrientez v. SMS(D)C, No. 007-88 (SMS(D)C Tr. Ct. Sept. 7, 1990).

B. The Feezor Affidavit

In order to determine if a genuine issue of material fact exists, this court must first be clear about what constitutes the record. Prior to the summary judgment hearing, Defendants moved to strike an affidavit by Winifred Feezor presented by the Plaintiffs in their response to the summary judgment motion. Defendants objected to the affidavit on the basis that it did not conform to the requirement of SMS(D)C Rule of Civil Procedure 28, which incorporates Fed. R. Civ. Pro. 65. Rule 28 requires that affidavits supporting motions for summary judgment be made on personal knowledge, set forth facts that would be admissible at trial, and show that the affiant was competent to testify on the matters stated therein.

After carefully reviewing Ms. Feezor's affidavit, and construing it in a light most favorable to Plaintiffs, the Court is unable to conclude that the Feezor affidavit is based on personal knowledge or presents facts that would be admissible at trial. Ms. Feezor's affidavit attests to her "general sense and fear" that the 1993 ordinance was not properly passed by the Community's General Council, and to her speculation regarding what various markings on the voter sign-in sheet may mean. See Feezor Aff. at ¶ 18. However, Ms. Feezor admits that she has no personal knowledge of what the markings mean, and that she was not present when the votes were counted. Feezor Aff., ¶¶10 and 18. Ms. Feezor notes that the reported tally on the 1993 Ordinance "always seemed a bit fishy to me," but besides citing her "sense" that the ordinance did not pass, she fails to specify factual allegations based on personal knowledge that would support her conclusion. Ms. Feezor's beliefs, senses, and speculation about whether the 1993 Ordinance was properly adopted by the Community fail to meet the standards of SMS(D)C Rule 28, and cannot, by definition, be used to create a genuine issue of material fact. See, e.g., Marler v. Missouri St. Bd. of Optometry, 102 F.3d 1453, 1457 (8th Cir. 1996).

C. The Third Totenhagen Affidavit

In support of its contention that the 1997 Ordinance was properly enacted, Defendant filed an affidavit of Susan Totenhagen dated March 8, 1999 (the "Third Totenhagen Affidavit"). This affidavit and its supporting Exhibits purport to supplement and correct certain aspects of the affiant's second affidavit dated November 10, 1999 (the "Second Totenhagen Affidavit"). As described above[1], the Third Totenhagen Affidavit says that although 27 persons whose names

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1 Supra, p. 6.

appeared on the General Council sign-in sheet for the May 13, 1997 meeting at which the 1997 Ordinance was voted on, contrary to the affiant's assertion in her second affidavit, only 13 of those persons actually attended the meeting. The Third Totenhagen Affidavit reaffirms that, as stated in the Second Totenhagen Affidavit, the vote on the 1997 Ordinance was 47 for and 0 against with the Chairman not voting. It was as a result of the potential significance of the new factual allegations in the Third Totenhagen Affidavit, its difference from the Second Totenhagen Affidavit with respect to the number of adoptees who voted, and its submission at an advanced stage of the proceedings herein, that this court gave the Plaintiffs the opportunity to respond to it in writing and orally. SMS(D)C Tr. Ct. Order, March 31, 1999.

In response, the Plaintiffs submitted no affidavits or other documents that contain specific facts that question the facts as stated by Totenhagen in her third affidavit. Instead, Plaintiff simply makes unsupported statements and innuendoes concerning the credibility of the affidavit. See Plaintiffs' Second Supplemental Brief at 18-20.

This is not enough to create a genuine issue of material fact and thus avoid summary judgment. According to one leading treatise, "The general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment. Unsupported allegations that credibility is in issue will not suffice." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2726. See also Anderson v. Liberty Lobby, 477 U.S. 242, 249-50 (1986); Moreau v. Local Union No. 247, Int. Bhd. of Fireman & Oilers, AFL-CIO, 851 F. 2d 515, 519-20 (1st Cir. 1988); Johns Hopkins Univ. v. Hutton, 297 F. Supp. 1165, 1201, aff'd in part rev'd in part on other grounds, 422 F. 2d 1124 (4th Cir. 1970). Because Plaintiffs did not supply an affidavit contradicting the Third Totenhagen Affidavit, or any other contrary evidence,

they have not properly raised the issue of Totenhagen's credibility and have not created a genuine issue of material fact with respect to the Totenhagen Affidavits. Carrol v. United Steelworkers of America, AFL-CIO-CLC, 498 F. Supp. 976, aff'd., 639 F. 2d 778 (4th Cir. 1980) (in order to raise credibility issue, party opposing summary judgment motion must produce by affidavit or otherwise sufficient evidence to show court that at trial he will be able to produce some fact to shake the credibility of the affiants); Rinieri v. Scanlon, 254 F.Supp. 469, 474 (D.N.Y. 1966) ("party opposing summary judgment must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and... the opposing party may not merely recite the incantation 'credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof"). For these reasons this court finds that the facts as stated in the third Tottenhagen Affidavit are undisputed.

