



## INTERIOR BOARD OF INDIAN APPEALS

Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director,  
Bureau of Indian Affairs

27 IBIA 163 (02/08/1995)

Judicial review of this case:

Remanded, *Feezor v. Babbitt*, 953 F.Supp. 1 (D.D.C. 1996)

Decision by Assistant Secretary - Indian Affairs, Feb. 2, 1999

Related Board case:

25 IBIA 296

Related judicial case:

*Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt*, 906 F.Supp. 513  
(D. Minn. 1995); affirmed, 107 F.3d 667 (8th Cir. 1997)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

SHAKOPEE MDEWAKANTON SIOUX COMMUNITY

v.

ACTING MINNEAPOLIS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-37-A, 94-38-A

Decided February 8, 1995

Appeals from disapprovals of tribal ordinances concerning adoption into tribal membership.

IBIA 94-37-A dismissed; IBIA 94-38-A reversed and remanded.

1. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

The Bureau of Indian Affairs has authority to interpret a tribal constitution in order to carry out its ordinance approval responsibility under the constitution. However, where the tribe has put forth a reasonable interpretation of its constitution, the Bureau must defer to that interpretation.

2. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

Where a tribe has adopted a constitution requiring Bureau of Indian Affairs review or approval of certain of its ordinances, the approval requirement is a matter of tribal law and may be repealed through adoption of a constitutional amendment.

3. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Statutory Construction: Indians

When officials of the Department of the Interior are called upon to interpret tribal constitutions, they should employ the same rules of statutory construction as are applicable to Federal and state constitutions and statutes.

4. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Statutory Construction: Generally

Under established rules of statutory construction, a statute should be interpreted so as not to render one part inoperative.

APPEARANCES: Kurt BlueDog, Esq., Andrew Small, Esq., and Vanya Hogen-Kind, Esq., Bloomington, Minnesota, for appellant; Mariana R. Shulstad, Esq., and Jean W. Sutton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Shakopee Mdewakanton Sioux Community (Community) seeks review of a November 12, 1993, decision issued by the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving the Community's Ordinance 10-27-93-001, and a December 13, 1993, decision, issued by a different Acting Area Director, disapproving the Community's Ordinance 11-30-93-002. <sup>1/</sup> Both ordinances concern adoption into the Community. For the reasons discussed below, the Board dismisses the appeal in Docket No. IBIA 94-37-A, reverses the Area Director's decision in Docket No. IBIA 94-38-A, and remands this matter to her for further action.

Background

The Community was organized in 1969 under the Indian Reorganization Act (IRA), 25 U.S.C. § 476 (1964). <sup>2/</sup> On August 8, 1969, the Community's Organizing Committee approved a census roll including 33 names to serve as the base membership roll for the Community. On November 4, 1969, the Community adopted a Constitution, which was approved by the Assistant Secretary of the Interior on November 28, 1969.

Article II of the Community's Constitution concerns membership. It provides:

Section 1. The membership of the Shakopee Mdewakanton Sioux Community shall consist of:

(a) All persons of Mdewakanton Sioux Indian blood, not members of any other Indian tribe, band or group, whose names appear on the 1969 census roll of Mdewakanton Sioux residents of the Prior Lake Reservation, Minnesota, prepared specifically for the purpose of organizing the Shakopee Mdewakanton Sioux Community and approved by the Secretary of the Interior.

(b) All children of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood born to an enrolled member of the Shakopee Mdewakanton Sioux Community.

(c) All descendants of at least one-fourth (1/4) degree Mdewakanton Sioux Indian blood who can trace their Mdewakanton Sioux Indian blood to the Mdewakanton Sioux Indians who resided

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<sup>1/</sup> No further distinction is made between the two individuals serving as Acting Area Director. The term "Area Director" is used to refer to both.

<sup>2/</sup> All further references to the United States Code are to the 1988 edition.

in Minnesota on May 20, 1886, Provided, they apply for membership and are found qualified by the governing body, and provided further, they are not enrolled as members of some other tribe or band of Indians.

Sec. 2. The governing body shall have power to pass resolutions or ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership.

Article III provides:

The governing body of the Shakopee Mdewakanton Sioux Community shall be a general council, composed of all persons qualified to vote in community elections. There shall be a business council consisting of the chairman, vice-chairman, a secretary-treasurer, which shall perform such duties as may be authorized by the general council.

On November 23, 1971, the Community enacted Ordinance S-3-71, entitled "Voting in of New Members." On the same date, the Community voted in ten new members, stating that the action was taken in accordance with the new ordinance. 3/ Ordinance S-3-71 was approved by the Area Director on December 2, 1971.

In 1975, the Community enacted Ordinance 6-13-75, concerning loss of membership. The ordinance provided for removal of deceased members from the membership roll, voluntary relinquishment of membership, and disenrollment of members found to be enrolled in other tribes. The ordinance was approved by the Area Director on June 17, 1975.

The Community's present enrollment ordinance was enacted in 1983. 4/ The ordinance established an enrollment committee and an enrollment office; provided for adoption of a base roll to be reconstructed from the 1969 census roll; provided that certain rolls prepared in 1886 and 1889 would be used to determine residence in Minnesota as of May 20, 1886; established procedures for filing and processing applications for enrollment, including an appeal procedure; and established grounds and procedures for disenrollment. The ordinance was approved by the Area Director on May 27, 1983.

In 1980, by Resolution 00083, the Community established a bingo enterprise. The resolution provided, inter alia, that if the enterprise proved profitable, "profits are authorized to be divided among the eligible voting members of the Shakopee Mdewakanton Sioux Community only after all other expenses for center maintenance and BINGO expenses are paid." The Community's bingo enterprise was successful and eventually grew into an even more

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3/ Actually, nine of the ten had been voted in at a Nov. 20, 1971, meeting. However, the community appears to have ratified its earlier action at the Nov. 23, 1971, meeting.

4/ The record copy of the ordinance has no number. The resolution enacting the ordinance is Resolution 7-4-16-83.

successful gaming enterprise. The Community also established a smoke shop enterprise. During the 1980's, the Community made various changes in the eligibility criteria for per capita distributions from bingo and smoke shop proceeds. In 1982, it provided for distribution to adult and minor community residents, apparently eliminating the requirement of membership in the Community. See unnumbered resolution dated December 12, 1982. In 1983, it appears to have reinstated the membership requirement, at the same time adding a 12-month residency requirement. See Resolution 002-12-3-83. Further changes were made in 1987. See Resolutions 7-22-87-001 and 7-22-87-002. Under the 1987 resolutions, membership was not required, and residence requirements varied according to categories of distributees.

A "Gaming Proceeds Distribution Ordinance," Ordinance 11-8-88-005, was enacted on November 8, 1988, but was shortly thereafter repealed and replaced by a "Business Proceeds Distribution Ordinance." Ordinance 12-29-88-002, enacted on December 29, 1988. 5/ The latter ordinance, among other things, eliminated the residency requirement and established a roll of adults and a roll of minors, which were to "comprise the final and exclusive list of persons entitled to receive payments and other benefits from the present and future businesses of the Shakopee Mdewakanton Sioux Community." Ordinance 12-29-88-002, sec. 8. The ordinance also established a procedure for certification of descendants of the listed individuals. It is clear from this ordinance that distributees were not required to be Community members.

On October 27, 1993, the Community enacted Ordinance 10-27-93-002, entitled "Gaming Revenue Allocation Amendments to Business Proceeds Distribution Ordinance." On the same date, it enacted the first of the two adoption ordinances on appeal here, Ordinance 10-27-88-001. The gaming revenue ordinance restricted per capita payments to enrolled members of the Community. The adoption ordinance established qualifications and procedures for petitioning to be adopted into the Community. It also provided for the immediate adoption of a number of individuals, whose names appeared on lists attached to the ordinance. 6/

The Community submitted both ordinances to the Area Director for approval. 7/ The Area Director approved the gaming revenue ordinance

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5/ In its text, this ordinance is also identified as Ordinance 12-22-88-001. This appears to be a typographical error. Ordinance 12-29-88-002 references, inter alia, five resolutions not discussed above, and not included in the record for this appeal. All apparently concerned distribution of business proceeds. These are: a resolution dated July 9, 1983, and Resolutions 8-15-85-001, 8-21-85-001, 11-11-86-6, and 11-14-88-01.

