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COMMISSION
OFFICE OF GENERAL
COUNSEL

2004 JAN 16 A 9:43

January 12, 2004

Mr. Jeff S. Jordon
Office of the General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E. Street, NW
Washington, D.C. 20463

Subject: MUR 5399

Dear Mr. Jordon,

Please consider this the response to your recent letter dated December 30, 2003 and attached complaint that was received by my client Leonard L. Prescott. Attached you will find the Statement of Designation of Counsel that my client sign authorizing my firm to represent him in this matter.

The complaint filed by the Shakopee Mdewakanton Sioux Tribal leadership against my client Leonard L. Prescott accuses him of falsifying information to the Gutknecht for U.S. Congress Committee when he made a \$1000 contribution to the Committee in 2002. Specifically the complaint alleges that Mr. Prescott falsely represented that he was a lobbyist for the Community and/or Mystic Lake Casino. Mr. Prescott never represented to the Committee or supplied any information to Mr. Gutknecht that he was a lobbyist for the Mystic Lake Casino or the Tribal Community. To the contrary Mr. Prescott has for many years been challenging the current tribal leadership of the Community with regard to its decision to eliminate the blood quantum requirements for membership. At the end of last year Mr. Prescott filed suit against the Government seeking to enforce the Tribe's constitutional membership criteria alleging the current leadership of the Tribe was using an adoption practice that violated the communities IRA Constitution. (See, the attached amended complaint, *St. Pierre v. Norton*.) In the complaint Mr. Prescott as a named plaintiff is identified as a constitutionally qualified enrolled member of the community, and makes no representation that he is currently employed by the community or is a lobbyist.

Mr. Gutknecht is well aware of Mr. Prescott's legal challenges and that Mr. Prescott is most certainly not advocating or lobbying on behalf of the current Tribal Council, the Community or Mystic Lake Casino. Mr. Prescott has never represented he was a lobbyist. The accusation that Mr. Prescott is claiming he is the tribe's lobbyist, is inconsistent with

January 12, 2004

Mr. Prescott's actions challenging the tribe's current leadership and their decisions relating to the community's constitutional standards for membership.

The Gutknecht for U.S. Congress Committee informs us that the entry under the designation of Mr. Prescott's occupation and name of employer was a data entry error, and that Mr. Prescott's occupation should have been entered as 'tribal benefactor'. They intend to send your offices a letter acknowledging the error and affirming that Mr. Prescott had not implied that he was a lobbyist for anyone. We understand that the Committee intends to file an amended report in the very near future correcting the error. Therefore, we believe no action should be taken against Mr. Prescott on this matter. The Gutknecht for U.S. Congress Committee has admitted to the data entry error and will be submitting their amended report to reflect Mr. Prescott's occupation as a tribal benefactor or the appropriate designation for his status as tribal member of the Shakopee Mdewakanton Sioux Community.

Also attached is a copy of the check that the Gutknecht for U.S. Congress received from Mr. Prescott. From the copy you can see that Mr. Prescott's name and address make no reference to any title that would imply he was employed at Shakopee. The copy of this check and the amended complaint is the best documentation we can supply to demonstrate Mr. Prescott was not misrepresenting his employment status or occupation. The fact is he has been publicly opposing the current tribal leadership on many issues and would not be viewed in that context to be advocating on behalf of the tribal council or the Casino. However, we would be glad to provide any other documentation that you feel might be helpful.

Sincerely,



Elizabeth T. Walker

cc: Leonard L. Prescott
Nels T. Pierson, III

STATEMENT OF DESIGNATION OF COUNSEL

Please use one form for each respondent

MUR 5399NAME OF COUNSEL: Elizabeth T. WalkerFIRM: Walker AssociatesADDRESS: 405 Wilkes StAlexandria, VA 22314TELEPHONE: (703) 838-6284FAX: (703) 838-0184

The above-named individual is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

Leonard Prescott

Print Name

1-7-04

Date

David T. Paul

Signature

Title

RESPONDENT'S NAME: _____

ADDRESS: 13733 Thunderbird Cir.Shakopee, MN 55379TELEPHONE: HOME (952) 445-0580BUSINESS ⁹⁵² (~~761~~) 215-5948

24-19-025-2369

Leonard E. Prescott
 W-623-907-348-429
 Ph 652-443-8903
 13723 Thunderbolt Circle
 Minneapolis, MN 55379

Day to the
 Order of *Dr. [illegible]*

FRODO BAGGINS
 Ring Road, P.O. Box 300,
 Peter Lake, MN 55372 (612) 447-2101

For *[Signature]*

⑆091909055⑆ 2= 10357=0⑈ 5875

Major \$1000⁰⁰

[illegible]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cecilia M. St. Pierre
R.R. 1 Box 1272 C
Hardin, MT 59034

Leonard L. Prescott
13733 Thunderbird Circle
Shakopee, MN 55379

On behalf of themselves and others
similarly situated,

Plaintiffs,

v.

Gale A. Norton, in her official
capacity as Secretary of the United States
Department of the Interior; and

Aurene M. Martin, in her official capacity as
Acting Assistant Secretary-Indian Affairs,
Bureau of Indian Affairs of
the United States Department of the Interior,
individually and jointly

Defendants.