D. The 1997 Ordinance

1. Enactment of the Ordinance

There is no dispute of fact concerning the BIA's approval of the 1997 Ordinance. The 1997 Ordinance was adopted by a vote of 47 for and 0 against at a duly called meeting of the General Council held on May 13, 1997. Second Totenhagen Aff., ¶ 11. The Area Director received the ordinance for review on May 15, 1997 and approved it on May 23, 1997--within the constitutional ten-day limit. Letter from Acting Area Director Larry Morrin to SMS(D)C Chairman Stanley Crooks (May 23, 1997), Small Aff., Ex.8; Second Totenhagen Aff., ¶ 13. The Area Director's decision was not appealed, and although he submitted a copy of the 1997 Ordinance and related materials to the Assistant Secretary - Indian Affairs by memorandum dated May 23, 1997, "the Department took no further action on the Third Adoption Ordinance

[the 1997 Ordinance] within 90 days following the May 13 date of enactment." Memorandum from Solicitor, U.S.D.I. to Assistant Secretary - Indian Affairs (May 22, 1998), at 9. The 1997 Ordinance, therefore, is not subject to further review by the BIA.

The only question raised by Plaintiffs is whether the 1997 Ordinance was properly enacted by the General Council. This argument is based on the fact that some persons who had been adopted pursuant to the 1993 Ordinance participated in the May 13, 1997 General Council meeting at which the ordinance was enacted. This question is one for this Court alone to decide since the Assistant - Secretary has determined that it is not appropriate for the BIA to determine voter qualifications in connection with its review of an adoption ordinance. Gover Decision at 17 ("...when issues of voter eligibility are raised by tribal members in connection with tribal ordinances subject to BIA review pursuant to tribal law, the appropriate course of action is to refer those individuals to a tribal forum.").

The court holds that the 1997 Ordinance was validly enacted by the Community. The enactment of the 1997 Ordinance did not depend on the presence or the votes of persons who were adopted pursuant to the 1993 Ordinance. Even if these people were excluded from participation in the May 13, 1997 General Council meeting at which the 1997 Ordinance was enacted, a quorum still would have been present and a majority of the quorum would have voted for the ordinance. It is undisputed that the Voter Sign-in Sheet for the meeting contained the names of 113 persons. Second Totenhagen Aff., Ex 10. It is likewise undisputed that twenty-seven of these persons had been adopted pursuant to the 1993 Ordinance. Third Totenhagen aff., ¶ 5. The Totenhagen affidavits also indicate that forty-nine of the 113 people on the sign-in sheet attended the May 13 meeting, including thirteen of the twenty-seven persons adopted

pursuant to the 1993 ordinance. Second Totenhagen Aff, Ex. 10; Third Totenhagen Aff., ¶ 5. Forty-seven of these persons voted, all of whom supported the ordinance. Second Totenhagen Aff., ¶ 11; Third Totenhagen Aff., ¶ 3.

It is apparent from these numbers that a quorum was present whether or not the thirteen adoptees are counted. The Bylaws of the Community define a General Council quorum as one third of all eligible voters and permit action to be taken by a majority of the quorum. SMS(D)C By-Laws, Art. III, §§ A(4) and (5). If all forty-nine persons who attended the May 13 meeting were eligible voters, obviously a quorum was present, since one third of 113 is thirty-eight. Furthermore, since forty-seven voted for the ordinance, obviously this constituted a majority of the quorum. If all twenty-seven of the adoptees were ineligible, the total number of eligible voters on the sign-in sheet should have been eighty-six (113 minus 27), and the number of eligible voters present would have been thirty-six (49 minus 13). Since one third of eighty-six is twenty-nine, the thirty-six indisputably eligible voters constituted a quorum. We know that two of the forty-seven people present did not vote and that at least one of these (the Chairman) was eligible. Second Totenhagen Aff., Ex. 9. The other non-voter could have been either eligible or allegedly ineligible since balloting is secret. If both of the non-voters were indisputably eligible, then only thirty-four of the indisputably eligible voters could have voted for the ordinance (36 minus 2). On the other hand, if only one of the non-voters was indisputably eligible, then thirty-five of them could have voted for the ordinance (36 minus 1). Thus, the minimum number of indisputably eligible voters who voted for the ordinance was thirty-four--clearly a majority of those present.

Because a quorum of indisputably eligible voters was present and a clear majority of those present voted for the ordinance, the fact that some allegedly ineligible people voted neither deprived the meeting of a quorum nor prevented the supporters of the ordinance from attaining a majority vote. Because the participation of the allegedly ineligible voters could not have changed the outcome of the meeting , the court concludes that even if the adoptees were, in fact, ineligible, this would constitute harmless error. Therefore, the court holds that the 1997 Ordinance was validly enacted by the General Council on May 13, 1997.

2. Ratification of Prior Adoptions Under the 1993 Ordinance

This leaves the question of whether the persons adopted pursuant to the 1993 Ordinance have been members since their adoption under that ordinance or just since the adoption of the 1997 Ordinance. It is the opinion of this court that even if the 1993 Ordinance was properly disapproved by the BIA after its enactment by the General Council (and after the adoption of the individuals in question) those adoptions were subsequently ratified and reaffirmed by the enactment and BIA approval of the 1997 Ordinance.[2]

The 1997 Ordinance was enacted by means of Resolution No. 5-13-97-002, which, so far as relevant, reads as follows:

> The General Council hereby: (1) reaffirms and ratifies the action of the General Council taken on November 30, 1993 to enact Adoption Ordinance No. 11-30-93-

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[2] Governments may ratify prior defective actions; provided, of course, that the government had the authority to take the action in the first place, and the defect was procedural or technical. See L.C. Eddy, Inc. v. City of Arkadelphia, 303 F. 2d 473, 476 (8th Cir. 1962); Tracy Cement Tile Co. v. City of Tracy, 176 N.W. 189, 190 (Minn. 1919); In re Matter of Certain Amendments to the Adopted and Approved Solid Waste Management Plan of Hudson Cnty. Waste Mgmt. Dist., 627 A. 2d 614, 622 (N.J. 1993); Bostrick v. City of Beaufort, 415 S.E. 2d 389, 391 (S.C. 1992).