6/ The two ordinances were evidently enacted to ensure compliance with the Indian Gaming Regulatory Act (IGRA) as it concerns per capita distribution plans, 25 U.S. C. § 2710 (b) (3), and the "Guidelines to Govern the Review and Approval of Per Capita Payments," issued by the Assistant Secretary - Indian Affairs on Dec. 21, 1992.

7/ Under IGRA, tribal per capita distribution plans covering gaming proceeds are required to be approved by the Secretary. 25 U.S.C.

but disapproved the adoption ordinance. The disapproval letter, dated November 12, 1993, stated in part:

The Community currently has, by virtue of Section 1 of Article II [of the Community's Constitution], three categories of members. These are (1) those individuals whose names appear on the base roll, (2) children of enrolled members, provided they have 1/4 degree Mdewakanton Sioux blood, and (3) descendants of certain Mdewakanton Sioux Indians, provided they have 1/4 degree Mdewakanton Sioux blood and meet some other qualifications not here relevant. The adoption ordinance would establish a fourth category of members, who are lineal descendants of enrolled members, without the need to establish any degree of blood, whether Mdewakanton Sioux or otherwise. The net effect of the adoption ordinance \* \* \* is to eliminate the 1/4 degree Mdewakanton Sioux blood requirement from the second category, which I do not believe can or should be accomplished by other than an amendment to the constitution.

The ordinance, if approved, would automatically enroll 165 individuals, consisting of 41 adults and 124 children. I understand that the number of adult members presently is fewer than 80. The number of enrolled members, children and adults, would be more than doubled by the ordinance were it to be approved.

(Area Director's Nov. 12, 1993, Decision at 2). The Area Director further stated that she believed adoptions were properly dealt with on a case-by-case basis, rather than through a "wholesale enrollment of an entire category of individuals." Id.

The Community appealed this decision to the Board. However, it also enacted a second adoption ordinance on November 30, 1993, Ordinance 11-30-93-002. This ordinance omitted the automatic adoption provision and thus required all qualified individuals to go through the petition process in order to be adopted. §/ The Area Director disapproved the second ordinance

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fn. 7 (continued)

§ 2710(b)(3)(B). Prior to enactment of IGRA, the Community's distribution resolutions and ordinances were not considered subject to BIA approval because the Community's Constitution did not require approval for such enactments. See, e.g., Dec. 29, 1982, Memorandum from Area Director to Minnesota Sioux Field Representative.

§/ Section 2 of the ordinance, entitled "Qualifications to Petition for Adoption," provides:

**"Section 2.1** In order to be presented to the General Council for a vote, for the purpose of adoption into the Shakopee Mdewakanton Sioux (Dakota) Community, an individual:

"(a) must be a lineal descendant of an individual who is enrolled or was enrolled in the Shakopee Mdewakanton Sioux (Dakota) Community prior to his/her death.

"(b) must not be enrolled in any other Indian Tribe.

on December 13, 1993, again stating that, because the ordinance eliminated the 1/4 blood requirement from Article II, section 1(b), of the Constitution, the change should be made through an amendment to the Constitution, rather than by ordinance. The Community appealed this decision to the Board. <sup>9/</sup>

The Board also received three other appeals from the Area Director's December 13, 1993, decision. These appeals were filed by members of the Community and lineal descendants of members. In addition, the Board received an appeal from the Area Director's November 12, 1993, decision approving the gaming revenue ordinance. That appeal was filed by four community members. All of these appeals were dismissed on April 28, 1994, for lack of standing. Feezor v. Acting Minneapolis Area Director, 25 IBIA 296 (1994).

#### Discussion and Conclusions

In its opening brief, the Community states: "The comprehensive Adoption Ordinance passed by the General Council on October 27, 1993, was replaced by the subsequent enactment of Adoption Ordinance 11-30-93-002. Therefore this appeal is only from the denial of approval of Adoption Ordinance 11-30-93-002" (Opening Brief at 1 n.1). The Board agrees that the Community's appeal concerning the October 27, 1993, ordinance now appears moot in light of the Community's manifest intent to replace that ordinance with Ordinance 11-30-93-002. Accordingly, the Community's appeal in Docket No. IBIA 94-37-A is dismissed as moot. Only the Area Director's December 13, 1993, disapproval of ordinance 11-30-93-002 remains at issue.

The Community contends that BIA has overstepped its authority in disapproving Ordinance 11-30-93-002. For one thing, it argues, the Area

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fn. 8 (continued)

"(c) must have a land assignment or lease on the Shakopee Mdewakanton Sioux (Dakota) Community Reservation. A minor child shall be exempt from this requirement and shall not be required to be a resident of the reservation."

<sup>9/</sup> On Jan. 11, 1994, after the Community's appeals were filed, the General Council purported to vote a number of individuals into membership. The Business Council sought an advisory opinion from the Community Court concerning the propriety of this action and whether or not per capita payments from gaming proceeds could be made to these individuals. The Community Court, although obviously reluctant to issue an advisory opinion, undertook to do so. The Court stated that, absent BIA approval of an adoption ordinance, or amendment of the Community's Constitution, "it would appear that the January 11, 1994 vote is not consistent with the Constitution." In re: Advisory from the Business Council -- Payment of Revenue Allocation to Thirty-one Members, Court File 037-94 (Shakopee Mdewakanton Sioux Community Court, Feb. 11, 1994), slip op. at 3. After similarly concluding that payment of per capita shares would likely be inconsistent with the Constitution and the gaming revenue ordinance, the Court advised the Business Council to place the per capita shares of these individuals into an escrow account until the issue of their membership was resolved.

Director's authority is limited by the IRA, 25 U.S.C. § 476(d)(1), which permits disapproval of an ordinance only if it violates "applicable laws," a term defined to mean "any treaty, Executive order or Act of Congress or any final decision of the Federal courts which are applicable to the tribe, and any other laws which are applicable to the tribe pursuant to an Act of Congress or by any final decision of the Federal courts." 25 U.S.C. § 476 note.

The Community misunderstands 25 U.S.C. § 476(d)(1). This provision applies to the approval of constitutions and bylaws, or amendments thereto, which are adopted under the IRA. <sup>10/</sup> It does not apply to the approval of ordinances. The IRA does not require that tribal ordinances be made subject to Secretarial approval. Kerr-McGee v. Navajo Tribe, 471 U.S. 195 (1985). Neither does it establish any explicit criteria for the approval of ordinances.

The Community's adoption ordinance is subject to Secretarial approval only because Article II, section 2, of the Community's Constitution makes it subject to such approval. The Constitution does not establish any substantive criteria for approval of ordinances.

[1] The Community appears to be contending that BIA may disapprove an ordinance only if it finds the ordinance to be in violation of Federal law. The Board cannot accept such a contention. The Community's Constitution places no such limitation on the Secretary's approval authority. Because Community membership and adoption are matters of tribal constitutional law, and the Constitution explicitly vests the Secretary with authority to review the Community's ordinances on these subjects, the Board finds that BIA has authority to disapprove membership and adoption ordinances which violate the Community's constitution. However, in determining whether such a violation has occurred, BIA is subject to the rule, enunciated in several Board decisions, that it must defer to the Community's reasonable interpretation of its own Constitution and laws. E.g., Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992); Rhatigan v. Muskogee Area Director, 21 IBIA 258 (1992); Thompson v. Eastern Area Director, 17 IBIA 39 (1989). See also Ute Indian Tribe of the Uintah & Ouray Reservation v. Phoenix Area Director, 21 IBIA 24 (1991) (BIA review of tribal ordinances should be undertaken in such a way as to avoid unnecessary interference with tribal self-government).

[2] The Community contends that, at the time its Constitution was drafted, BIA required that a Secretarial approval provision be included in Article II, even though membership is an internal tribal matter. Although not entirely clear, it appears possible that the Community's argument is

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<sup>10/</sup> 25 U.S. C. § 476 (d) (1) provides:

"If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution, and bylaws or any amendments are contrary to applicable laws."

that the approval requirement is not truly a part of tribal law because it was forced upon the Community.

Several documents in the record date from the period in which the Community was organized and the Constitution was drafted. These documents show that the first organizational meeting was held on April 22, 1969, and that the draft constitution which emerged from this meeting included the Secretarial approval requirement. Although substantial revisions were made before the document was voted upon, the approval requirement remained. An Acting Superintendent's letter describing the April 22, 1969, meeting, while not specifically discussing the approval requirement, indicates that the draft constitution contained "those ideas on which there was agreement among all those in attendance at this meeting" (Acting Superintendent's May 19, 1969, Letter to Area Director). Although there is no evidence in these documents that BIA forced the approval requirement upon the Community, the Board assumes for purposes of this decision that BIA at least encouraged its inclusion.

