

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SHELDON PETER WOLFCHILD, et al.,)	
)	
)	
Plaintiffs,)	
)	Case No. 03-2684L
)	and
v.)	Case No. 01-568L
)	(consolidated)
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
)	
)	

NOTICE OF SUPPLEMENTAL AUTHORITY

RE: TRIBAL COURT OF THE LOWER SIOUX COMMUNITY IN
MINNESOTA, SCOTT ADOLPHSON v. LOWER SIOUX COMMUNITY
COUNCIL, CASE NO. CIV-10-051

Erick G. Kaardal
William F. Mohrman
Mohrman & Kaardal, P.A.
33 South Sixth Street
Suite 4100
Minneapolis, Minnesota 55402

Attorneys for Plaintiffs

Dated: November 3, 2010

I, Erick G. Kaardal, declare as follows:

1. I am an attorney at Mohrman & Kaardal, P.A. and represent the Wolfchild Plaintiffs in this case.

2. I have attached hereto a true and correct copy of the following documents from the Lower Sioux Indian Community Tribal Court Proceeding, Scott Adolphson v. Lower Sioux Community Council, Tribal Court File No. Civ-10-051:

- 10-27-10 Hearing Summary
- Clerk's Notice and Order dated November 1, 2010

3. I bring these documents to the Court's attention because the government denies that the 1886 Mdewakanton have vested rights after the 1980 Act, while the Lower Sioux Tribal Court on Monday, November 1, 2010 acknowledged 1886 Mdewakanton have vested rights and distinguished them from the rights of community members.

4. The tribal court stated at page 3 of the order that "the Lower Sioux Indian Community may not deprive a **Minnesota [1886] Mdewakanton Sioux Indian of any vested rights, such as the ability to identify himself or herself as a Mdewakanton Sioux Indian or the right to participate in federal, tribal or state programs that provide benefits to Minnesota Mdewakanton Sioux Indians.**" (Emphasis added.)

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Executed on: November 3, 2010

s/ Erick G. Kaardal
Erick G. Kaardal

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2010, a copy of the foregoing was filed electronically with the Clerk of the Court through its ECF System and electronic notice was delivered to the parties entitled to receive notice.

Dated: November 3, 2010.

s/Erick G. Kaardal
Erick G. Kaardal

LOWER SIOUX TRIBAL COURT
THE HONORABLE DEPUTY JUDGE LEIF RASMUSSEN

10-27-10 hearing summary: Scott Adolphson v. Lower Sioux Community Council CI 10-051
Appeal of Loss of Membership Privileges

PRESENT: Scott Adolphson, Petitioner
Shawn Frank, Attorney for Lower Sioux Community Council
Kateri O'Keefe, Lower Sioux Enrollment Clerk

Judge Rasmussen began by explaining the reason for the hearing as being Scott Adolphson's appealing the decision of the Enrollment Membership Community to withdraw his qualified membership privileges and that decision has been made by Enrollment Community and Mr. Adolphson is appealing that. He then directed that, pursuant to the Enrollment Ordinance, Petitioner has burden of the proof to show why that decision was in error.

Scott Adolphson began by stating that he appealed under the Constitution itself instead of the Gaming Ordinance because the Constitution protects his vested rights. He stated that he was enrolled in 85. In 1999 he was granted full membership privileges and has had them for 11 years. The Gaming Ordinance came up and he was challenged by a person and was removed, but he is going under the Constitution of Section 6 of the Lower Sioux Constitution which states that nothing contained in this Article shall be construed to deprive him of his vested right.

Judge Rasmussen asked Mr. Adolphson: So you don't dispute that you currently are not residing within the 10 mile radius of the Tribe's Trust Land, but rather you are arguing that the Tribe itself, under the Constitution does not have the right to withdraw or rescind your qualified membership privileges pursuant Section 6 of the Constitution?

Mr. Adolphson responded that Section 6 protects the right to what's in place. The Gaming Ordinance doesn't supersede the Constitution. He stated that he has been around, but his case is on Section 6 of the Lower Sioux Constitution "You have a vested right here and the Gaming Ordinance takes it away from you which is unconstitutional".

Mr. Adolphson continued by stating that if he removed himself and joined another community, then yes. Other than that, any ordinance that's passed is retroactively applied. Even if so, it's a taken of his vested right.

Judge Rasmussen then asked Mr. Adolphson what his response to Section 3 of the Constitution is. Following that question, Judge read that Section 3 from the Constitution: "Any person who is a member of the Community, but has removed therefrom for a period of two (2) years, shall automatically forfeit all rights and privileges to the benefits of said Community such as land assignments and sharing in Community profits."

Judge then asked Mr. Adolphson: How do those two Sections interact?

Mr. Adolphson answered by asking why would Section 6 state in there that nothing contained in this Article which would be the Constitution any ordinance or resolutions violate your vested rights. That's my argument.