Case No. 1: 03CV01057

**AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE
RELIEF AGAINST FEDERAL AGENCY DEFENDANTS UNDER
THE ADMINISTRATIVE PROCEDURES ACT**

Plaintiffs, Cecelia M. St. Pierre and Leonard L. Prescott, are constitutionally qualified enrolled members of the Shakopee Mdewakanton (Dakota) Sioux Community ("SMSC," "Tribe" or the "Community"). They are before this Court seeking to correct the Dakota Community's enrollment practices, which are in violation of SMSC's constitution, which was created and is

implemented under the auspices of the Indian Reorganization Act ("IRA"). Suit is brought against the federal government for its failure to safeguard SMSC's constitutionally mandated enrollment procedures and distribution of the Community's land and resources, in violation of its fiduciary duty in this regard and the Administrative Procedure Act ("APA").

OVERVIEW OF THE CASE

By excluding constitutionally qualified Dakotas from enrollment, while adopting large numbers of unqualified individuals, the Defendants have allowed illegitimate members in the SMSC to illegally control one of the most successful Indian casinos in the country. As a result of this manipulation, qualified but disenfranchised members have no voice in governing the Community, the assignment of land, the decisions on voter and member qualifications, or receipt of other benefits for federally recognized Indian people. The adoption practices, which are presently being followed, but which were illegally instituted, patently violate the SMSC's constitution by allowing non-qualified members to control every decision regarding the Community. The failure of the Defendants to act in accordance with their duties has allowed a few faux leaders, motivated by the substantial economic success of the SMSC's casinos, to take illegal control of the Community's resources.

This claim, in short, illustrates the conundrum of the vanishing Indian: a case in which legitimate members by design have been kept in the minority and have been vanquished, for the benefit of a few spurious leaders who have exploited the weak, if not absent, oversight of the federal regulatory authorities. Inconsistent actions and inaction of the federal government have, in effect, sanctioned the illegal practices of these specious leaders, undermining the government-to-government relationship between the Community and the United States. Plaintiffs are seeking declaratory and injunctive relief from this Court to correct the harm to the current and future

generations of legitimate SMSC members. Plaintiffs are asking this Court for protection of their constitutionally protected rights as legitimate members of their federally recognized Dakota Community.

JURISDICTION

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331, 1361 and 2201.

THE PARTIES

2. Individual Plaintiffs each are older than 18 years of age. Each individual Plaintiff meets the constitutional requirements for membership in and is a properly-enrolled member of, the Shakopee Mdewakanton Sioux (Dakota) Community.

3. Defendant Gale A. Norton is sued in her official capacity as Secretary of the Interior ("Secretary"). The United States Department of Interior ("DOI") is an agency of the United States Federal Government.

4. Defendant Aurene M. Martin is sued in her official capacity as Acting Assistant Secretary – Indian Affairs, DOI ("Assistant Secretary"). She is in charge of the activities and actions at the Bureau of Indian Affairs ("BIA"), which is an agency within the DOI. (Collectively, the parties mentioned in paragraphs 3 and 4 are referred to as the "Defendants" herein).

BRIEF FACTUAL SUMMARY OF ENROLLMENT LIST HISTORY

5. The current Shakopee Mdewakanton Reservation was known as the Prior Lake Reservation until 1969, when it was reorganized as the Shakopee Mdewakanton Sioux Community under the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 476, *et seq.* The

original Reservation consisted of land purchased at Lower Sioux, Prairie Island and Shakopee for the landless Mdewakanton residing in Minnesota on May 20, 1886. In 1969, residents of Prior Lake met to consider organizing a separate Community on the land held in trust by the United States, expressly for the Mdewakanton Sioux individuals. Consistent with the provisions of the IRA, the Bureau of Indian Affairs ("BIA") attended these meetings to assist with the organization of the new Community. The BIA provided advisory and technical support in the drafting and ratification of the Community's constitution and, after the thirteen charter members of the Community ratified the constitution, exercised its review authority, as required, in approving the constitution.

6. Pursuant to Article II, Section I of SMSC's constitution, 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 role 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 in Minnesota on May 20, 1886, Provided they apply for membership and are found qualified by the governing body, and provided further, that they are not enrolled as members of some other tribe or band of Indians.

7. In the early 1980s, the SMSC began to develop certain gaming operations, as permitted by law. Over the next two decades, the SMSC's gaming profits grew substantially

during a crucial time of development of the SMSC Enrollment List. The SMSC had begun operating a bingo hall in 1982 and expanded this hall in 1984 through 1985, when the Community built a larger facility. The expansion of the bingo hall allowed the Community to make *per capita* distributions to members.

8. In 1983, the Community drafted and approved an Enrollment Ordinance, providing for an Enrollment Committee to review and process all membership applications and to verify that the applicant qualified under the constitution.

9. The enrollment process was intended to create a membership roll of constitutionally qualified enrolled members and to determine the eligible voters in the Community. The Enrollment Committee asked the BIA to assist in the preparation of this roll.

10. Following BIA policy and guidelines, the Committee members attended BIA enrollment workshops and used the BIA enrollment manual to avoid federal violations. The manual was used and studied thereafter at the Committee's meetings. In 1987, the Community enacted Enrollment Ordinance No. 1-2-87-005 directing the Enrollment Committee to screen all current voting members to ensure that they met the constitutional requirements for membership and to prepare a current enrollment membership list.