No matter what the origin of the approval provision, however, it is now a matter of tribal law and will remain so until repealed by the Community. As the Supreme Court noted in Kerr-McGee, 471 U.S. at 199, tribes with approval provisions in their constitutions "are free, with the backing of the Interior Department, to amend their constitutions to remove the requirement of Secretarial approval." The Board sees no reason to believe that BIA would not approve an amendment to the Community's constitution which removed the ordinance approval provision. 11/ Until such an amendment is adopted, however, the Secretary retains both the authority and the responsibility to review the Community's membership and adoption ordinances.

[3, 4] The Community next argues that BIA's interpretation of its Constitution is unreasonable because it makes Article II, section 2, inoperative. "If a person could not be adopted without qualifying for membership," the Community contends, "there would be no need to provide for adoption, and the Constitutional provision allowing for adoption would be superfluous" (Community's Opening Brief at 6). It continues:

The [Community] interprets Article II, Section 2 of its Constitution as providing that the Community may enact laws governing adoption, subject to Secretarial approval, and that adoption is for persons other than those qualifying for membership under the

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11/ BIA's more recent policy has been to encourage the deletion of ordinance approval provisions from tribal constitutions. See, e.g., June 18, 1980, Memorandum from Acting Deputy Commissioner of Indian Affairs to Area Director, included in the record for this appeal:

"It has been the policy of this office for some time now to eliminate from tribal constitutions the review provision because it is frequently confusing and unduly burdensome. Moreover, there is no Federal law that requires Secretarial review of tribal enactments. We suggest that in the future when amending constitutions you encourage the tribes to eliminate this provision from their constitutions."

criteria of Article II, Section 1. [12/] The Community's interpretation of its Constitution gives meaning to both membership and adoption. Conversely, the Area Directors' interpretation gives meaning only to membership. Their reading of the Constitution renders adoption meaningless. (Emphasis in original.)

Id. at 7. In support of this argument, the Community cites a number of cases for the “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985), quoting from Colautti v. Franklin, 439 U.S. 379, 392 (1979). See also, e.g., FAA Administrator, v. Robertson, 422 U.S. 255, 261 (1975). The Board agrees with the Community that this well-established principle of statutory construction should apply to the construction of tribal constitutions. Hopi Indian Tribe v. Commissioner of Indian Affairs, 4 IBIA 134, 82 I.D. 452 (1975). The Board also agrees that, in order to give effect to this principle of construction, the term “adoption” must be recognized as having a meaning different than the term “membership,” and “future membership.” Once this distinction has been made, it follows that the Community might well set different criteria for adoptions than for standard enrollments.

Even so, the Board cannot conclude that the Area Director's interpretation of the Community's Constitution is unreasonable, as the Community contends it is. Given the obvious impact that the adoption ordinance will have upon the membership of the Community and the membership criteria in the Constitution, it is not unreasonable to interpret the Constitution as requiring amendment in order to implement the change. The Board finds that the Area Director's interpretation is reasonable.

It also finds, however, that the Community's interpretation of its Constitution is reasonable. The Constitution gives the Community authority to enact ordinances concerning adoption. Such authority necessarily includes authority to establish criteria for adoption. It is reasonable to conclude, especially in light of the principle of statutory construction discussed above, that the Constitution permits the Community to establish different criteria for adoptions than for standard enrollments.

Where two reasonable interpretations of a tribe's constitution are possible, the rule requiring deference to the tribe's interpretation of its own laws comes into play. That rule has even more force here because the ordinance concerns tribal membership, a matter long considered to be within the exclusive province of the tribes. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (“A tribe's right to define its own

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12/ Section 1.1(b) of the adoption ordinance provides in part:

“The Community adopts this Ordinance in order to provide a process to petition for membership in the Community for those persons of Mewakanton Sioux (Dakota) blood who may not qualify under Article II, Section 1 (a), (b) or (c) of the Community's Constitution. This Ordinance does not alter the membership qualifications set forth therein.”

membership for tribal purposes has long been recognized as central to its existence as an independent political community"). See also United States v. Wheeler, 435 U.S. 313, 322 n.18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906); Roff v. Burney, 168 U.S. 218 (1897). The Board finds that BIA and the Board should give deference to the Community's interpretation of its Constitution in this case.

The Community's final argument is that the Community Court is the only forum with authority to determine the constitutionality of the adoption ordinance. The Board cannot accept this argument in toto because it has found, as discussed above, that BIA has authority to interpret the Community's Constitution in connection with its ordinance approval responsibilities. It agrees, however, that the Community Court is the preferable forum. See, e.g., Wells v. Acting Aberdeen Area Director, 24 IBIA 142 (1993). Given the ongoing disputes within the Community, the Board has no doubt that the Community Court will have ample opportunity to rule on this point. 13/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's December 13, 1993, decision is reversed, and this matter is remanded to her, with instructions to approve the Community's Ordinance 11-30-93-002.

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//original signed

Anita Vogt  
Administrative Judge

I concur:

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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13/ It is apparent from the record that the Community is deeply divided over membership issues and that the divisions are of long standing, some evidently stemming from the "voting in" of members during the early years of the Community. Some of these controversies have already been taken to the Community Court and to Federal District Court. E.g., Smith v. Mdewakanton Dakota (Sioux) Community, Case No. 038-94, Shakopee Mdewakanton Sioux Community Court; Smith v. Babbitt, Civ. No 3-94-1435 (D. Minn.).



# United States Department of the Interior

OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20240

FEB 02 1999

In re: Feezor v. Babbitt Remand of the Shakopee Mdewakanton Sioux (Dakota)  
Community Ordinance No. 11-30-93-002 (Second Adoption Ordinance)

## I. INTRODUCTION

This is the Department of the Interior's response to the federal district court decision, Feezor v. Babbitt, 953 F. Supp. 1 (D.D.C. 1996).<sup>1</sup> In Feezor, several members of the Shakopee Mdewakanton Sioux (Dakota) Community brought suit against the Secretary of the Interior, the Assistant Secretary - Indian Affairs, and the Chief Administrative Judge of the Interior Board of Indian Appeals (IBIA), challenging Shakopee Mdewakanton Sioux Community v. Acting Minneapolis Area Director, Bureau of Indian Affairs, 27 IBIA 163 (1995). In that decision, the IBIA approved the Community's Adoption Ordinance No. 11-30-93-002 ("Second Adoption Ordinance"). The federal court held that the IBIA decision could not be sustained on the administrative record before the court because it failed to address three issues raised by the plaintiffs, whom the court found had effectively not been allowed to participate in the IBIA proceedings. The issues remanded are:

- (1) How could the IBIA exceed the 90-day time limit that the Shakopee Constitution provides for Secretarial review of tribal adoption ordinances?
- (2) Was the Community's appeal to the IBIA properly authorized?
- (3) Was the adoption ordinance in fact enacted by a proper majority vote of tribal members?

Subsequent to the federal court remand, the Community enacted another ordinance ("Third Adoption Ordinance"), which purports to replace and supersede the Second Adoption Ordinance, but which admittedly was enacted with the votes of individuals who had been adopted pursuant to the Second Adoption Ordinance. I requested briefing on whether the Third Adoption Ordinance mooted these proceedings, and asked the Solicitor to review the issue. On May 22, 1998, after extensive briefing by the parties, the Solicitor concluded that the Third Adoption Ordinance did not moot the federal court remand proceedings. Memorandum from Solicitor to

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<sup>1</sup> Pursuant to the authority delegated to me by the Secretary, and as provided in the procedures the Department established for responding to the court decision, I am issuing this decision on behalf of the Department.

Assistant Secretary - Indian Affairs (May 22, 1998). On June 5, 1998, I concurred in that opinion and ordered briefing on the merits of the three remanded issues.<sup>2</sup>

The factual background of this matter is described in sufficient detail in the IBIA decision, the federal court decision, and the Solicitor's May 22, 1998, memorandum. Briefly summarized, however, on November 30, 1993, by a secret ballot vote certified as 33 for, 32 against, 6 abstentions, and 1 spoiled ballot, the General Council of the Community passed Ordinance No. 11-30-93-002, referred to as the Second Adoption Ordinance. 1 AR P<sup>3</sup>. On December 13, 1993, the BIA Area Director disapproved the ordinance as facially inconsistent with the Shakopee Constitution. 1 AR Q. The Community appealed the Area Director's disapproval to the IBIA. Approximately fourteen months later, on February 8, 1995, the IBIA reversed the Area Director's decision, 27 IBIA 163, and ordered the Area Director to approve the Second Adoption Ordinance, which the Area Director did on February 17, 1995. 1 AR C. In July 1996, several tribal members ("plaintiffs") filed suit in federal court against the Department, challenging the IBIA decision and the approval of the Second Adoption Ordinance. The court remanded the three issues listed above to the Department for consideration and explanation. Feezor, 953 F. Supp. at 7.