> 0002 [the 1993 Ordinance] and; (2) reaffirms and ratifies all actions taken under its authority.

The Community sent both the resolution and the ordinance to the Area Director for approval.[3] The Area Director acknowledged the receipt of both documents, and approved the ordinance as enacted by... Resolution No. 5-13-97-02." Letter from Acting Area Director Larry Morrin to SMS(D)C Chairman Stanley Crooks (May 23, 1997), Small Aff., Ex. 8. For this reason, this court finds that the Area Director's approval applies both to the ordinance and to its enacting resolution.

Plaintiffs have suggested that it was somehow improper for the General Council to enact the 1997 Ordinance as a means of curing any alleged defects in the 1993 Ordinance during the pendency of their challenge to the earlier ordinance. This suggestion is based on a misunderstanding of the relative roles of the legislative, executive and judicial branches of government.

The power of the legislature to repeal or amend a law cannot be limited by the pendency of administrative or judicial challenges to the law. The legislature's power to enact, amend and repeal laws is limited only by the requirement that it act constitutionally. Amending or replacing a challenged law while a challenge is pending is certainly within the power of the legislature even when the legislative changes renders the challenge moot. See e.g., Princeton University v. Schmid, 455 U.S. 100, 103 (1982); National Advertising Co. v. City and County of Denver, 912 F. 2d 405, 412 (10th Cir. 1990); Maryland Highways Contractors Ass'n. v. Maryland, 933 F. 2d

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[3] The General Council may govern adoptions by means of both ordinances and resolutions subject to review by the Secretary of the Interior. SMS(D)C Const. Art. II, § 2. Likewise the review power granted to the Secretary encompasses both adoption ordinances and adoption resolutions. SMS(D)C Const., Art. V, § 2.

1246 (4th Cir. 1991), cert. denied, 502 U.S. 939 (1991). The enactment of the 1997 Ordinance and Resolution No. 5-13-97-002 did precisely that for challenges to the 1993 Ordinance based on alleged defects in the enactment and approval of the ordinance.[4]

E. The 1993 Ordinance

In light of this court's decision regarding the 1997 Ordinance and its effects, it is arguably unnecessary to decide whether the 1993 Ordinance was properly adopted and became effective notwithstanding the Gover Decision. Plaintiffs have gone even farther--arguing that the Gover Decision, along with Solicitor Leshy's memorandum of May 22, 1998, have conclusively determined that both the 1993 and the 1997 ordinances are invalid. Plaintiffs' Supplemental Brief (Effect of February 2, 1999 Remand Decision of Department of Interior Invalidating Second Adoption Ordinance), at 3-4; Tr. of May 5, 1999 Hearing, at 18.

This court disagrees. For several reasons, it is appropriate, and even necessary, for this court to consider the validity of the 1993 Ordinance and the related adoptions. First, since the interpretation of the Community Constitution is clearly a matter of tribal law, and this court has jurisdiction to interpret the Community Constitution pursuant to Section II of the Tribal Court Ordinance, this Court, not the Assistant Secretary - Indian Affairs, is the proper forum for final interpretation of the Community Constitution. This court is not bound by the decision of the

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[4] The Solicitor for the Department of the Interior advised the Assistant Secretary - Indian Affairs that the 1997 Ordinance did not moot the consideration of the three questions remanded to Interior by the district court in Babbitt. However, it is apparent that the primary reason for this advice was the inability of the Solicitor, on the record before him, to determine whether the validity of the 1997 Ordinance turned on the validity of the 1993 Ordinance. See Memorandum from Solicitor, U.S.D.I., to Assistant Secretary - Indian Affairs (May 22, 1998), Second Totenhagen Aff., Ex. 12, at 1, 16, 18-23. The record before this court suffers from no such defect. As explained above, it is clear from the record here that the 1997 Ordinance was properly enacted.

Assistant Secretary. See Iowa Mut. Ins. Co. v. LaPlant, 480 U.S. 9, 19 (1987); Hinshaw v. Mahler, 42 F. 3d 1178, 1179 (9th Cir. 1994); Sanders v. Robinson, 864 F. 2d 630, 633 (9th Cir. 1989), cert. denied, 490 U.S. 1110 (1989). Second, if valid, the 1993 Ordinance would also determine all of the issues raised by Plaintiffs' in this case. Third, because the validity and effectiveness of the 1993 Ordinance are still at issue in Babbitt, the federal district court should have the benefit of this court's interpretation of the Community's own law on these important internal matters.

This Court believes the Assistant Secretary should not have ruled on these questions of tribal constitutional law while an action was pending in tribal court that involved the very same question. Had the Assistant Secretary waited for a short time, or even certified the questions to this court, he would have had the benefit of this court's interpretation of the ordinance review provisions of Article V, Section 2 of the Community Constitution. Given the delay that had already occurred since the federal district court remanded the matter to the Secretary in 1996, a few more weeks would seem to have been a reasonable exchange for the Community's interpretation of its own constitution with respect to these issues-- especially in light of the well-established departmental policy of giving deference to such interpretations. See Brady v. Acting Phoenix Area Director, BIA, 30 IBIA 294, 299 (1997); United Keetoowah Band v. Muskogee Area Director, BIA, 22 IBIA 75, 80 (1992). See also Iowa Mut. Ins. Co. v. LaPlant 480 U.S. 9 (1987).