11. Congress enacted the National Indian Gaming Regulatory Act ("IGRA") in 1988, which required the SMSC, as the operator of gaming facilities, to adopt a Business Distribution Ordinance. The SMSC approved an Ordinance, however the BIA rejected it. The SMSC then submitted to the BIA an amendment to the defective Ordinance, which the BIA erroneously approved. This faulty Ordinance included certain individuals to receive per capita distributions who did not meet the Community's constitutional requirements for membership.

12. In 1990, the Business Council of the Community retained a genealogist, John L. Schade, to conduct independent research and work with the Enrollment Committee to develop a validly constituted list of individuals constitutionally qualified to receive Court of Claims Docket 363 distributions. All purported members of the Tribe, who were not otherwise enrolled by being on the 1969 census, were directed to make application and submit documentation to support their blood degree qualification and ancestry to May 20, 1886. This list also inherently provided a determination as to who was then properly qualified as a member of the Tribe. Some individuals claiming membership, however, refused to submit an application or documentation to prove their eligibility to vote. As a result, problems arose at each subsequent election because valid membership for all those participating in votes could not be verified.

13. The SMSC, with the assistance of Mr. Schade, verified individuals' qualifications in 1991 for receiving Docket 363 distributions. This verification of the Docket 363 recipients was then submitted to the BIA and the research was certified (The "1991 Certified List"). The "1991 Certified List" was then posted to give notice as to who qualified for Docket 363 distributions. Certain individuals, whose names had been declared as unqualified for Docket 363 payments due to the membership verifications, brought suit in Tribal Court against individual members of the Enrollment Committee for not including them on the "1991 Certified List." The Tribal Court enjoined the Enrollment Committee from using the list until membership issues could be resolved, but only after the upcoming Business Council election. This action came despite the fact that the "1991 Certified List" was the only census which properly verified current membership in the Community. And, as a result of this inappropriate stance by the Tribal Court, individuals who did not have the required $\frac{1}{4}$ blood degree were allowed to vote in the 1991 Business Council election, which inexorably tainted the outcome, making it invalid *ab*

initio. At this spurious election, Stanley Crooks was illegitimately elected chairman by a narrow margin, defeating Leonard Prescott, who at that time was the chairman of the SMSC.

14. During this period of time, the SMSC built the Mystic Lake Casino, one of the largest gambling venues in the United States. *Per capita* distributions to individuals in the Community increased significantly. Illegitimate Community members were aware that disqualification on Community membership rolls would mean the loss of significant individual and family income to them.

15. Within days of the election, the new but faux leadership destroyed all records in the enrollment office. The Enrollment Committee remained enjoined by the Tribal Court and was never called back to screen applicants. Thus, Stanley Crooks refused to acknowledge the "1991 Certified List," which had been created and verified by the Enrollment Committee and its genealogist and certified by the BIA. With the enrollment applications destroyed, and the approved screening process on hold, membership decisions in the Community reverted to majority or popularity vote, including participation by certain constitutionally unqualified and unapproved individuals, who were voted into the Community without Enrollment Committee review.

16. On October 27, 1993, the illegally constituted SMSC passed an Ordinance ("First Adoption Ordinance") which attempted to eliminate the blood quantum constitutional requirement and simultaneously adopted into membership a list of people who were not qualified under the Tribe's constitution. The Ordinance failed to pass at the meeting of the General Council; however, after the first vote failed and the meeting had been adjourned, another vote was taken by those who remained after many voting-qualified members had left the meeting. After this second vote, Chairman Crooks declared the Ordinance enacted. On November 12,

1993, the Minneapolis area office of the BIA appropriately disapproved of the Ordinance as an improper attempt to amend the constitution's membership requirements and further disapproved of the attempt to enroll "wholesale" a group of individuals without determining individual membership eligibility.

17. On November 30, 1993, the SMSC enacted Ordinance 11-30-93-002 ("Second Adoption Ordinance"). This Ordinance also attempted once more to eliminate the blood quantum constitutional requirement for membership, but omitted the automatic adoption provision for some unqualified persons which was found in the First Adoption Ordinance. Unbelievably, the non-qualified individuals, whom Chairman Crooks had attempted to adopt "wholesale" with the First Adoption Ordinance, were allowed to vote on the Second Adoption Ordinance, just eighteen days after the BIA found that they were not members of the Tribe. On December 13, 1993, the Area Director again properly disapproved the Second Adoption Ordinance as an inappropriate method of attempting to change the Community's constitution. The putative attorneys for the obviously tainted voting membership of the SMSC, without having the valid authority of the Community as required by law and without a Business Council resolution, appealed the Area Director's decision to the Interior Board of Indian Appeals ("IBIA"). On February 8, 1995, the IBIA then inexplicably and wrongly reversed the Area Director's disapproval of the Second Adoption Ordinance. Upon remand to him, the Area Director complied with the IBIA's Order and approved the Second Adoption Ordinance. This remand and the subsequent approval of the Second Adoption Ordinance, however, were ultimately found to be invalid by Assistant Secretary of Indian Affairs Gover.