The parties have now fully briefed the remanded issues. In addition, on October 23, 1998, I requested additional briefing on five issues, four of which I considered potentially relevant to the remanded issues and one which is relevant to a threshold issue: whether this proceeding should be stayed pending resolution of tribal court litigation recently filed by plaintiffs Winifred S. Feezor and Cecilia M. St. Pierre.

The Department's involvement in this dispute arises solely because the Shakopee Constitution confers upon the BIA Area Director and the Secretary certain obligations and authority to review and approve or disapprove tribal adoption ordinances. Article II, Section 2 of the Shakopee Constitution grants the General Council the "power to pass resolutions or ordinances, subject to the approval of the Secretary of the Interior, governing future membership, adoptions and loss of membership." 2 AR 18. As amended in 1980, Article V, Section 2 of the Shakopee Constitution provides:

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

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<sup>2</sup> Notwithstanding the fact that the federal court only remanded the three identified issues, and the fact that my June 5 instructions expressly limited briefing to those three issues, both the Community and plaintiffs included arguments in their briefs addressing several additional issues. This decision is limited to the remanded issues.

<sup>3</sup> Denotes the Administrative Record submitted in Feezor v. Babbitt, Vol I, Tab P.

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 a 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 takes 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.

## 2 AR 32.

All parties to this proceeding agree that the exclusive source of the Department's authority<sup>4</sup> to review and approve or disapprove the Community's adoption ordinances is the Shakopee Constitution. Federal review of tribal ordinances is not required by federal law.<sup>5</sup> Thus, the Shakopee Constitution "sets the parameters of the Secretary's review authority" because that review "is authorized only by the Tribe's Constitution, and not by Federal law." Zinke & Trumbo, Ltd. v. Phoenix Area Director, BIA, 27 IBIA 105, 109 (1995).

## II. SHOULD THE DEPARTMENT STAY THESE PROCEEDINGS?

Because the issues remanded raise questions of tribal law related to the scope and extent of the Department's tribal ordinance review authority, the Community has suggested at various times that these proceedings be stayed, or that tribal law questions be certified to the tribal court, or that I abstain altogether from reaching the merits of the tribal law issues. More recently, on August 13, 1998, plaintiffs Fezor and St. Pierre (but not the Prescotts) filed an action in tribal

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<sup>4</sup> General references concerning the role or authority of "the Department" are intended to encompass both the role of the BIA Area Director in reviewing tribal ordinances, as well as that of the IBIA or the Assistant Secretary - Indian Affairs, exercising their delegated authority on behalf of the Secretary in reviewing the Area Director's action.

<sup>5</sup> In fact, federal policy encourages tribes to remove such review provisions from their constitutions. See Memorandum from Acting Deputy Commissioner of Indian Affairs to Minneapolis Area Director (June 18, 1980). 2 AR 33.

court seeking a variety of declaratory and injunctive relief against the Community and unnamed adopted individuals until this matter is resolved. Feezor v. Shakopee Mdewakanton Sioux (Dakota) Community Business Council, et al., No. 311-98 (Tribal Court of the SMS(D) Community). The Community counterclaimed and has sought declaratory judgment on several issues, including the following:

1. "that the IBIA's action, and the Area Director's subsequent approval were sufficient under the Shakopee Constitution to approve the Second Adoption Ordinance" (Count I);
2. "that the General Council's action [at the November 30, 1993, meeting] satisfied the requirements of Article V, Section 2 [allowing the Council "by a majority vote," to refer disapproved ordinances to the Secretary of the Interior]" (Count II); and
3. "that the persons who voted on the Third Adoption Ordinance, and who were adopted under the Second Adoption Ordinance, were qualified to vote, and shall be considered members of the Community until they are validly disenrolled pursuant to Community law" (Count IV).<sup>6</sup>

After considering the supplemental briefs, I have decided not to stay these proceedings. Because the remand requires resolution of issues regarding the Department's distinct role pursuant to the Shakopee Constitution in reviewing tribal adoption ordinances, and because the federal court remand specifically directed the Department to respond to certain questions pertaining to that role, this matter is distinguishable from the cases in which Departmental abstention has been deemed appropriate. Therefore, I do not believe a stay of these proceedings is required. Instead, in light of the time that has already passed since the IBIA's decision and the court's decision, and in light of the continued uncertainty that exists in the absence of a Departmental decision, I have concluded that it is appropriate to issue this decision.

The first remanded issue—the effect of the 90-day time period for Secretarial review—goes to the heart of the Secretary's authority to act under the Shakopee Constitution. Although the Community's counterclaim in the tribal court litigation appears obliquely related to this issue, it does not raise the issue directly, nor is the Department a party to those proceedings. Because this issue has a direct impact on the Department's exercise of its review functions under the Shakopee Constitution, and whether or not it will recognize a tribal ordinance as having become effective, I have concluded that it is appropriate to decide this issue without further delay and without waiting to determine what, if any, relevance a tribal court ruling on the Community's counterclaim would have in resolving this issue. It is true that the Department will defer to a tribe's reasonable interpretation of its own constitution. In this case, however, as discussed in

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<sup>6</sup> Count III of the counterclaim pertains to the purported "ratification" by the Third Adoption Ordinance of the Community's appeal regarding the Second Adoption Ordinance. As already noted, the validity of the Third Adoption Ordinance is itself disputed, although that issue is not within the scope of these remand proceedings.

detail in Part IV of this decision, I have concluded that the interpretation of the 90-day provision offered by the Community in these proceedings exceeds the bounds of reasonableness.

With respect to the second remanded issue—whether the Tribe's appeal was properly authorized—I have concluded that it is unnecessary to address this issue in this decision. The 90-day issue is dispositive, and affords plaintiffs the relief they sought in the district court action. Because resolution of the appeal authorization issue is no longer relevant to the Department's determination regarding the status of the Second Adoption Ordinance, a decision on this issue would constitute an unnecessary intrusion into tribal affairs. Therefore, this issue is immaterial to the decision whether or not to stay these proceedings.

Finally, the third issue—the scope of the Department's obligations with respect to examining voter eligibility when exercising its ordinance review authority—continues to be a deeply contentious issue among the parties to these proceedings. In remanding the issue, the federal court presumed that determining the validity of enactment was among the Department's duties. The Community's counterclaim in tribal court appears intended to seek declaratory relief providing in effect that *whether or not* the Second Adoption Ordinance (or even the Third Adoption Ordinance) was validly enacted, adoptees have full rights of membership until disenrolled. Thus, it does not appear that the tribal court will address the issue remanded to the Department, nor does it appear that tribal court resolution of the counterclaim would resolve this ongoing issue, which is likely to arise again when an ordinance subject to Departmental review is enacted. Even though the 90-day issue is dispositive regarding plaintiffs' challenge in Feezor v. Babbitt, I have concluded that it is appropriate to address this third issue on the merits in this decision without further delay, in order to provide a Departmental decision on this potentially recurring issue and to provide guidance to the BIA.

### III. PENDING PROCEDURAL REQUESTS

Upon filing its reply brief in these proceedings on August 31, 1998, the Community requested that I hold oral argument. I have concluded that in light of the extensive briefing that has already taken place, oral argument would not be of significant benefit in deciding this matter, and therefore I deny the Community's request.

In addition, pending before me is a request from the Community, submitted on December 17, 1998, in response to the Affidavit of Winifred Feezor filed with plaintiffs' Supplemental Brief. The Community requests leave to file a motion to strike the Affidavit of Winifred Feezor pertaining to the vote on the Second Adoption Ordinance, and to permit the Community to file an affidavit of Randolph J. Schacht, the Election Commissioner of the Community. My decision in Part VI, below, concerning the third remanded issue—Departmental examination of the validity of enactment of ordinances subject to its review pursuant to tribal law—makes both affidavits irrelevant for purposes of this proceeding. Accordingly, I have not considered the Affidavit of Winifred Feezor, and I deny the Community's request.