The Assistant Secretary, however, decided this policy was not applicable because the interpretation offered by the attorneys for the Community "exceeds the bounds of reasonableness." Gover Decision at 7. The interpretation referred to is the one offered on behalf

of the Community by its attorneys. It seems to this court that it, not Community's attorneys, is the proper source for a final, official interpretation of the Community Constitution. Because of the Assistant Secretary's refusal to wait on this court's imminent ruling on the 90-day review issue, this court was deprived of having any impact on the Assistant Secretary's decision on the tribal law question of whether a key Community ordinance had been properly adopted and approved in the manner required by the Community Constitution. By acting as he did, the Assistant Secretary, in effect, decided that no interpretation this Court might offer could possibly be "reasonable" if it disagreed with his views. The policy of deference to tribal courts' interpretations of their own laws surely requires that the Assistant Secretary at least give this court the opportunity to express its views on these issues before deciding they are unreasonable.

Therefore, this court believes it is essential, not only to provide an alternative holding in support of its decision herein, but also to offer the BIA and the federal courts a statement of its views on the constitutional issues surrounding the passage and review of that ordinance. These issues involve the two phases of the ordinance approval process as established by the Community Constitution: (1) approval by the Community and (2) review by the BIA.

1. Adoption of the 1993 Ordinance by the Community

Defendant argues that the General Council validly passed the 1993 Ordinance at the November 30, 1993 General Council meeting. In order to pass a valid Community ordinance, among other things, a quorum of the Community General Council must be present and a majority must vote to approve the ordinance. See SMS(D)C By-Laws, Art. III, Sec. A(4) and Art. V, Sec. 2.

To support their arguments that a quorum was present and a majority voted for the 1993 ordinance, Defendants have provided an affidavit from Susan Totenhagen, the current Secretary

of the Community, who is the person responsible for maintaining the Community's records. See Second Totenhagen Aff. Totenhagen's affidavit describes the numerous attached exhibits and attests to the fact that the Community records show that on November 30, 1993, a quorum of the Community's enrolled membership was present and a majority voted to adopt the 1993 ordinance. Id.

Plaintiffs counter that a quorum was not present because people who were not qualified to vote were permitted to vote. There is nothing in the record that this court could find, nor to which the court has been directed, to support Plaintiffs' contentions. First, in order to vote at General Council meetings a person need only be a properly enrolled member of the Community. SMS(D)C Const., Arts. II and. IV. What is confusing about some of Plaintiffs' arguments is that they repeatedly assume the very point they are trying to prove, namely that people adopted under Article II, Section 2 are not constitutionally qualified to vote. That is simply not the state of Community law. This court has concluded that people may be adopted under Article 2, Section 2, even if they would not qualify under another section of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Therefore, whether an enrolled member of the Community is constitutionally qualified is for the Enrollment Committee to determine, not for the Plaintiffs. See Enrollment Ordinance 12-28-94-005.

In addition, in their pleadings before the Department of Interior on remand, Plaintiffs allege that members of the Welch family were allowed to vote in the November 30, 1993 election, but were not members of the Community. See Plaintiffs' Opening Brief on Judicial Remand, July 31, 1998, at 16. This allegation, however, is in error because all of the Welches were enrolled in the Community by the time of the November 30, 1993 meeting. See Brief of SMS(D)C, July 31, 1998, Ex. 14, at 3; Welch v. SMS(D)C, No. 022-92 (SMS(D)C Tr. Ct. June

3, 1993). Indeed, at least one of the documents Plaintiffs requested that the Court include in the record specifically notes that the Welches were enrolled at the time of the November 30, 1993 General Council meeting. See BIA Brief on Five Issues, Dec. 4, 1998, at 5, n.6.

The Plaintiffs also presented arguments to the Department of Interior regarding the ability of members to vote in Secretarial elections. For the purpose of this Court's interpretation of Community law, the ability of the Welches, or others, to vote in Secretarial elections is not relevant to a member's qualification to vote in a General Council election. Eligibility to vote on General Council ordinances is determined by the Community under the terms of its Constitution and Enrollment Ordinance. See SMS(D)C Const., Arts. III, IV, V(i)-(h); Enrollment Ordinance No. 6-08-93-001. See also Smith et al. v. SMS(D)C Business Council et al., No. 038-94 (SMS(D)C Tr. Ct. July 8, 1994), aff'd, SMS(D)C Business Council et al. v. Smith et al., No. 001-94 (SMS(D)C Ct. App. June 19, 1995) ("One of an Indian Tribe's most basic powers is the authority to determine questions of its own membership," and "[a] tribe has power to grant, deny, revoke, and qualify membership.") There is no indication in the Community's Constitution or Enrollment Ordinance that eligibility to vote in Secretarial elections under 25 C.F.R. Part 81 is requirement for Community membership.

In sum, despite four years and active participation in three related lawsuits, Plaintiffs have failed to demonstrate any genuine issue of fact concerning whether the people constituting a quorum or voting at the November 30, 1993 General Council meeting were duly enrolled members of the Community. The Gover Decision does not address this issue. Therefore, this court holds that as a matter of law the 1993 Ordinance was properly adopted by the Community's General Council on November 30, 1993.

1. Review of the 1993 Ordinance by the Secretary

a. The Ninety-Day Review Provision

Article V, Section 2 of the Community Constitution establishes the process for referring legislation to the Secretary for approval. It reads as follows:

> Any resolution or ordinance which, by terms of this constitution, is subject to review by the Secretary of the Interior shall be presented to the Area Director of this jurisdiction who shall, with[in] ten (10) days thereafter, approve or disapprove the same. If the Area Director shall approve any ordinance or resolution, it shall thereupon become effective, but the Area Director shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, rescind the action of the Area Director for any cause by notifying the council of such decision.
>
> If the Area Director shall refuse to approve any resolution or ordinance submitted to him within ten (10) days of its enactment, he shall advise the council of his reasons therefore. If these reasons appear to the council insufficient, it may, by majority vote, refer the ordinance [or] resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.
>
> If the Area Director shall take no action to approve or disapprove any resolutions or ordinance within thirty (30) days of its being presented to the Area Director, the community shall consider the resolution or ordinance approved and notify the Area Director of the same.