18. In addition to adopting non-qualified individuals illegally as members in contravention of the Community's constitution, the faux leadership of the SMSC has taken

actions to prevent legitimately qualified individuals from becoming enrolled members of the Tribe, also in contravention of the Community's constitution.

19. In 1994, the BIA and National Indian Gaming Commission concluded that constitutionally unqualified individuals, who were not valid members of the Community and, therefore, not eligible to receive *per capita* distributions under the IGRA, were in fact receiving such distributions in violation of Subsection 3 of Section 11 of IGRA. Thus, the BIA requested information from the Community to verify the eligibility of members receiving *per capita* distributions. The Community, however, failed to produce this information. Despite the fact that this has left the Tribe with a constitutionally defective membership and governing body, the Defendants have not taken any further action to remedy the fatally tainted enrollment of the Tribe, and so they have failed in their duty to ensure that the distribution of gaming profits comports with federal law.

20. The DOI has acknowledged that it has a fiduciary duty to monitor and enforce the application of IGRA.

21. After the Area Director had disapproved the Second Adoption Ordinance, the faux leadership requested that the DOI conduct a Secretarial Election on a proposed revision to the Community's constitution to amend the membership requirements. This election was held on April 19, 1995. Then, on June 2, 1995, the Assistant Secretary of Indian Affairs, using the Tribe's "1991 Certified List," invalidated the election results because the BIA found, based on the "1991 Certified List," that non-qualified individuals had voted in the Secretarial Election. In rejecting the election results, the Assistant Secretary discussed the importance of ensuring that individuals voting on an amendment to the constitution are eligible to vote. In response, the purported Tribal leadership requested a second Secretarial Election.

BLOOD QUANTUM DETERMINATIONS

22. Coincident with invalidating the Secretarial Election, however, the Secretary of the DOI asked that an administrative law judge be appointed to take evidence and make blood degree determinations for approximately 63 individuals claiming Docket 363 distributions and membership in the Community. As part of the June 2, 1995, instructions to the Office of Hearings and Appeals, proposed determinations were to be issued first on 23 identified individuals, whose right to vote in a Secretarial Election under the Indian Reorganization Act had been challenged. Proposed determinations were also to be issued on the additional 40 individuals who appealed to the Office of Hearings and Appeals their 1991 blood degree determinations, which had been issued for purposes of Docket 363.

23. Prior to any final rulings on the blood quantum determinations, the IBIA improperly reversed the Area Director's disapproval of the Second Adoption Ordinance, which resurrected the Tribe's recent illegal adoption practice. The faux Tribal leadership then retracted its request for a second Secretarial Election. This Court in *Feezor v. Babbitt*, 953 F. Supp. 1 (D. D.C. 1996), ultimately found that the IBIA's decision was not sustainable on the administrative record, and remanded the matter to the DOI for further consideration. On remand, Assistant Secretary Gover upheld the Area Director's initial disapproval of the Second Adoption Ordinance and found that the Second Adoption Ordinance had never become effective.

24. Several years later, on May 18, 1998, the DOI modified the June 2, 1995, instructions to the Office of Hearings and Appeals, and continued to pursue blood degree determinations for the purpose of deciding eligibility under Docket #363. The DOI stated in its Memorandum that these final determinations regarding blood quantum would be used to clarify

voter eligibility for future Secretarial Elections. The instructions also provided that the determinations made by the hearing examiner or administrative judge would be forwarded to the Assistant Secretary of Indian Affairs for approval, and that once approved, the determinations would be final for the Department.

25. Despite the fact that these blood degree determinations were referred on June 2, 1995, to the Office of Hearings and Appeals, they have yet to be resolved. Over the course of this eight year period, four administrative judges have been assigned to make these blood determinations. Not only has this not been completed, but the methodology being used most recently by the currently administrative judge, Judge Thomas K. Pfister ("Judge Pfister"), is in error.

26. Judge Pfister has made final determinations on only ten subdockets, which were challenged by Plaintiffs (acting as interveners in the blood quantum determinations), and the BIA, whose counsel also lodged strong exceptions, and the DOI. The remaining subdockets are still pending, resulting in an eight year delay. Despite the BIA's and DOI's awareness that Judge Pfister's determinations were in error, the BIA and DOI have failed to correct those determinations, and have thereby allowed for the falsification of bloodlines.

27. Despite the genealogical errors of Judge Pfister that both the BIA attorneys and intervenors strongly opposed, the former Assistant Secretary approved the initial ten subdockets prematurely before the findings on the remaining subdockets had been completed.

28. The result of the BIA's and DOI's failure to act in a timely and prudent manner, and to cease administrative proceedings which are in direct conflict with the law (and objection by BIA's own counsel), is that the SMSC remains governed by faux leadership, through constitutionally unqualified individuals participating in Tribal votes. This invalidates all

governance actions by the Tribe, bringing into question the legality of all gaming distributions under IGRA.