IV. REMAND ISSUE #1: HOW COULD THE IBIA EXCEED THE 90-DAY TIME LIMIT THAT THE SHAKOPEE CONSTITUTION PROVIDES FOR SECRETARIAL REVIEW OF TRIBAL ADOPTION ORDINANCES?

Article V, Section 2 of the Shakopee Constitution provides in relevant part:

If the Area Director shall refuse to approve any resolution or ordinance submitted to him within ten (10) days of its enactment, . . . the council . . . may . . . 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.

It is undisputed that the IBIA's reversal of the Area Director's disapproval of the Second Adoption Ordinance occurred more than 90 days after the enactment of the ordinance, as did the Area Director's subsequent "approval" of the ordinance in compliance with the IBIA decision.

Plaintiffs and the BIA take the position that under the plain language of the Shakopee Constitution, the Secretary's authority to approve a disapproved ordinance expires 90 days from the date of enactment. The BIA suggests that even though the 90-day time period is jurisdictional, the IBIA may still proceed to decide an appeal after that time period has expired in order to take final agency action under the Administrative Procedure Act in the case of eventual IBIA disapproval of an ordinance or, if the IBIA decides an ordinance should have been approved, to issue "binding guidance" from the Secretary's office to the BIA. In the latter case, according to the BIA, if the Tribe reenacts the same ordinance and resubmits it, the BIA must approve it. Thus, the BIA contends, while action beyond the 90-day time period has no direct effect on an ordinance, it still serves some useful purpose. The BIA asserts that previously the Community itself has taken the position that the 90-day time period is jurisdictional, although the Community has argued a different position since the Feezor v. Babbitt litigation was filed.

The Community contends that the 90-day time period in the Constitution imposes an affirmative obligation on the Secretary to act within that time period, but does not create a jurisdictional limitation on the Secretary's ability to act to correct an improper disapproval of an ordinance, nor should it be construed as a restriction upon the Community's ability to accept an untimely decision by the Secretary when making such a correction. The Community asserts that the Department's administrative appeal regulations governing tribal appeals of an Area Director's decision make it impossible for the Department to issue a final decision within the 90-day period provided in the Shakopee Constitution. Therefore, according to the Community, there is a conflict between the appeal regulations that directly govern the IBIA's jurisdiction, and the Shakopee Constitution. The Community argues that to resolve this conflict, the IBIA's jurisdiction to act should be evaluated solely in relation to the Department's regulations, and the tribal constitutional time period should not be construed as a limitation on the Secretary's authority. The Community also argues that the constitutional language is itself ambiguous—the word "may" is permissive but does not specifically or necessarily preclude action beyond 90

days, just as the word "Secretary" isn't literally construed as meaning that the Secretary must personally consider these appeals.

The Community asserts that IBIA precedent—while not having expressly addressed this issue—can be explained as creating a practical distinction between reversing an Area Director's approval of an ordinance, and reversing an Area Director's disapproval of an ordinance. According to the Community, IBIA cases illustrate that in practice, for tribal ordinances that were initially *approved*, the IBIA *has* refused to review or reverse those decisions after the 90-day period has expired. In such cases, according to the Community, the IBIA rightfully treats the 90-day period as a limitation because upon initial approval, the ordinances became effective and tribes have a right to rely on the expiration of the 90-day period as creating finality. The Community contends that in contrast, when a tribal ordinance has initially been disapproved and has never become effective, the IBIA has allowed review and action beyond the 90-day period in order to further the interest in reaching the "correct result," and also implicitly recognizing that the Department's appeal procedures cannot produce a timely result. To support its argument, the Community cites Keweenaw Bay Indian Community v. Minneapolis Area Director, BIA, 29 IBIA 72 (1996); White Mountain Apache Tribe v. Acting Phoenix Area Director, BIA, 21 IBIA 151 (1992); and Ute Indian Tribe v. Phoenix Area Director, BIA, 21 IBIA 24 (1991), in which the IBIA issued decisions more than 90 days from the date of enactment of a tribal ordinance.

In considering this issue, I adhere to the principle of giving deference to a tribe's reasonable interpretation of its own laws. 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). The question, then, is not whether the Tribe's interpretation represents the best interpretation of its Constitution, but whether it represents a reasonable one.

Applying this appropriately deferential standard, I nevertheless conclude that the 90-day time period in the Shakopee Constitution places a jurisdictional limitation on the authority of the Secretary to approve an ordinance initially disapproved by the Area Director, and that the alternative interpretation offered by the Community exceeds the bounds of reasonableness. Therefore, the IBIA was without authority when it issued its decision because the authority granted to the Secretary by the Shakopee Constitution had lapsed. Similarly, the Area Director's subsequent purported approval pursuant to the IBIA decision was also invalid and without effect.

The plain meaning of the word "may" in Article V, section 2, expresses an intent to permit the Secretary to act within the specific and unambiguous prescribed time period. The Community's argument that the word "may" is ambiguous is unconvincing. The word "may" means to "have power," or be "able," or "have permission." Webster's New Collegiate Dictionary (1973). By implication, if the Secretary is granted the power to act within a clearly prescribed time period, that grant of authority does not extend beyond that period. The sole source of the Secretary's authority to review Community ordinances is the Shakopee Constitution. Absent some expression in that Constitution granting the Secretary authority to approve a disapproved ordinance outside that specified time period, it is not reasonable to conclude that the Secretary

has such authority.<sup>7</sup> Unlike the word "shall," which is a directive, but may need further interpretation or instructions to determine the consequences of noncompliance,<sup>8</sup> the word "may," taken in its context in the Shakopee Constitution, simply grants permission to act within the prescribed time period. In such a case, there need be no statement of consequences for failure to act because the consequences are clear—the authority has lapsed. If there can be any doubt about how a 90-day Secretarial review provision would have been interpreted in 1980, when this provision was incorporated into the Shakopee Constitution, it is resolved by the solid and consistent Departmental precedent that existed at the time interpreting such provisions as jurisdictional in nature, both with respect to approvals and disapprovals.<sup>9</sup>

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<sup>7</sup> The Community's contention that because the word "Secretary" in Article V, section 2, has not been read literally, therefore the word "may" is similarly ambiguous, is without merit. The designation of an official to whom authority is granted carries no necessary implication that the official may not delegate the authority to a subordinate, who thus exercises the official's authority. More significantly, when the Shakopee Constitution was amended in 1980, there was clear Departmental precedent indicating that such tribal constitutional language vesting authority in the "Secretary" did *not* preclude Secretarial delegation of that authority. Solicitor's Opinion, May 16, 1947, II Op. Sol. Indian Affairs 1457, 1458 (reference in tribal constitutions to review by "the Secretary of the Interior" not interpreted as requiring that Secretary personally exercise the review function).

<sup>8</sup> Cf. St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986). The Community Constitution uses the word "shall" to impose an obligation on the Area Director to act within the prescribed 10-day period, and also defines the consequences for failure to satisfy that obligation. At a minimum, under the Shakopee Constitution, the Area Director may still act to disapprove an ordinance within a 30-day time period, thus precluding it from taking effect. If the Area Director takes no action to either approve or disapprove it within 30 days, the Tribe may deem the ordinance approved and notify the Area Director accordingly.

<sup>9</sup> See Administrative Appeal of the Hopi Indian Tribe v. Commissioner, BIA, 4 IBIA 134, 143-44 (1975) (time limitations in tribal constitution are binding); Solicitor's Opinion, May 16, 1947, II Op. Sol. Indian Affairs 1457, 1460 (not feasible to delegate Secretary's review authority to subordinate officials, with a right of appeal, because of limited time period for review); Solicitor's Opinion, July 28, 1941, I Op. Sol. Indian Affairs 1060, 1061 (ordinances approved by the Superintendent "cannot be rescinded" because 90-day review period had expired, even though ordinances themselves were ineffective because beyond power of the tribal council to enact); Solicitor's Opinion, April 11, 1940, I Op. Sol. Indian Affairs 950, 951 ("the Department can[not] ignore the plain requirements" of the tribal constitution; "ordinance cannot now be given formal approval" because 90-day review period had expired); Solicitor's Opinion, Feb. 23, 1939, I Op. Sol. Indian Affairs 882 (right of review "no longer exists" after 90 days);

(continued...)