(Emphasis added).

Defendants argue alternatively that either (1) the Assistant Secretary's characterization of the constitutional ninety-day secretarial review period as "jurisdictional" is incorrect or (2), if the ninety-day period is jurisdictional, so is the ten-day window for review by the Area Director

The obvious purpose of the ninety-day review period is to protect the Community against abuse of the Area Director's ordinance and resolution review power. The drafters of the Community Constitution granted this power sparingly. The Constitution provides for such

review and approval in just two situations—resolutions and ordinances "governing future membership, adoptions and loss of membership" and ordinances "directly affecting non-members." MS(D)C Const., Art. II, Sec. 2 and Art. V, Sec. 1, cl. (h). Apparently, the drafters felt the need for some sort of oversight of the power of the Community Council in these areas, but they also recognized that the power to disapprove resolutions and ordinances is a significant limitation on the sovereign rights of the Community, which power could, itself, be abused. For that reason they imposed several limitations on the review power, among them the requirement that the Area Director "approve or disapprove an ordinance or resolution" within ten days and the right of the Community Council to appeal the disapproval of an ordinance or resolution to the Secretary.

The right to appeal to the Secretary was clearly intended to be an important protection for the Community's rights of self-determination. Unfortunately, the Gover Decision defeats the intent on the Constitution by interpreting the ninety-day period as jurisdictional; i.e., as establishing an absolute deadline for secretarial action that, as a practical matter cannot be met unless the Assistant Secretary exercises his discretionary power to take such appeals out of the hands of the IBIA. It cannot be met because the normal BIA appeal process established by 25 C.F.R. Part 2 cannot be completed in ninety days. See Gover Decision at 9-11. The notion that because it is theoretically possible for the Assistant Secretary to bypass the IBIA and issue a decision on an appeal within ninety days, there is no inconsistency between the Assistant Secretary's interpretation of the ninety-day provision and BIA rules (which, in this respect, remain essentially the same as they were when Article V of the Community Constitution was adopted in 1980) ignores the undeniable fact that in practice such an inconsistency exists.

If the Assistant Secretary means to suggest that the mere theoretical possibility of completing BIA review within ninety days is justification for adopting a narrowly literal interpretation of Article V, Section 2 that renders the Community's appeal right practically worthless, this court must respectfully disagree. If, however, the Assistant Secretary is implying that he will, as a matter of course, exercise his authority under 25 C.F.R. § 2.20(b) to determine all Shakopee ordinance appeals within the ninety days allowed by the Community Constitution, his interpretation is reasonable. It is reasonable because it not only preserves a real right of appeal for the Community, but it also insures that appeals will be promptly determined. Both of these outcomes are consistent with the obvious intent of Article V, Section 2 of the Community Constitution because they protect the sovereign, governmental rights of the Community to make its own laws subject only to reasonable oversight in limited circumstances.

It is possible, therefore, that, with the cooperation of the Assistant Secretary, his literal interpretation of the ninety-day review period could yield a reasonable outcome. However, at this time it is not possible for this court to determine whether this approach was intended or is acceptable to the Assistant Secretary. Until this issue is clarified between the Community and the Assistant Secretary, it would be premature for this court to issue its own interpretation of the ninety-day provision unless it were necessary to resolve the issues before it in this case—specifically the validity of the 1993 Ordinance. For the reasons discussed below, the validity of the 1993 Ordinance can be determined without reference to the ninety-day provision.

b. The Ten-day Review Provision

If the Gover Decision is wrong about the ninety-day provision, then the IBIA approval of the Ordinance should stand. On the other hand, if the 90-day period for Secretarial review is

jurisdictional for the reasons given in the Gover Decision, the 10-day period for initial action by the Area Director surely must likewise be jurisdictional. Since the Area Director's disapproval of the 1993 Ordinance occurred more than 10 days after its enactment, the disapproval was ineffective. In other words, the failure of the IBIA to act within 90 days of the date of enactment may invalidate the IBIA reversal of the Area Director's disapproval of the ordinance, but the failure of the Area Director to disapprove the ordinance within 10 days of enactment in turn invalidates his disapproval. Since the Area Director's action was void, it must be treated the same as a failure to act. Under Article V, Section 2 of the Community Constitution, if the Area Director fails to approve or disapprove an ordinance within 10 days, it becomes effective by operation of law 30 days after enactment. Obviously, if the 1993 Ordinance was valid, the persons adopted pursuant to it have been Community members since that time and, as such, were entitled to the full benefits of membership during the period between the enactment of the 1993 and 1997 ordinances—regardless of the effectiveness of the ratification of those adoptions by the resolution that approved the 1997 Ordinance.

The Assistant Secretary did not directly consider or rule on the effect of the 10-day requirement for BIA Area Director action contained in Article V, Section 2 of the Community Constitution, although in a footnote it appears he assumed that the Area Director actually had 30 days in which to approve or disapprove an ordinance. Gover Decision at 8, n. 9. That assumption was incorrect.

This assumption was incorrect because it failed to heed the basic canon of statutory construction that requires all portions of a statute to be given effect. Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 239 (1985), quoting Colautti v.