PROCEDURAL SUMMARY

29. In July of 1996, Plaintiff, Cecelia St. Pierre, and her sister, Winifred Feezor, on behalf of themselves and other similarly situated Community members ("Feezor Plaintiffs"), filed suit in the federal court in the District of Columbia against the federal government, challenging the adoption practices of the current, albeit illegitimate, SMSC leadership that had been upheld by the Interior Board of Indian Appeals ("IBIA") at the DOI. Judge Robinson of this Court remanded the case to the DOI on December 20, 1996, for consideration and explanation of three issues: (1) whether the IBIA exceeded the 90 day time limit to review the Second Adoption Ordinance; (2) whether the Community properly authorized the appeal from the decision of the BIA's Area Director to the IBIA; and (3) whether the Second Adoption Ordinance was validly passed by constitutionally qualified and eligible voting members of the Community. *Feezor v. Babbitt*, 953 F. Supp. 1 (D. D.C. 1996).

30. On May 23, 1997, before the DOI responded to the federal court remand, the invalidly constituted membership of the SMSC passed yet another Ordinance ("Third Adoption Ordinance"). This Ordinance was substantively identical to the Second Adoption Ordinance, having made only minor technical changes. By its terms, the Third Adoption Ordinance incorporated wholesale the Second Adoption Ordinance, while purporting to "amend" the Second Adoption Ordinance. Individuals who had illegitimately been adopted into membership under the legally challenged Second Adoption Ordinance, as well as other individuals who were not qualified, voted on the Third Adoption Ordinance. While the DOI was actively engaged in the federal court-mandated Second Adoption Ordinance remand proceeding, the Area Director,

handcuffed by the IBIA's reversal of the prior stance of his office in invalidating the Second Adoption Ordinance (even though this was then under challenge in this Court), qualified his approval of the Third Adoption Ordinance, stating that it was approved because it was "substantially the same as" the Second Adoption Ordinance. By law, DOI Secretary Bruce Babbitt had ninety days within which he could have reversed and disapproved the Area Director's initial approval of the third adoption ordinance. However, Secretary Babbitt failed to take any such action and thereby tacitly approved the Area Director's faulty decision approving the Second Adoption Ordinance. This inaction by the DOI is particularly suspect in light of a preceding letter from BIA recognizing that this type of adoption practice would be contrary to the Community's constitution and against federal policy.

31. SMSC's faux leadership argued to the DOI that the remand was moot due to the scam it perpetrated in obtaining the Area Director's approval of a Third Adoption Ordinance, which was nothing more than a replication of the Second Adoption Ordinance improperly reinstituted by the IBIA, and which was under siege in the *Feezor* lawsuit. Solicitor Leshy of the DOI, in a May 22, 1998, Memorandum Opinion to the Secretary of Indian Affairs, found that this Third Adoption Ordinance did not moot the federal court remand and noted that, because the Third Adoption Ordinance was found to be substantially the same as the Second, it might be at best merely an amendment to the Second Adoption Ordinance and not a stand alone ordinance. Therefore, he raised the logical question challenging the validity of the Third Adoption Ordinance in the event the Second Adoption Ordinance was ultimately ruled invalid. He also expressed the persistent concern about the issue of unqualified participants voting on the Third Adoption Ordinance. In short, he warned that if the Second Adoption Ordinance failed, the third would also fail.

32. On February 2, 1999, Assistant Secretary Gover issued his decision regarding the Second Adoption Ordinance in response to the 1996 federal court remand. Assistant Secretary Gover found that the IBIA was without authority when it approved the Second Adoption Ordinance because the 90 day time period to review ordinances had expired. The BIA and DOI did not reach the other two issues on remand because of the finding that the IBIA had acted without authority. Therefore, the Area Director's December 13, 1993, decision disapproving the Second Adoption Ordinance as an inappropriate method of attempting to change the Community's constitution stands as the BIA's position on the Second Adoption Ordinance. The SMSC, which continues to allow participation by constitutionally unqualified individuals, still applies the practice found in the Second Adoption Ordinance, under the auspices of the illegal and identical Third Adoption Ordinance. Moreover, the faux SMSC leadership persists in permitting individuals invalidly adopted under the Second Adoption Ordinance to receive all benefits of Community membership and to participate in tribal governance, despite the fact that Assistant Secretary Gover reinstated the Area Director's December 13, 1993, decision disapproving the adoption practice.

33. Due to Assistant Secretary Gover's decision, declaring in essence the Second Adoption Ordinance void, in response to this Court's remand, the Area Director was asked to reconsider his approval of the Third Adoption Ordinance, but he refused to do so. The DOI has taken no measure to reconcile the invalidation of the Second Adoption Ordinance with the Third Adoption Ordinance which was passed by the invalidly constituted membership of SMSC as a means to circumvent this Court's Order and the subsequent remand decision. Accordingly, the DOI has failed to enforce the remand decision, which invalidated the very adoption practice that was found inconsistent with the Community's constitution.

34. The Tribal Court *sua sponte*, but *ultra vires*, purported to overrule Assistant Secretary Gover's February 2, 1999, decision, by holding that both the Second and Third Adoption Ordinances were valid and finding that all individuals adopted in the Community since the spurious enactment of the Second Adoption Ordinance were entitled to full benefits of membership. James H. Cohen, Esq. wrote to Assistant Secretary Gover at the DOI on June 3, 1999, informing him of the Tribal Court's decision purporting to overrule the Assistant Secretary's February 2, 1999, decision. Mr. Cohen asked that the DOI provide the Plaintiffs with a "clear indication of the DOI's intended further course of action, if any, within thirty (30) days." The DOI has been ominously absent in taking any definitive action to reconcile this subversion of its own directives.

