COURT OF THE
SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

COUNTY OF SCOTT STATE OF MINNESOTA

LANNY ROSS, Plaintiff, vs. SHAKOPEE MDEWAKANTON SIOUX COMMUNITY, Defendant.	Court File No. 013-91

MEMORANDUM OPINION AND ORDER

Summary

In this case, the Court is called upon to consider the validity of an ordinance which, from the record before us, has formed the basis for relative stability within the Shakopee Mdewakanton Sioux Community for a period of nearly four years, in light of Article VI of the Community's Constitution. Because we are asked to overturn an action of the Community's General Council, the question presented is perhaps the most difficult that this Court has faced.

It is made more difficult because of the factual background which underlies the challenged action. For a number of years, before and including 1988, the Community lived in nearly constant turmoil. In no small part this turmoil was a product of three facts: the Community's businesses were generating substantial

monies; a significant share of those monies were being distributed "per capita" to the Community's membership; and the right of various persons to participate in these "per capita" payments repeatedly was disputed by other persons within the Community.

No useful purpose would be served by a recitation of the specifics of that history. Suffice it to say that the files of the Federal courts and Federal agencies, not to mention the file cabinets of many attorneys, are littered with records of disputes which had, at their base, understandable desires on the part of some to participate in the Community's resources, justifiable fears that such participation would be denied by others, and profound doubts that there was any forum which had jurisdiction to respond.

During the period from 1983 to 1988, the Community operated under an Ordinance which mandated that all persons receiving "per capita" payments be residents of the Community's reservation, and that any member who had left the Reservation and returned not receive such payments for a period of one year following their return. In 1988, the Community's General Council took two actions aimed at stilling the fears of persons receiving per capita payments: In the late winter of 1988, it created this Court. And on December 29, 1988, it passed Ordinance No. 12-29-88-002. That ordinance listed the persons who on that date were receiving "per capita" payments, and it stated that, barring two separate affirmative votes of two-thirds of the Community's membership, those would continue to receive such payments. Ordinance No. 12-29-88-002 also stated that, barring two separate affirmative votes

of two-thirds of the Community's membership, no other persons (except certain minors), regardless of their membership in the Community, would in the future be eligible to receive payments.

In this case, this Court--one of the two structures that was established to bring stability to the Community--has been asked to declare that a portion of Ordinance No. 12-29-88-002, the second such structure, violates Article VI of the Constitution of the Shakopee Mdewakanton Sioux Community. In one of the ironies that characterizes much of life, we find that we must do so.

Our holding is narrow, and at least pending further proceedings, it is only prospective in its effect. Specifically, our holding is that, while the Shakopee Mdewakanton Sioux Community could, consistent with Article VI of its Constitution, establish Reservation residency requirements which members would be required to meet before they could receive "per capita" payments, it could not, consistent with Article VI, remove those residency requirements and still deny per capita payments to the members to whom payments were not being made because of their prior absence from the Community's Reservation. Therefore, we today direct the Community to commence making per capita payments to Ross.

We believe that we do not now have before us a record sufficient to decide whether the effect of this order either can or should be made retroactive. We therefore also direct the parties to discuss with the Court a briefing schedule on this issue.

Discussion

The parties agree that there are no disputes with respect to

any material facts, and have placed this matter before us on cross motions for summary judgment.

The facts are these: The Plaintiff, Lanny Ross, is a member of the Community. (He notes that he is a "charter member", which is true enough because his name does appear on the roll of the Community developed in 1969, but no consequence flows from this fact because nothing in the Community's governing documents distinguishes the rights of "charter members" from those of other members). When the Community adopted its residency requirements in 1983, Ross did not reside on the Reservation. Therefore, his name did not appear on a list of persons whom the Community deemed to be eligible to receive "per capita" payments at that time. Ross returned to the Community in 1988, but on December 29, 1988, when Ordinance No. 12-29-88-002 was adopted, he had not yet been a resident for twelve months, and therefore was not receiving payments.

With respect to residency and "per capita" payments, Ordinance No. 12-29-88-002 provides:

> Section 4- Reservation Residency Not Required- There shall be no requirement that recipients of per capita payments otherwise qualified shall maintain their residence on the Shakopee Mdewakanton Sioux Community Reservation. Payments and program benefits shall be available to community members and persons otherwise qualified whether or not those persons actually reside on the Shakoopee Mdewakanton Sioux Community Reservation.

As to the persons who are to eligible to receive such payments, the Ordinance states:

> Section 8- Final and Exclusive List of Eligible Recipients-

> The list of persons on the Roll of Adults, and the Roll of Minors and their descendants, shall comprise the final and exclusive list of persons entitled to receive payments and other benefits from the prsent and future businesses of the Shakopee Mdewakanton Sioux Community. Excepting only those described in Section 6 [which section pertains to certain trusts for minors], no further additions shall be made . No person listed on the Roll of Adults, and no minor child of those persons, now named on the Roll of Minors, and those who may subsequently be certified as qualifying for for [sic] addition to the Rolls pursuant to Section 6 of this Ordinance, shal ever be denied payments or benefits, and the value of the property right of each person on the Roll of Adults and the Roll of Minors shall be maintained at an equal level with the value of the property rights of the others named on those Rolls.

The Roll of Adults included all members of the Community (and some other persons)--save only for four persons whose names appeared on a separate list, denominated "List C - Persons eligible or enrolled for voting membership not now receiving benefits". Those four people were Ross, Charlie Vig, Pat Welch, and Dave Blue. Following the adopting of Ordinance 12-29-88-002, the General Council voted on the question of whether the names on List C should be added to the Roll of Adults. The vote was 21 for, 29 against, with 5 abstaining. Since December 12, 1988, Ross has lived on the Reservation and has been permitted to vote in the General Council and in the Community's elections; but he has not received "per capita" payments.