Judge Rasmussen then asked Mr. Adolphson if he feels that there is a conflict then that Section 3 and Section 6 when read together, don't make any sense.

Mr. Adolphson answered: Exactly.

Judge then asked Mr. Adolphson if he had any other evidence he would like to put forward.

Mr. Adolphson responded that no, this was all he had to say.

Mr. Frank then stated that when the Constitution is looked as a whole, what Section 6 talks about is the basic right of membership as a member of the Community. The provision that Section 3 does not talk about the revocation of a person's membership, but merely a qualified status which allows that person to participate in certain Community benefits.

Mr. Frank continued that membership rights that are not vested under the membership provisions have not been challenged and Mr. Adolphson remains a member of the Community; he is not however a qualified member as that term is envisioned in Section 3 and then further defined in the Enrollment and Membership Privilege Ordinance; so the two are not in conflict, but speak to two different components of the bundle of membership that Lower Sioux Community members and its qualified status members enjoy and doesn't think there is a conflict or constitutional question. If the Enrollment Community and the Council's determination that the two year residency was not maintained, is not at challenge, then feels it's in the Court's authority to affirm the decision of the Council's decision to revoke qualified status.

Judge Rasmussen asked Mr. Frank what a persona has who has lost their qualified membership privileges and still remains a member, what right does that person have then?

Mr. Frank answered that as a member of an enrolled Indian Tribe a person would have access to certain health and education benefits, a whole wealth of benefits that come with being an enrolled member. To participate in certain programs of this Community one would need to be a qualified membership/status.

Judge Rasmussen asked Mr. Frank if the qualified status, in this Community, gives one the right to vote and receive Tribal gaming benefits etc.

Mr. Frank that it includes the right to participate in distributions from the Community's economic development comprising of voting as well.

Judge Rasmussen asked Mr. Adolphson for a response.

Mr. Adolphson responded by stating that the Gaming Ordinance since 1993 has been amended 30 times. IT doesn't make any sense

Judge Rasmussen stated to Mr. Adolphson that he was referring to a Gaming Ordinance,

Mr. Adolphson replied, membership privilege/Gaming Ordinance have been amended and continued by stating that they have amended the Amendments. The Constitution is supposed to protect and stated that evidently it doesn't here.

Judge Rasmussen then asked Mr. Adolphson if he had any additional evidence. Mr. Adolphson responded that no, that was all he had to say.

Judge Rasmussen then asked Mr. Frank if he had anything further. Mr. Frank responded to the extent that there are questions beyond the constitutional question that whether or not the Com can have a qualified status and the impact on that two year residency; I don't have anything further. If the issue then becomes the review of the actual decision and whether or not that's in questions, then the Community would reserve a right to put forth that evidence.

Judge Rasmussen clarified and asked again if Mr. Adolphson had any evidence to present to the Court today that would overturn their decision of his living outside of the 10 mile radius for two consecutive years.

Mr. Adolphson responded that that was not his appeal.

Judge Rasmussen then asked for final presentation of anything further. Both Mr. Adolphson and Mr. Frank indicated there was nothing further.

Judge Rasmussen to take the matter under advisement and will issue an Opinion shortly.

IN THE TRIBAL COURT OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

LOWER SIOUX INDIAN RESERVATION

STATE OF MINNESOTA

TO: PETITIONER:
Scott Adolphson
PO Box 130172
Roseville, MN 55113

RESPONDENT:
Lower Sioux Community Council
Shawn Frank, Esq.
Attorney for Lower Sioux Community Council
Jacobson Buffalo Magnuson Anderson & Hogen
335 Atrium Office Building
1295 Bandana Boulevard
St. Paul, MN 55108

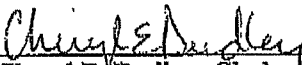
CLERK'S NOTICE

RE: SCOTT ADOLPHSON V. LOWER SIOUX COMMUNITY COUNCIL
TRIBAL CASE FILE NO.: CIV-10-051

Enclosed please find a true and correct copy of an ORDER in regard to the above-referenced matter.

If you should have any questions, please do not hesitate to give me a call.

Dated this 1st day of November, 2010.


Cheryl E. Dudley, Clerk of Court

Enclosure

cc: Tara Loomis, Lower Sioux Tribal Council Executive Secretary (w/enclosure)

Lower Sioux Community
in Minnesota
Tribal Court
Filed
On: NOV 01 2010

IN THE TRIBAL COURT OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

Scott Adolphson,
Petitioner,

Court File No.: CIV-10-051

vs.

ORDER

Lower Sioux Community Council,
Respondent.

The above referenced matter came on for hearing before the undersigned on October 27, 2010 at 10:00 a.m. at the Lower Sioux Tribal Court. Petitioner, Scott Adolphson, appeared pro se. Shawn R. Frank appeared on behalf of the Respondent, Lower Sioux Community Council.