35. By virtue of SMSC's faux leaders spuriously passing since 1993 three virtually identical Adoption Ordinances circumventing the membership criteria dictated by the Community's constitution and the decisions of federal agencies, the status of the Community's enrollment process and membership has remain clouded. Indeed, the illegitimate participation of unqualified individuals in Community decisions has rendered the true members of the Community powerless to control their own Community. The Plaintiffs in this action have continued to submit numerous formal requests to the Defendants, repeatedly asking them to take action with regard to the illegal adoption practices at Shakopee and the resulting illegitimate tribal government. However, the Defendants have refused to take any such action. The inaction of the United States government has exacerbated these problems, and intervention by the United States government is necessary to correct them.

COUNT ONE

**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT DUE TO
DEFENDANTS' DEPARTURE FROM POLICY WITHOUT VALID SUPPORTING
REASONS - (ADOPTION ORDINANCE)**

36. Plaintiffs incorporate by reference paragraphs 1 through 35 as if fully set forth herein.

37. On November 30, 1993, the SMSC enacted Ordinance 11-30-93-002 ("Second Adoption Ordinance"), attempting to eliminate the blood quantum requirement for membership in the Community.

38. As required by the Community's Constitution, the Second Adoption Ordinance was sent to the BIA Area Director for approval.

39. On December 13, 1993, the Area Director disapproved the Second Adoption Ordinance as an inappropriate method of attempting to change the constitution, stating:

It is clear to me that the Adoption Ordinance circumvents the Constitution by attempting to accomplish by Ordinance what the Community's Constitution requires to be done by Constitutional Amendments - changing of the membership within the Community. This Ordinance has the effect of eliminating Article II, Section I (b) by eliminating the 1/4 degree Mdewakanton blood requirements of the Constitution. It would allow all people who can prove descendancy, but who may have been denied membership in the past because of the one quarter degree blood requirement, an opportunity to reapply. This result would affect the very fabric of the Community. It is my opinion that self government would be better served by putting this matter to the qualified voters of the Community in a duly called election to amend the Community's Constitution

...

It is therefore, my interpretation that the Constitution of the Shakopee Indian Community would require a Constitutional amendment to change the blood quantum for membership. The reference in the Constitution to the delegation of authority to

promulgate resolutions and ordinance [sic] to address issues of adoption is an appropriate delegation; however, it is not absolute in all circumstances. *The Community is not free to violate other provisions in the Constitution by an Adoption Ordinance.* (emphasis added)

40. Though the IBIA reversed the Area Director's disapproval of the Second Adoption Ordinance on February 8, 1995, the Assistant Secretary of Indian Affairs, in response to a federal court remand, found on February 2, 1999 that the IBIA had been without authority to approve the Second Adoption Ordinance and reinstated the Area Director's December 13, 1993, disapproval of the Second Adoption Ordinance. Therefore, the Area Director's December 13, 1993, disapproval of the Second Adoption Ordinance is the Defendants' current and final position regarding that Ordinance.

41. On May 13, 1997, SMSC passed the Third Adoption Ordinance, which was substantively identical to the Second Adoption Ordinance. As required by the Community's constitution, the SMSC submitted the Third Adoption Ordinance to the BIA Area Director for approval. Stanley R. Crooks, Chairman of the SMSC, asserted to the BIA that the Third Adoption Ordinance was substantively identical to the Second Adoption Ordinance and contained only minor technical changes. Moreover, the Third Adoption Ordinance stated, on its face, that it was an amendment to the Second Adoption Ordinance, to "clarify the procedures" of the Second Adoption Ordinance.

42. On May 23, 1997, prior to the reinstatement of the Area Director's disapproval of the Second Adoption Ordinance, the Area Director, obliged by the BIA's overruling of his initial invalidation of the Second Adoption Ordinance, approved the Third Adoption Ordinance, stating that: "Our review indicates that the New Adoption Ordinance is substantively the same as Adoption Ordinance No. 11-30-93-002 which we approved on February 17, 1995. Thus, we find

no reason for disapproval." Accordingly, the BIA approved the Third Adoption Ordinance based solely on the fact that it was identical to the Second Adoption Ordinance.

43. When the Assistant Secretary issued his February 2, 1999, decision reinstating the Area Director's original disapproval of the Second Adoption Ordinance, he failed to address the Third Adoption Ordinance in his opinion.

44. Subsequent to the disapproval of the Second Adoption Ordinance, Plaintiffs repeatedly requested that the Defendants address the inconsistency between the decisions on the Second and Third Adoption Ordinances.

45. Defendants have failed and/or refused to address and correct the inconsistent decisions rendered on the Second and Third Adoption Ordinances.

46. An agency's departure from prior decisions can be considered arbitrary, capricious and an abuse of discretion, particularly when the agency has failed to explain its departure from prior precedent.

47. An agency must articulate a rational connection between the relevant facts and the decision the agency has made.

48. The Defendants have not articulated any valid reason for the inconsistency in the decisions they made regarding the inconsistencies surrounding the DOI's rulings on the Second and Third Adoption Ordinances.