Franklin, 439 U.S. 379, 392 (1979. See also Turner v. Bd. of Trustees, 126 Cal. Rptr. 443 (Cal. App. 1976); Martin v. Dept. of Soc. Security, 121 P. 2d 394 (Wash. 1942); FAA Administrator v. Robertson 422 U.S. 255, 261 (1975); Weinberger v. Hynson, Wescott & Dunning, 412 U.S. 609, 633 (1973); Welsh v. SMS(D)C, No. 023-92 (SMS(D)C Tr. Ct. Dec. 23, 1994), at 5; Stade v. SMS(D)C, No. 002-88 , (SMS(D)C Tr. Ct. Apr. 13, 1988); Hopi Indian Tribe v. Commissioner of Indian Affairs, 4 IBIA 134, 82 I.D. 452 (1975). In particular, the Gover Decision effectively nullified the requirement of Article V, Section 2 that the Area Director "approve or disapprove" an ordinance submitted to him for review within ten days.

The general outline of Article V, Section 2 of the Community Constitution is reasonably clear.[5] It covers all of the possible responses of the Area Director-- approval, disapproval and failure to act. The Area Director is required in mandatory terms to approve or disapprove an ordinance within ten days of receipt[6]. If he approves the ordinance, it becomes immediately effective, subject to the Secretary's right to rescind within ninety days from enactment. If the area Director disapproves the ordinance within the ten-day period, he must advise the council of his reasons therefore, and the General Council then may invoke the ninety-day review by the Secretary. Finally, if in spite of the requirement to approve or disapprove an ordinance within ten

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5 Supra, p.22-23.

6 Article V. Section 2 is ambiguous as to the date from which the ten days runs. The first paragraph of Section 2 requires the Area Director to "approve or disapprove" an ordinance "with[in] ten (10) days thereafter," the "thereafter" referring to the date the ordinance was "presented to the Area Director" (which this court interprets as meaning the date the ordinance was received by the Area Director). On the other hand, the second paragraph requires the Area Director to "advise the council of his reasons" for refusing to approve an ordinance within ten days of "enactment." While it might be possible to interpret the two ten day periods as different (one determining when the Area Director is required to "advise the council of his reasons" for not approving the ordinance, and the other determining absolute deadline for Area Director action, it does not seem likely that the drafters of the Constitution intended this difference. Given the specific requirement that the Area Director approve or disapprove an ordinance within ten days of presentation, and the subsequent reference in paragraph 3 of the section to the ordinance becoming effective thirty days after it was "presented to the Area Director," this court construes the ten day approval period to run from presentation of the ordinance.

days of receipt, the Area Director fails to act, the ordinance takes effect thirty days after receipt by the Area Director and is not subject to the ninety-day review by the Secretary.

The provision specifically requires that the Area Director "shall approve or disapprove" an ordinance within ten days. The court interprets this to be a mandatory requirement. Generally, as used in constitutions and statutes the word "shall" is considered to be imperative or mandatory, and is only considered to be permissive if that meaning is evident from the context of the statute or constitution or it is the clear intent of the drafters. Scanlon v. City of Menasha, 114 N.W. 2d 791, 795 (Wis. 1962). See also Kaplan v. Tabb Associates, Inc., 657 N.E. 2d 1065, 1067 (Ill. App. 1995); People v. Municipal Ct. of Los Angeles Judicial Dist., 197 Cal. Rptr. 204, 206 (Cal. App. 1984); Johnson v. Dist. Atty. for Northern Dist., 172 N.E. 2d 703, 705 (Mass. 1961). This is especially true where "public policy is in favor of this meaning, or when addressed to public officials, or where a public intent is involved, or where the public…have rights which ought to be exercised or enforced…." Black's Law Dictionary 1375 (6th Ed. 1990), citing People v. O'Rourke, 13 P. 2d 989 992 (Cal. App. 1932). See also State ex rel. Trent v. Sims, 77 S.E. 2d 122, 136 (W. Va. 1953) ("shall" to be read as mandatory especially where the provision concerns public policy).

As explained above, there is a clear public policy purpose served by construing the ten-day provision as mandatory and hence jurisdictional. That purpose is to provide for the outside review of Community ordinances and resolutions in two key situations but to protect the Community's self-government rights by limiting the review process, particularly by requiring decisions to be made within specific time periods and by subjecting the Area Director's actions to review by the Assistant Secretary.

To interpret the reference to "approve or disapprove" in the phrase "If the Area Director takes no action to approve or disapprove any... ordinance within thirty (30) days" of receipt to be

a positive grant of an additional twenty days of review time to the Area Director, as suggested by the Gover Decision, is not reasonable. This interpretation would render the plain, express requirement that he "approve or disapprove" within ten days essentially meaningless. Under the Assistant Secretary's interpretation that the ninety day window for Secretarial review is jurisdictional, reducing the actual time available to obtain a secretarial decision by up to thirty days would make it practically impossible for the Community to challenge an Area Director's disapproval of an ordinance – even if the Assistant Secretary invoked his authority to decide the appeal pursuant to 25 C.F.R. §2.20(b).

Consider this hypothetical situation. The council enacts an ordinance on day one and immediately submits it to the Area Director for review who receives it on day two. The Area Director takes no action until day thirty-one (twenty-nine days after receipt) at which time he disapproves the ordinance and immediately returns it by mail to the Community which convenes a council which, on day thirty-four votes to refer the ordinance to the Secretary for review and immediately overnights the referral to the Secretary who receives it on day thirty-five. According to the Gover decision, the Secretary would have just sixty-five days-- just over two months-- to review the Area Director's disapproval because the ninety days runs from the date of enactment, not the date the Secretary receives the referral. Obviously, the chances of this occurring would be essentially zero.