ISSUES RAISED IN THE NOTICE OF APPEAL

Petitioner, pursuant to Section 5.9 of the Lower Sioux Indian Community Enrollment and Membership Privilege Ordinance ("Enrollment Ordinance"), is appealing Lower Sioux Indian Community Resolution No. 10-109 whereby the Lower Sioux Community Council did formally find that Petitioner ceased to maintain residency within the Community Area for a period of two consecutive years and that Petitioner was no longer a Qualified Member of the Lower Sioux Indian Community. Petitioner in both his July 27, 2010 Notice of Appeal and at oral argument did not challenge the Community Council's finding that he has lived outside of the Community Area for two consecutive years but rather constitutionally challenged the Community Council's authority to rescind his membership privileges.

LEGAL STANDARD

The relevant parts Section 5.9 of the Enrollment Ordinance are as follows:

Section 5.9 Appeals

The decision of the Community Council to remove membership privileges from a Qualified Member may be appealed by the affected member to the Community Court. Jurisdiction is hereby granted to such court to consider the appeal, and the Community's sovereign immunity is waived for the limited purpose of the court's review of the Council's decision; no monetary relief shall be allowed. The person making the appeal shall have the burden of demonstrating that the decision of the Community Council was clearly erroneous. The court's review on appeal shall be limited to the record that was before the Community Council.

As set forth in Section 5.9, the Petitioner bears the full burden of proof to rebut, by clear and convincing evidence, the presumption that the Community Council did not in error when it determined that the Petitioner had ceased to maintain residency within the Community Area for two consecutive years and thus is no longer entitled to Qualified Member privileges.

FINDINGS OF FACT

Petitioner did not provide any evidence to rebut the findings of the Community Council that he has lived outside the Community Area for two consecutive years.

Petitioner's appeal of Community Council Resolution 10-109 is based exclusively on his argument that the Community Council does not have the constitutional authority to rescind a Lower Sioux Community member's membership privileges.

The Court's jurisdiction in this matter is limited to determining whether the Community Council erred in its determination that the Petitioner has lived outside the Community Area for two years. *See Section 5.9 of the Enrollment Ordinance.* It appears to be an unresolved question whether this Court can entertain a claim regarding the constitutionality of the Enrollment Ordinance when such claim is asserted in connection with a member's appeal of his loss of membership privileges; however, since the resolution of the Petitioner's constitutionality claim does not change the ultimate outcome of Petitioner's appeal, the Court will briefly address Petitioner's claim.

Petitioner argues that Article III, Section 6 of the Constitution of the Lower Sioux Indian prohibits the Community Council from rescinding membership privileges. Article III, Section 6

states: "Nothing contained in this article shall be construed to deprive any Minnesota Mdewakanton Sioux Indian of any vested right." The parts of the Enrollment Ordinance addressing the acquisition and loss of membership privileges are based on Article III, Section 3 of the Constitution. Article III, Section 3 states: "Any person who is a member of the Community, but has removed therefrom for a period of two (2) years, shall automatically forfeit all rights and privileges to the benefits of said community such as land assignments and sharing in community profits."

Petitioner argues that Article III, Section 3 and Article III, Section 6 of the Lower Sioux Constitution are in conflict and incompatible. The Sections are not in conflict. Article III, Section 6 guarantees to Minnesota Mdewakanton Sioux Indians that the Lower Sioux Indian Community may not deprive a Minnesota Mdewakanton Sioux Indian of any vested right, such as the ability to identify himself or herself as a Minnesota Mdewakanton Sioux Indian or the right to participate in federal, tribal or state programs that provide benefits to Minnesota Mdewakanton Sioux Indians. Article III, Section 3 addresses the loss and reacquisition of membership benefits that are enjoyed by members of the Lower Sioux Indian Community, such as the privilege of voting or the privilege in sharing in the distribution of the profits of Community gaming. The rights and benefits addressed in Article III, Section 3 deal specifically with the rights and benefits a person has as a member of the Lower Sioux Indian Community and are separate and distinct from the rights and benefits a person may have as a Minnesota Mdewakanton Sioux Indian. In other words, although a Lower Sioux member may lose his or her rights to the benefits of membership under Article III, Section 3 the Community Council may not take away the vested rights a person has as a Minnesota Mdewakanton Sioux Indian.

CONCLUSIONS OF LAW

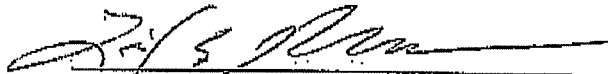
Petitioner has failed to prove by clear and convincing evidence that Respondent erred in its determination that Petitioner has ceased to maintain residency within the Community Area for two

consecutive years and that Petitioner is no longer a Qualified Member of the Lower Sioux Indian Community.

ORDER

Petitioner's appeal of Lower Sioux Indian Community Resolution No. 10-109 rescinding Petitioner's qualified membership benefits is DENIED.

Dated: November 1, 2010



Leif E. Rasmussen
Deputy Judge