49. The May 23, 1997, decision of the BIA Area Director, which approved the Third Adoption Ordinance, despite the fact that the substantively identical Second Adoption Ordinance was being reviewed by the DOI pursuant to a federal court remand, constituted a final agency action.

50. Moreover, the subsequent actions and inaction of the DOI/BIA, when refusing to: (1) clarify the February 2, 1999, Opinion of former Assistant Secretary Gover; (2) rescind the Area Director's approval of the Third Adoption Ordinance; or (3) enforce the February 2, 1999, decision by prohibiting the SMSC from continuing to treat the Second and Third Adoption Ordinances as valid, constituted final agency actions.

51. This Court previously recognized that the IBIA consistently has held that individual members of a Community, such as the Plaintiffs, have no standing to appeal an Area Director's decision regarding an Ordinance to it. *See Feezor, supra*, at ¶ 29. Moreover, Plaintiffs have no legal basis for challenging Defendants' actions and failure to act in Tribal Court. Plaintiffs have, therefore, exhausted their administrative remedies, and their only redress is in a federal court.

52. The Community's constitution incorporates the due process and equal protection guarantees of the United States Constitution.

53. As a result of the Defendants' improper, arbitrary and capricious actions and inaction, individuals who do not constitutionally qualify for membership in the Community have taken control of the Community's government and have used this power to dilute the Community's resources, prevent constitutionally qualified individuals from receiving Community benefits, and have received tribal benefits in violation of the Community's Constitution and federal law, including the Indian Gambling Regulatory Act, 25 U.S.C. Sections 2701-2721, The Indian Civil Rights Act, 25 U.S.C. Sections 1301-1303, and the Indian Reorganization Act, 25 U.S.C. Section 461 *et. seq.*

54. As a result of the Defendants' improper, arbitrary and capricious actions and inaction, individuals who do not constitutionally qualify for membership in the Community have

jeopardized the government relationship between the Community and the United States government. Defendants' arbitrary and capricious actions and inaction are threatening the sovereignty and the very existence of the Community.

55. As a result of the Defendants' improper, arbitrary and capricious actions and inaction, Plaintiffs have been denied their liberty and property without due process of law, in violation of federal and state law, as well as the Community's own constitution.

56. As a result of the foregoing, the Plaintiffs, who have challenged every adoption practice, have been damaged as set forth more fully above.

COUNT TWO

VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT DUE TO DEFENDANTS' DEPARTURE FROM POLICY WITHOUT VALID SUPPORTING REASONS - (BLOOD QUANTUM DETERMINATIONS)

57. Plaintiffs incorporate by reference paragraphs 1 through 56 as if fully set forth herein.

58. On June 2, 1995, the Secretary requested that an administrative law judge be appointed to make blood degree determinations for certain individuals claiming membership in the Community. These blood degree determinations, once approved by the Assistant Secretary for Indian Affairs, were to be considered final for the Department and binding for future membership determinations. The genealogical analysis the administrative law judge has applied in making these blood quantum determinations for certain individuals is contrary to established Department policy, genealogical scholarship, evidence relating to the sources upon which the administrative law judge relies, and the Community's own verified and BIA certified determinations (such as the Tribe's "1991 Certified List").

59. Plaintiffs have requested that Defendants adhere to their own policies in making these blood degree determinations.

60. An agency's departure from established procedures can be considered arbitrary, capricious and an abuse of discretion.

61. An agency must articulate a rational connection between the relevant facts and the decision the agency has made.

62. The Defendants have not articulated any valid reason for their departure from established procedures for making blood quantum determinations.

63. As a result of the foregoing, the Plaintiffs, who have challenged every adoption practice, have been damaged as set forth more fully above.

COUNT THREE

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT AS A RESULT OF SUBSTANTATIVE DEFICIENCIES DUE TO ARBITRARY AND CAPRICIOUS AGENCY ACTION AND INACTION

64. Plaintiffs incorporate by reference paragraphs 1 through 63 as if fully set forth herein.

65. The Third Adoption Ordinance was an improper attempt to establish a new category of Community membership, without formally and validly amending the Community's constitution by Secretarial Election, as required under the Indian Reorganization Act (IRA), 25 U.S.C. Section 461 *et. seq.*, federal regulations implementing the IRA 25 C.F.R. Section 81, and the Community constitution itself.

66. As a result of the Area Director's May 23, 1997, decision approving the Third Adoption Ordinance and the Secretary's failure to overturn the Area Director's decision, the Defendants have arbitrarily and capriciously approved the Third Adoption Ordinance and

allowed that approval to stand, despite the fact that the Third Adoption Ordinance permits unqualified individual adoptees, regardless of blood degree, full membership rights and benefits identical to those of constitutionally qualified members, rendering meaningless Article II, Section I, of the Community's constitution.

67. Despite repeated demands by the Plaintiffs, the Defendants, in clear error, have failed and/or refused to take action to declare the Third Adoption Ordinance invalid as being facially inconsistent with the Community's constitution.

68. The May 23, 1997, decision of the BIA Area Director, which approved the Third Adoption Ordinance, while the substantively identical Second Adoption Ordinance was being reviewed by the DOI pursuant to a federal court remand, constituted a final agency action.