I do not accept the Community's argument that there is a conflict between the constitutional time period and the Department's appeal regulations, which provides a basis to ignore the constitutional language. First, there simply is no direct conflict making a timely decision impossible. The Shakopee Constitution does not even impose an affirmative obligation upon the Secretary to act. Instead, it permits the Secretary to reverse an Area Director's decision within 90 days from the date of enactment of the ordinance, but the Secretary need not act at all to comply with the terms of the Constitution. Second, although there is some merit in the Community's contention that a degree of inconsistency exists between the constitutional time period and the normal timetable of an appeal before the Department, it does not follow that it was or is impossible for the Department to render a timely decision.

The parties agree that in 1980, appeals from an Area Director's action on a tribal ordinance would have been lodged with the Commissioner of Indian Affairs, to whom had been delegated the Secretary's authority over such matters. 43 C.F.R. § 4.353 (1980); 230 Departmental Manual 1.1 (Aug. 16, 1974). No procedures prevented the Commissioner from acting on the appeal within a 90-day period. If the decision on the ordinance was based on an exercise of discretionary authority, the Commissioner's action was final for the Department. 25 C.F.R. § 2.19(c)(1) (1980). If, on the other hand, the Commissioner's action was based on an interpretation of law, Departmental procedures provided a right of appeal to the IBIA. 25 C.F.R. § 2.19(c)(2) (1980). In the latter case, it would indeed appear that exhaustion of the full scope of Departmental appeal procedures within 90 days from the date of enactment of the tribal ordinance would have been unlikely if not impossible.<sup>10</sup> This apparent inconsistency between the

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<sup>9</sup>(...continued)

Solicitor's Opinion, March 17, 1937, 1 Op. Sol. Indian Affairs 736, ("Secretary has no authority over the ordinances" after the 90-day period expires). Post-1980 IBIA decisions that address this issue also consistently hold that the 90-day period is jurisdictional. See Zinke & Trumbo, Ltd. v. Phoenix Area Director, BIA, 27 IBIA 105, 109 (1995) (parameters of Secretary's review authority limited by time periods in tribal constitution); Pawnee Tribe of Oklahoma v. Anadarko Area Director, BIA, 26 IBIA 284, 288-89 (1994) (once 90-day review period has passed, "the Secretary no longer has any authority to act on the ordinance").

<sup>10</sup> The BIA's argument that the Commissioner's action necessarily would constitute an exercise of discretionary authority is questionable. Whether a decision is "based on the exercise of discretionary authority" or "based on interpretation of law," 25 C.F.R. § 2.19(c) (1980), would seem to depend on the issue being decided. See Wray v. Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 146, 154 n.4 (1984) (initial approval of lease may be discretionary act, but administering an approved lease may require interpretation of law to determine rights of parties). In the present case, the Area Director's initial disapproval of the Second Adoption Ordinance did not purport to be based on an exercise of discretion or policy, but upon a legal interpretation of the Shakopee Constitution. Compare Thomas v. Commissioner, BIA, 4 IBIA

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90-day review period provided in the Shakopee Constitution and the full scope of the Departmental appeal process, however, did not make a timely decision impossible. Indeed, in this context, it is possible that the Commissioner's decision would have been deemed final Secretarial action, due to the time constraints imposed by the Shakopee Constitution. In all cases, however, the Secretary reserved the authority to take jurisdiction of appeals at any stage of the proceedings, and thus a timely decision was not impossible.<sup>11</sup> 43 C.F.R. § 4.5 (1980). I do not disagree with the Community's point that the Department's appeals regulations and procedures do not appear to have been designed with these tribal ordinance review cases in mind. However, while the potential inconsistencies may have provided the Community with some grounds to challenge the Department's appeal process as applied in this context, it stretches things too far to suggest that it created ambiguity within the Shakopee Constitution or permits the clear and specific language in that Constitution to be construed as giving the Secretary an open-ended timetable for reversing an Area Director's disapproval of a tribal ordinance.<sup>12</sup>

<sup>10</sup>(...continued)

251 (1975) (decision declining to convert fee property to trust status was an exercise of discretionary authority). In fact, the preamble to the same regulations that the BIA cites as providing the IBIA with jurisdiction over tribal ordinance review decisions also reiterated the IBIA's lack of jurisdiction to review discretionary decisions of BIA officials, suggesting that ordinance review decisions may not categorically be characterized as discretionary. See 54 Fed. Reg. 6478, 6479 (Feb. 10, 1989). Without deciding this issue, I will assume for purposes of this decision that the Community is correct in asserting that at least in some cases, in 1980, the Commissioner's action on a tribal ordinance would have been appealable to the IBIA under the Department's regulations.

<sup>11</sup> While the Departmental appeal procedures now in effect are not relevant to interpreting the intent behind the language in the 1980 amendment to the Shakopee Constitution, today there also are provisions allowing the Assistant Secretary - Indian Affairs, to assume jurisdiction of an appeal filed with the IBIA, 25 C.F.R. § 2.20(c) (1998), and issue a decision within 90 days.

<sup>12</sup> I agree with the Community that the BIA's position that IBIA action beyond the 90-day period is still appropriate is problematic. To suggest that the IBIA may continue to consider the matter and issue a decision is contrary to longstanding precedent that the Board does not issue advisory opinions. See Jackson v. Muskogee Area Director, BIA, 32 IBIA 45, 47 (1998) ("Board does not have authority to issue advisory opinions"); Horse v. Anadarko Area Director, BIA, 29 IBIA 175, 176 (1996) (same); Seminole Nation of Oklahoma v. Acting Director, Office of Tribal Services, BIA, 25 IBIA 4 (1993) (same); Grand Traverse Band of Ottawa and Chippewa Indians v. Acting Deputy to the Assistant Secretary - Indian Affairs (Tribal Services), 18 IBIA 450, 453 (1990) (Board "has not been delegated authority to issue advisory opinions").

Nor am I convinced that a reasonable distinction may be made between the "approval" and "disapproval" provisions in the Shakopee Constitution with respect to the 90-day review period. Had there been an intent to create such a distinction in 1980, and to allow a longer period for approving ordinances that initially had been disapproved, it would have made little sense to use identical language in both provisions. Reliance and finality are not only relevant when an Area Director has initially approved an ordinance, as suggested by the Community. Even when an ordinance has initially been disapproved, and no Secretarial action occurs within the 90-day review period, the Community similarly is entitled to rely on the fact that Secretarial authority to approve the ordinance has expired. In such cases, the Community may decide to pursue another course, and should be able to do so without facing a belated "approval" of the prior ordinance at some unspecified time in the future.

The three IBIA cases cited by the Community are not persuasive. In Keweenaw Bay Indian Community v. Minneapolis Area Director, BIA, 29 IBIA 72 (1996), and White Mountain Apache Tribe v. Acting Phoenix Area Director, BIA, 21 IBIA 151 (1992), the IBIA affirmed an Area Director's disapproval of a tribal ordinance, issuing its decision more than 90 days following enactment of the ordinance. In neither case was a 90-day time requirement raised by the parties, nor would a jurisdictional defect in the IBIA's decision have changed the outcome, given the fact that the BIA initially disapproved the ordinances and the IBIA agreed with that decision. Although the issuance of decisions in these cases admittedly is inconsistent with the Department's longstanding interpretation of the effect of the 90-day review period, the Community reads too much into them by suggesting that they reflect conscious Departmental practice to treat the 90-day period as nonjurisdictional when an ordinance initially has been disapproved, or that they provide a reasoned basis for departing from interpreting that time period as jurisdictional. Nor does Ute Indian Tribe v. Phoenix Area Director, BIA, 21 IBIA 24 (1991), help the Community. In Ute Indian Tribe, as in the present case, the IBIA reversed an initial disapproval more than 90 days from the date of enactment, thus changing the outcome. However, Ute Indian Tribe is distinguishable because in that case the Board held that the ordinance provisions at issue *were not even subject to Secretarial review*, with the stipulated exception of two provisions which had been mooted by the time the decision was issued. 21 IBIA at 29, 30-32. As a result, the 90-day review period in the tribal constitution did not apply. The clear weight of Departmental precedent is to treat the 90-day provision in tribal constitutions as jurisdictional, although on at least two occasions the potential relevance of that precedent has missed the attention of either the parties or the IBIA.

In summary, I conclude that the 90-day period in the Shakopee Constitution is a jurisdictional limitation on the Secretary's authority to approve or disapprove tribal ordinances that are subject to Secretarial review. Therefore, once that time period expired, the IBIA no longer had authority to issue its decision, and the Area Director had no authority to approve the Second Adoption Ordinance pursuant to the IBIA's decision. The Area Director's initial disapproval of the Second Adoption Ordinance stands, and that ordinance did not become effective.