The drafters of the Community Constitution cannot have intended such a result. Obviously, it is in the interest of the Community to give the Secretary as much of the ninety days as possible to review the Area Director's decision. The ten-day window for approval or disapproval of an ordinance by the Area Director must have been intended expedite the review

process and to leave reasonable time for an appeal to the Secretary, if necessary. Allowing the Area Director to exceed the ten-day deadline is inconsistent with this objective. For this reason the Court interprets the ten-day window for approval or disapproval by the Area Director as jurisdictional. The Area Director, therefore, may approve or disapprove an ordinance only within ten days of receipt. If the Area Director fails to act within the ten-day period, the ordinance becomes effective by the operation of law on the thirty-first day after receipt.

This interpretation is not only consistent with the Gover decision on the ninety-day period and with the apparent intent of the framers of the Community Constitution, it also appears to be consistent with the position taken by the former Assistant Secretary - Indian Affairs in her May 23, 1995 letter to Mr. Cohen in which she concluded that because the Area Director disapproved the 1993 Ordinance more than ten days after it was presented to him by the Community, it "was not properly before" him, i.e., he had no jurisdiction to act. Small Aff., Ex. 6. See also Letter from Acting Area Director Larry Morrin to Stanley R. Crooks (May 23, 1997), Small Aff. Ex. 8 ("The constitution requires approval or disapproval [of the 1997 Ordinance] by this office within ten (10) days."); Letter from Ada E. Deer, Assistant Secretary – Indian Affairs to Stanley R. Crooks, Chairman, Shakopee Mdewakanton Sioux Community (May 17, 1995), Plaintiff's Second Supplemental Brief, Ex. 1.

This interpretation is also consistent with the 1941 opinion of the Solicitor for the Department of the Interior that Assistant Secretary Deer relied on in her May 23, 1995 letter. That opinion, dealt with a provision of the Walker River Paiute Constitution of 1937 that contained a ten-day review provision similar to the provision at issue here. In that opinion the

Solicitor concluded that the BIA had no authority to act on an ordinance after the period had expired. 1 Op. Sol. 950.

Here, as recognized by Assistant Secretary Deer, the Area Director's disapproval of the 1993 Ordinance occurred more than ten calendar days after enactment of the ordinance. The 1993 Ordinance was enacted on November 30, 1993, and it was submitted to the Area Director on December 2. See Plaintiffs' Second Supplemental Brief at 7 ("the adoption ordinance was voted on with 24-hour balloting on November 30 and December 1, 1993, and forwarded to the Area Director on December 2, 1993."). The Area Director disapproved it on December 13, 1993--eleven days after it was presented. Letter from Acting Area Director to Chairman, SMC (D) (December 13, 1993), Small Aff., Ex. 1; Plaintiffs' Second Supplemental Brief at 7.

As the Plaintiffs point out, however, the tenth day (December 12, 1993) was a Sunday. This begs the question whether the Constitution refers to calendar days or business days. This issue was discussed specifically at the General Council Meeting of November 30, 1993, just prior to the vote on the 1993 Ordinance. Some members of the Council were concerned about how long the Area Director had under the Constitution to approve or disapprove the ordinance. The discussion was as follows:

> Cynthia Picket: Do you think it is going to happen within 12 days and then you are looking at less than 12 days because you have weekends, so 8 days we are looking at this, actually 7 days?
>
> Darlene Matta: We can call a meeting with 48 hours notice. It depends on how fast all of you parents can fill out your enrollment papers for your children.
>
> Glynn Crooks: But the fact still remains though, Darlene, she is not talking about that. She is talking about so we approve this [the 1993 Ordinance] tonight, it sits on the Bureau's desk for how long?
>
> Darlene Matta: They have ten days.
>
> Stanley Crooks: Ten days.
>
> Glynn Crooks: But yet we are told we can't take that chance because we have to assume that we are not going to get it.
>
> Cynthia Picket: Ten business days or ten days period?
>
> Stanley Crooks: Ten days.

Glynn Crooks: You don't know the Bureau—so they wait the ten days.

Minutes of General Council Meeting, November 30, 1993, Second Totenhagen Aff., Ex. 7, at 21-22.

Obviously, the General Council assumed ten days meant ten calendar days. The BIA initially adopted the same interpretation. It asserted in the Feezor remand proceedings:

> The Department interprets the ten days literally, not as business days , which is consistent with the Community's interpretation. Thus, the Area Director could not have approved the ordinance on the Monday, had he chosen to do so.

Brief of the Bureau of Indian Affairs on the Merits, In Re: The Remand of the Shakopee Mdewakanton Sioux Second Adoption Ordinance: *Feezor v. Babbitt*, U.S.D.I., Office of the Assistant Secretary – Indian Affairs, Second Hogan-Kind Aff., Ex. 2, at 5 n. 8. This is consistent with the reasoning of the Assistant Secretary – Indian Affairs in the May 23, 1995, letter to James H. Cohen, which, as noted above, concluded that the 1993 Ordinance "was not properly before the Area Director on December 13, 1993."