Article VI of the Community's Constitution provides:

> All members of the community shall be accorded equal opportunities to participate in the economic resources and activities of the community.

The parties have disputed at great length the effect of this

provision; but neither party really has provided a defining explanation for its position. Ross' principal contention is that "per capita" payments are economic resources of the Community, and that the effect of Article VI is to require that he receive an equal distribution of those resources. The difficulty with this argument is that it begs the question. On occasion, in the materials submitted to the Court, Ross appears to assert that under all circumstances Article VI establishes a right to equal distributions among all voting members, with no distinctions being permissible among such members. And he makes variations on this argument, asserting that the Community's denial of payments to him is a denial of a property right without due process of law, in violation of the due process and equal protection guarantees of the Indian Civil Rights Act of 1968. 25 U.S.C. 1302. But those arguments stand or fall on the resolution of the fundamental question. He has a right to protect only if Article VI gives him a right to receive payments.

The Community's arguments also miss the mark to some extent. The Community correctly notes that Article V of the Constitution gives the General Council the authority to "manage all economic affairs and enterprises of the community". But the provisions of Article V do not negate the effect, whatever it may be, of Article VI. The Community stresses the fact that one of the most fundamental powers of an Indian tribe is the power to determine its own membership. But the Community has decided its own membership, and Ross is a member. The question is: what does Article VI mean

for members. The Community asserts that the acceptance of Ross' arguments would mean that each member would be guaranteed an equal share of all Community resources--that the Community could never establish programs, such as education and health care programs, which would distinguish between members based on their need. Ross rejects that argument as a "straw man" (or, in oral argument, as a "straw horse"); but he does not explain what exactly Article VI does mean.

In the view of the Court, however, at least three things are clear.

First, Article VI clearly was not intended to, and does not, preclude the Community from establishing programs based on members' need or on circumstances, or establishing appropriate standards for the dispostion of the Community's resources. Far more specific language would be required than that used in Article VI, to reach such a result. It is our view that the equal protection analysis generally employed in interpreting the Fourteenth Amendment to the United States Constitution, imposed upon the Community's actions by the Indian Civil Rights Act of 1968, in most cases is probably the appropriate one for interpreting Article VI. The manner in which the "rational relationship" and "strict scrutiny" formulae that traditionally are applied in Fourteenth Amendment cases may change in the context of the Community and its circumstances; but at least the Community's government is not required to be merely a vessel to pass along all Community property in equal shares to all members.

This leads us to our second conclusion, which is that the

Community did not violate either the provisions of Article VI or of the Indian Civil Rights Act when, in 1983, it established both the requirements that a person be a resident of the Reservation in order to receive "per capita" payments, and that members who returned to the Reservation then reside thereon for twelve months before becoming eligible for payments. The Community is tiny, both in terms of its membership and its land base. In 1983, it also was tiny in terms of its resources. It was not an unreasonable choice for the Community to hold its "per capita" payments within the boundaries of the Reservation, where the General Council could reasonably conclude they were most needed. Also, when money suddenly was appearing where it had not been before, it was not unreasonable for the General Council to require members who had left the Reservation to demonstrate a commitment to the Community, in the form of a one-year waiting period, before permitting them to partake of the Community's resources. Therefore, insofar as Ross claims per capita payments from 1983 through December 29, 1988, his claim must fail.

But third, under Article VI, the decision of the General Council on December 29, 1992 to eliminate the residency requirement for most members (to permit them to leave the Reservation and retain their rights to payment), but to retain forever the effect of the residency requirement on Ross (so that only by two affirmative votes of two-thirds of the Community's entire membership could he participate in payments, regardless of where he lives) is impermissible. It did not have the effect of holding

vital monies on the Reservation. To the contrary, since Ross is a resident and is not receiving payments, while many other members who are receiving payments presumably may have left, the effect may well have been the reverse. It also did not have the effect of eliciting a demonstration from anyone to the Community. Indeed, the only apparent effect is to penalize members who happen to have failed to return to the Reservation in time to be eligible to leave again with payments in hand.

No purpose permissible under the "equal opportunities" language of Article VI can possibly be served by such a result. The Court is fully cognizant of the fact that members of the Community may well feel as though their residence on the Reservation during the troubled times preceding December 29, 1988 entitles them to special consideration, as against members who were not on the Reservation at that time. And indeed, they might be correct--<u>if the same residency requirements applied to all members.</u> But when the requirements have been lifted for some, in the view of the Court they must be lifted as to all.

Therefore, it is clear to us that we must order that Ross be given "per capita" payments, commencing immediately. Whether, however, this Court has the authority to order that Ross be compensated for payments he did not receive from December 29, 1988 to the present, and whether--whatever our authority--it is appropriate for us to enter such an order, is a matter we do not now decide. The parties have not briefed this issue, and in our view, considering the amounts that may be at issue, the Court must

have the benefit of the parties' views.

ORDER

For the foregoing reasons, it is herewith ORDERED:

1. That the Defendant's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made during the period prior to December 29, 1988; and

2. That the Plaintiff's Motion for Summary Judgment is granted, insofar as it relates to per capita payments made following the date of this Order; and

3. That on or before July 24, 1992, counsel for the parties are directed to inform the Court of their schedule, to permit the Court to establish a briefing schedule with respect to the matters that remain undecided in this litigation.

July 17, 1992

Kent P. Tupper
Chief Judge

John E. Jacobson
Associate Judge