V. REMAND ISSUE #2: WAS THE COMMUNITY'S APPEAL TO THE IBIA PROPERLY AUTHORIZED?

Article V, Section 2 of the Shakopee Constitution provides in relevant part:

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 a majority vote, refer the ordinance [or] resolution to the Secretary of the Interior, . . . .

It is undisputed that following the Area Director's disapproval of the Second Adoption Ordinance and prior to the Community's appeal to the IBIA, the General Council did not meet and did not vote to authorize an appeal to the IBIA. It is also undisputed that on its face, the May 13, 1997, Third Adoption Ordinance reaffirms, ratifies, and approves the appeal filed on behalf of the Community regarding the Second Adoption Ordinance, although the validity of the Third Adoption Ordinance is disputed.

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 Adoption Ordinance, and because my decision that the Second Adoption Ordinance did not become effective affords plaintiffs the relief they sought in Feezor v. Babbitt, I have concluded that it is neither necessary nor appropriate to consider the second remanded issue further. While I am mindful of the district court's remand instructions, I do not believe the court intended to require a decision from the Department on an issue that no longer needs to be decided, and which is uncertain to recur. Equally important, to decide this issue in this context would mean that I am unnecessarily deciding an issue of tribal law, contrary to the strong policy of avoiding unnecessary federal intrusion into tribal affairs.<sup>13</sup>

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<sup>13</sup> Although I decline to address this issue further, I note that the record shows that at the time the IBIA was considering the Community's appeal, plaintiffs had an action against the Community pending in tribal court in which plaintiffs expressly asserted that the Community's appeal was not properly authorized under the Shakopee Constitution, and sought injunctive relief. Amended Complaint at 12, Smith, et al. v. Shakopee Mdewakanton Sioux (Dakota) Community, No. 038-94 (Court of the SMS(D) Community) (Feb. 17, 1994) (included at 3 AR FF as Appendix to Appellants' Brief on Standing). That pending tribal court action raises at least some question whether IBIA abstention on this issue would have been appropriate. In contrast to the 90-day provision, which explicitly addresses the *Secretary's* authority to perform his or her review functions pursuant to the Shakopee Constitution, the provision regarding the authorization of an appeal pertains to the *Community's* authority and the procedural requirements imposed on the General Council in order to appeal an Area Director's disapproval of an ordinance. Thus, I would be reluctant to look behind the authority of tribal officials lodging an

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VI. REMAND ISSUE #3: WAS THE SECOND ADOPTION ORDINANCE IN FACT ENACTED BY A PROPER MAJORITY OF TRIBAL MEMBERS?

The dispositive nature of my decision on the jurisdictional 90-day issue also makes it unnecessary to address the third remanded issue for purposes of determining the status of the Second Adoption Ordinance. However, while this third issue may technically be moot with respect to the Second Adoption Ordinance, it appears to be one that is likely to recur. Therefore, I believe it is appropriate to address this issue here in order to set forth a Departmental position and provide appropriate guidance to the BIA.

In Feezor v. Babbitt, the federal court stated that because the IBIA had explicitly acknowledged that the Department has the authority to interpret the Community's Constitution in connection with reviewing a tribal ordinance, "[t]he decision whether to approve a tribal ordinance presumably requires consideration of whether the ordinance was properly enacted under the Constitution—unless, as was the case here, IBIA refuses to entertain the question." 953 F. Supp. at 7. In his May 22, 1998, Opinion, at 21 n.10, the Solicitor suggested that in considering and responding to the remanded question whether the ordinance was in fact enacted by a proper majority vote, there is a related threshold issue that the Department should consider—whether the federal court's presumption was correct. Recognizing the importance of this threshold issue, all parties to this proceeding have briefed both whether the Department should review voter eligibility issues in reviewing tribal ordinances, and if so, whether the Second Adoption Ordinance was validly enacted in this case. Because I conclude that the Area Director and IBIA were justified in not examining voter eligibility in deciding whether to approve or disapprove the Second Adoption Ordinance, I do not address issues pertaining to the vote itself.

Plaintiffs contend that in accepting the role and responsibility of reviewing and approving certain tribal ordinances, the Department also accepted the obligation to ensure that ordinances subject to its review have been properly enacted by qualified members of the Tribe and that those who purport to act in determining tribal membership have the authority to do so. According to plaintiffs, the federal court's presumption was correct—because the Department has the authority to interpret the Shakopee Constitution, it must also have the obligation to review and decide upon all constitutional questions related to tribal ordinances awaiting Departmental action. Plaintiffs further contend that the Department has an obligation to review voter eligibility questions in order to enforce the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301 et seq., because allowing unqualified individuals to vote violates the civil rights of qualified members. Finally, plaintiffs assert that because gaming revenue distribution is governed by federal law and because tribal gaming operations are located on federal trust lands, the federal government trust

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<sup>13</sup>(...continued)

appeal on behalf of a tribe, at least when the issue is not raised by the BIA or by individuals who arguably have standing to speak on behalf of the Tribe.

responsibility requires that Departmental review of tribal ordinances extend to ensuring that gaming revenues only go to qualified tribal members.

Both the Community and the BIA assert that it is not appropriate for the Department to address questions of voter eligibility when reviewing tribal ordinances pursuant to tribal law. According to the Community and the BIA, there are only a few limited circumstances in which it is appropriate for the Department to review tribal membership eligibility, and each involves a direct nexus to federal law or the administration as federal trustee of trust assets. Both contend that even in those limited cases where voter eligibility is reviewed, it is done reluctantly and in a manner that will avoid unnecessary interference with tribal self-government. Both the BIA and the Community note that in practice, the Department's review of tribal ordinances pursuant to tribal law has never extended to reviewing voter eligibility. Therefore, both the Community and the BIA take the position that when disputes arise regarding the validity of enactment of a tribal ordinance subject to Departmental review, the tribal members raising voter eligibility issues should be referred to a tribal forum.

I conclude that as a general matter, it is not appropriate for the Department to review internal tribal disputes concerning voter eligibility when exercising its ordinance review or approval authority pursuant to tribal law. Approval of tribal ordinances pursuant to tribal law does not carry the same nexus to federal law, nor the same trust responsibility, as does review and approval of tribal constitutions pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461 et seq., the conduct of an IRA election, or the distribution of assets held in trust by the federal government. Even in those cases, the Department will review voter eligibility issues only when strongly justified, and will exercise its authorities in a way that avoids unnecessary intrusion in tribal self-governance. See Letter from Assistant Secretary - Indian Affairs to Area Director, June 2, 1995 (Shakopee Secretarial election) (BIA Opening Brief, Exhibit 1); see also Shakopee Mdewakanton Sioux (Dakota) Community v. Babbitt, 906 F. Supp. 513 (D. Minn. 1995), aff'd, 107 F.3d 667 (8th Cir. 1997). Similar restraint is exercised whenever the Department must review tribal enactments. See Cheyenne River Sioux Tribe v. Aberdeen Area Director, 24 IBIA 55 (1993). Nor does the ordinance review function carry the same necessary implications as recognizing the results of a tribal election for purposes of government-to-government relations. Cf. Rosales v. Sacramento Area Director, BIA, 32 IBIA 158 (1998); Crooks v. Area Director, Minneapolis Area Office, BIA, 14 IBIA 181 (1986). The Department has not extended its review of voter eligibility in limited circumstances to cases involving review of tribal ordinances conducted pursuant to tribal law. Restraint from unnecessary interference in tribal affairs is particularly warranted for matters involving membership issues, because while still subject to federal and tribal constitutional law, the power to control membership is a fundamental aspect of tribal sovereignty. See United Keetoowah Band v. Muskogee Area Director, BIA, 22 IBIA 75, 80 (1992). In addition, simply because the ordinance review role is included within a tribal constitution adopted and approved under the Indian Reorganization Act does not give rise to a federal obligation to review voter eligibility regarding the enactment of tribal ordinances as it may, under appropriate circumstances, regarding votes specifically conducted pursuant to the IRA.

At least where, as here, a tribal forum exists to consider challenges to enactment raised by tribal members, it is appropriate for the Department to refer those tribal members to tribal court (or other appropriate tribal forum) to resolve their dispute. If, following approval of an ordinance and in carrying out subsequent obligations to administer *federal law*, the Department believes it must examine the validity of enactment of a tribal ordinance, my decision today does not preclude such an examination. But in construing the scope of authority and obligations of the Department acting pursuant to *tribal law*, I am not convinced that the role accepted by the Department should be construed as an open door for what amounts to a significant intrusion into internal tribal affairs.