Admittedly, this is a strict and literal construction of the constitutional language, but so is the Assistant Secretary's construction of the 90-day secretarial appeal period. In fact, contrary to the Assistant Secretary's interpretation of the 90-day period, interpreting the ten-day period as ten calendar days recognizes and protects the Community's interests by strictly limiting the Area Director's review powers, which obviously are in derogation of the Community's sovereign, governmental rights. By keeping the review period as short as possible, the Area Director will, for all practical purposes, be limited to dealing with serious defects that appear on the legislative record and that affect the federal government's trust responsibility, rather than substituting his judgment for that of the General Council. That makes sense since it appears that the review provisions of Article V, Section 2 must have been intended to protect against illegal action by the

General Council rather than against "unwise" political decisions. Furthermore, a strict interpretation of the ten-day period make sense regardless of how the 90-day period is interpreted

Therefore, the Area Director's disapproval on the eleventh day after receipt was entirely without effect and was functionally and legally equivalent to failure to approve or disapprove within ten days. Unlike many other tribal constitutions, failure to act does not result in *de facto* disapproval. This is because, as explained above, Article V, Section 2, expressly provides for approval by operation of law in the event that the Area Director does not act within the ten-day period. Other tribal constitutions, including the Walker River Paiute Constitution at issue in 1 Op. Sol. 950 (I.S.D.I. 1979), require Bureau approval as a precondition to the validity of an ordinance. Consequently, the 1993 Ordinance became effective by operation of law on January 1, 1994 (thirty days after presentation to the Area Director on December 2).

IV. CONCLUSION

This Court would like to be clear that it has held in the past that the General Council's historical practice of "voting in" or adopting new members by ordinance under Art. II, Sec. 2, without requiring that those persons demonstrate that they possess one-fourth Mdewakanton Sioux blood, is a reasonable and permissible interpretation of the Community's Constitution. Smith et al. v. SMS(D)C, No. 11-96 (SMS(D)C Ct. App. Aug. 7, 1997). Consistent with this precedent, this Court holds today that the 1997 Ordinance and its adopting resolution are effective as a matter of Community law. People who are or were properly adopted into the Community pursuant to the terms of the 1997 Ordinance, and pursuant to other properly executed adoption procedures, are entitled to the full benefit of Community membership. In addition, the resolution that adopted the 1997 Ordinance effectively ratified and confirmed all adoptions under the 1993 Ordinance.

In the alternative this court holds that the 1993 Ordinance was validly adopted by the General Council and became effective by operation of law after the Area Director failed to disapprove the ordinance ten days after having received it for review. Having ruled on Defendants' counterclaims in Defendant's favor, there is no longer a basis to grant the relief requested in Plaintiffs' Amended Complaint.

ORDER

Based on a review of the submissions herein, and for the foregoing reasons,

Defendant's Motion for Summary Judgment is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice.

Dated: 5/19/99

Henry M. Buffalo, Jr.
Judge

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

COUNTY OF SCOTT STATE OF MINNESOTA

In Re: Trust under Little Six, Inc. Retirement Plans

Court File No. 055-95

MEMORANDUM AND ORDER

On May 28, 1999, a conference in this matter was held by telephone, not on the record, for scheduling purposes. Jan Stuurmans, Esq. participated on behalf of Robert A. Burns and John Somers; Steven Olson, Esq. participated on behalf of Little Six, Inc. ("LSI"); and Steven Wolter, Esq. participated on behalf of Leonard Prescott, F. William Johnson, and Peter Riverso.

During the conference, agreement was reached among the parties that an evidentiary hearing on the issue of whether the Trust Under Little Six, Inc. Retirement Plans (the "Trust") was validly created would be held on September 22, 1999, commencing at 9:00 a.m.. It also was agreed that the parties would exchange witness lists and exhibit lists not later than ten days before the hearing. However, as the Court began to put pen to paper in drafting this Order it dawned on me that "ten days before the hearing" would be Sunday, September 12, 1999. So, that portion of the scheduling order is herewith modified: witness lists and lists of exhibits will be exchanged not later than Friday, September 10, 1999.

At the conclusion of the conference, Mr. Wolter asked the Court how, in light of the unusual nature of these proceedings, the burden of proof would be allocated, and in what order

the parties would proceed during the hearing. Those questions were sufficiently interesting that the Court asked for a bit of time to reflect on them.

Reflection has led me down the following path. As I observed in my January 19, 1999 Memorandum Opinion and Order, I think it is likely that the question as to whether the Trust was validly created and the question as to whether this Court has jurisdiction over this action actually are one and the same. If the Trust was validly created under the law of the Shakopee Mdewakanton Sioux (Dakota) Community (the "Community"), then I think it probably will be subject to the basic requirements of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001 - 1500 (1994), and the Federal Courts will have exclusive jurisdiction over disputes relating to it. Conversely, if the Trust was not validly created under Community law, then I think the jurisdiction which the Community has given this Court is broad enough for me to hear and decide the issues raised herein. And since the party who asks a court to hear a case generally has the burden of proving that the court has jurisdiction to do so -- cf., Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375 (1994), and Moog World Trade Corp. v. Bancomer, S.A., 90 F.3d 1382 (8th Cir. 1996) -- I believe that the parties who ask this Court to hear this case bear the burden of proving the contention that is central to the Court's jurisdiction: that the Trust was not validly created under Community law. Therefore, at the hearing Messrs. Burns and Somers and LSI will have that burden, and will put in their case first.

Based on the foregoing, it is ORDERED:

1. That an evidentiary hearing on the issue of the validity of the creation of the Trust Under Little Six, Inc. Retirement Plans will be held on September 22, 1999;

2. That the parties will exchange lists of their witnesses and exhibits not later than

September 10, 1999; and

3. That at the hearing, Robert A. Burns, John Somers, and Little Six, Inc., will have the burden of proceeding and of proving that the Trust Under Little Six, Inc. Retirement Plans was not validly established under the laws of the Shakopee Mdewakanton Sioux (Dakota) Community.

June 7, 1999

John E. Jacobson
Judge