As noted by the IBIA, the Shakopee Constitution does not establish any substantive criteria for review of ordinances by the BIA and the Secretary. Shakopee, 27 IBIA at 169. Consistent with the clear federal policy favoring tribal self-governance and avoiding unnecessary federal intrusion in tribal affairs, I believe the scope of review by the Department should be limited, and in most cases should be restricted to reviewing the ordinance for facial validity with federal law and the tribal constitution. Cf. Ute Indian Tribe, 21 IBIA at 28 (review of tribal ordinances should be undertaken in such a way as to avoid unnecessary interference with tribal self-government). Therefore, with respect to the Second Adoption Ordinance, it was sufficient that the Area Director and the IBIA limited their review and decisions to the facial validity of the adoption ordinance. I agree with the BIA and the Community that when a dispute regarding voter eligibility is raised in connection with a tribal ordinance subject to BIA review, the appropriate course for the BIA is to refer the individual tribal members to tribal court or other available tribal forums (e.g., tribal election board) for resolution of the dispute.

The limited time periods allowed for ordinance review by the Shakopee Constitution—10 days for the Area Director and 90 days for the Secretary—supports my conclusion that the obligations imposed upon the Department by the Shakopee Constitution do not include matters which likely would require more extensive proceedings and evidentiary fact-finding. The Shakopee Constitution provides only that the Department's approval makes an ordinance "effective;" it does not provide that such approval makes an ordinance "valid." Thus, for example, even following approval, a tribal court might still strike down an ordinance on any number of grounds.

Plaintiffs allege that Departmental review of voter eligibility is required in order for the Department to fulfill its obligation to uphold the Indian Civil Rights Act and because the Community's gaming operations occur on federal trust lands. I disagree. With respect to the latter issue, the court in Smith v. Babbitt already rejected plaintiffs' similar contentions that the Indian Gaming Regulatory Act and the presence of gaming operations on federal trust land created a fiduciary obligation for the Department to determine tribal membership eligibility and

ensure that gaming revenue per capita payments are made only to qualified members. See 875 F. Supp. 1353, 1369 (D. Minn. 1995), aff'd, 100 F.3d 556 (8th Cir. 1996).<sup>14</sup>

I also conclude that the ICRA does not require the BIA or the Secretary, in reviewing tribal adoption ordinances, to resolve internal tribal disputes concerning voter eligibility. If, as suggested by plaintiffs, voter eligibility disputes necessarily implicate the ICRA because allowing allegedly "unqualified" individuals to vote will always dilute the votes of "qualified" voters, the Department would always be thrust into determinations of voter eligibility—under an often impossible time frame—whenever a dispute arises in connection with enactment of a tribal ordinance. It is true that in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 66 n.22 (1978), the Supreme Court suggested that persons aggrieved by tribal law may be able to seek relief from the Department when a tribal constitution requires Departmental approval of tribal ordinances. But the Court was silent on whether such relief would extend beyond obtaining Departmental disapproval of ordinances which on their face would violate the ICRA, which was the nature of the allegation at issue in Santa Clara. Nor did the Court suggest that the ICRA required the Department to engage in a far-reaching inquiry into internal tribal matters whenever ICRA allegations were raised in the context of reviewing a tribal ordinance.

In contrast, the IBIA has held that "the Department has both the authority and responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe," United Keetoowah v. Muskogee Area Director, BIA, 22 IBIA 75, 80 (1992), and thus the BIA may be required to examine the validity of a vote in a tribal election for purposes of determining whom to recognize as the elected leadership of a tribe. Under such circumstances, the IBIA has held that the BIA has both "the authority and the responsibility to decline to recognize the results of a tribal election when it finds that a violation of ICRA has tainted the election results." Id. at 83. Unlike its tribal ordinance review responsibilities pursuant to tribal law, the BIA's review of a tribal election for purposes of determining federal recognition of a tribal government for government-to-government relations has a direct and immediate impact on federal interests. See also Masayesva v. Zah, 792 F. Supp. 1178, 1188 (D. Ariz. 1992) (tribal right to determine its membership does not extend to defeating the Department's ability to exercise its authority under federal law).

Thus, while the Department's exercise of its ordinance review functions pursuant to tribal law possibly may have implications for certain federal interests, I am not convinced that there is a "distinct federal interest" that requires the examination of voter eligibility in deciding whether or not to approve an adoption ordinance. To the extent that questions regarding the underlying validity of an ordinance do at some point directly have a clear nexus to the administration of federal law (e.g., recognizing results of a tribal election; determining eligibility to vote in a Secretarial election), the Department may still, as part of its federal authorities, address such

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<sup>14</sup> Indeed, even while arguing the point, plaintiffs seem to acknowledge that they lost this issue in Smith v. Babbitt. See Plaintiffs' Response Brief at 13 n.34.

issues and thereby protect any clearly defined federal interest. When it does so, however, there will be a specific context with a clear federal nexus, and in that context, the Department will decide the issue in a manner least intrusive of tribal affairs.

Finally, I would note that in the present case, plaintiffs (including the Prescotts) had—and indeed were exercising—a right to seek judicial relief in the tribal court for their ICRA allegations. Their tribal court action, Smith v. Shakopee, No. 038-94 (Tribal Court of the SMS(D) Community), was pending when the IBIA was considering the Community's appeal. Amended Complaint at 17-18 (included at 3 AR FF, Appendix to Appellants' Brief on Standing). Particularly under circumstances such as these, it is even more appropriate for the Department to allow the tribal court to address the issue.<sup>15</sup>

In conclusion, 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 these individuals to a tribal forum.

## VII. CONCLUSION

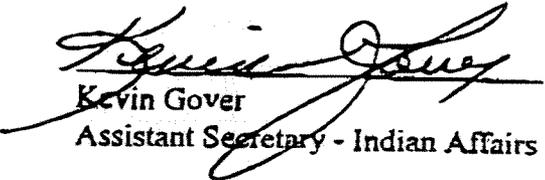
The Shakopee Constitution's 90-day time period for Secretarial review and action on tribal adoption ordinances is jurisdictional. Therefore, the IBIA was without authority to act when it ordered the Area Director to approve the Second Adoption Ordinance, and the Area Director similarly was without authority in purporting to do so. The Area Director's initial disapproval stands, and the Second Adoption Ordinance did not become effective.

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<sup>15</sup> I am not convinced that plaintiffs have demonstrated on this record that pursuing tribal court remedies would be "futile," as used in the context of an exhaustion requirement. Without deciding whether the exhaustion doctrine—or an exception—even applies in this context, I would note that plaintiffs' argument is substantially undercut by their apparent willingness to pursue tribal court remedies from time to time. In addition to the Smith v. Shakopee case, plaintiffs' recently-filed tribal court action and representations to the court appear at odds with their statements in these proceedings. See, e.g., Transcript of Proceedings at 22 (Aug. 18, 1998), Feczor v. Shakopee Mdewakanton Sioux (Dakota) Business Council, et al., No. 311-98 (Tribal Court of the SMS(D) Community) (Mr. Cohen: "I'm convinced that this Court can and will do the right thing") (Plaintiffs' Response Brief, Exhibit 3). I also note that the record before me includes at least one case in which the tribal court agreed with plaintiffs' views, at least in some respects. See In re Advisory From the Business Council—Payment of Revenue Allocation to Thirty-One Members, No. 037-94 (Tribal Court of the SMS(D) Community) (Feb. 11, 1994) (concluding that a General Council vote to "vote in" individuals as members was invalid because it did not comport with the constitutional requirement that ordinances relating to membership be approved by the Secretary or his designee) (included at 3 AR FF).

Because the 90-day issue is dispositive in determining that the Second Adoption Ordinance was not validly approved, deciding whether the Community's appeal to the IBIA was properly authorized would unnecessarily intrude on tribal affairs and unnecessarily decide an issue of tribal law. Therefore, I decline to address this issue.

Finally, in order to provide guidance to the BIA regarding the third remanded issue, I have addressed it and conclude that the Department should not review questions of voter eligibility in reviewing tribal ordinances that are subject to such review solely as a matter of tribal law. Instead, tribal members who question voter eligibility should be referred to the appropriate tribal forum for resolution of this internal matter.



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