69. Moreover, the subsequent actions and inaction of the DOI/BIA in refusing to: (1) clarify the February 2, 1999, Opinion of former Assistant Secretary Gover; (2) rescind the Area Director's approval of the Third Adoption Ordinance; or (3) enforce the February 2, 1999, decision by prohibiting the SMSC from continuing to treat the Second and Third Adoption Ordinances as valid, constituted final agency actions.

70. This Court previously recognized that the IBIA consistently has held that individual members of a Community, such as the Plaintiffs, have no standing to appeal an Area Director's decision regarding an Ordinance to it. *See Feezor, supra*, at ¶ 29. Moreover, Plaintiffs have no legal basis for challenging Defendants' actions and failure to act in Tribal Court. Plaintiffs have, therefore, exhausted their administrative remedies, and their only redress is in a federal court.

71. The Community's constitution incorporates the due process and equal protection guarantees of the United States Constitution.

72. As a result of the foregoing, the Plaintiffs, who have challenged every adoption practice, have been damaged as set forth more fully above.

COUNT FOUR

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT DUE TO ARBITRARY AND CAPRICIOUS AGENCY ACTION AND INACTION REGARDING PROCEDURAL DEFICIENCIES AND DUE PROCESS VIOLATIONS

73. Plaintiffs incorporate by reference paragraphs 1 through 72 as if fully set forth herein.

74. For years, Defendants have been aware that individuals, who were not qualified to vote and who were not constitutionally qualified members of the Community, voted on the Third Adoption Ordinance. Despite this knowledge, Defendants issued a letter approving the Third Adoption Ordinance and have failed to rescind this approval or to clarify their position regarding the Third Adoption Ordinance.

75. For years, Defendants have been aware that individuals who are not constitutionally qualified members of the Community have voted in Community elections and have voted on all Community issues. Despite this knowledge, Defendants have failed to take any action to ensure that only constitutionally qualified members of the Community participated in Community elections and other matters.

76. Defendants have permitted the faux leadership of the Community to use the Second and Third Adoption Ordinances to control membership in, and distribution of, the benefits of the Community, including *per capita* distributions from the Community's gaming enterprises, in violation of federal and state laws and the Community's own constitution.

77. As a result of the Defendants' arbitrary and capricious actions and failure to act, the faux leadership of the SMSC, as well as the purported but illegal membership of the SMSC, no longer reflects the will of the constitutionally qualified members of the Community. As a

result, Plaintiffs' identity as members of a sovereign entity and the Defendants' government-to-government relationship with the SMSC is in jeopardy.

78. The Community has ceased to enroll members, contrary to its obligations under its constitution and federal laws. Instead, membership now is controlled completely through adoptions. Individuals who are favored by the current faux tribal leadership are rewarded by being adopted in to the Community, regardless of whether they meet the constitutional requirements of membership. Individuals, who are not so obsequious, are denied membership in the Community, regardless of whether they meet the constitutional requirements of membership.

79. The Defendants have arbitrarily and capriciously refused to take action to address these illegal activities.

80. The May 23, 1997, decision of the BIA Area Director, in approving the Third Adoption Ordinance, despite the fact that the substantively identical Second Adoption Ordinance was being reviewed by the DOI pursuant to a federal court remand, constituted a final agency action.

81. Moreover, the subsequent actions and inaction of the DOI/BIA, in refusing to (1) clarify the February 2, 1999, Opinion of former Assistant Secretary Gover; (2) rescind the Area Director's approval of the Third Adoption Ordinance; or (3) enforce the February 2, 1999 decision by prohibiting the SMSC from continuing to treat the Second and Third Adoption Ordinances as valid, constituted final agency actions.

82. This Court previously recognized that the IBIA consistently has held that individual members of a Community, such as the Plaintiffs, have no standing to appeal an Area Director's decision regarding an Ordinance to the Interior Board of Indian Appeals ("IBIA"). *See Feezor, supra*, at ¶ 29. Moreover, Plaintiffs have no legal basis for challenging Defendants'

actions and failure to act in Tribal Court. Plaintiffs have, therefore, exhausted their administrative remedies, and their only redress is in a federal court.

83. The Community's constitution incorporates the due process and equal protection guarantees of the United States Constitution.

84. As a result of the foregoing, the Plaintiffs, who have challenged every adoption practice, have been damaged as set forth more fully above.

COUNT FIVE

DEFENDANTS' BREACH OF FIDUCIARY DUTIES

85. Plaintiffs incorporate by reference paragraphs 1 through 84 above, as if fully restated herein.

86. In their official capacities, Defendants have assumed under federal and common law a fiduciary duty to Native American Tribes and their individual constitutionally qualified members, including those of the Shakopee Mdewakanton Community. One facet of that duty is a responsibility to uphold the integrity of tribal government by ensuring that tribal leaders adhere to the mandates of their tribal constitution which, in the instant matter, incorporates the due process and equal protection guaranties of the United States Constitution.

87. By approving and/or refusing subsequently to invalidate Amended Adoption Ordinance Number 5-13-97-002 ("Third Adoption Ordinance"), despite the fact that Defendants knew or should have known that the Community's interpretation of its constitution was clearly unreasonable, Defendants have breached their fiduciary duties to the Plaintiffs and all constitutionally qualified members of the Shakopee Mdewakanton Community.

88. Defendants have breached their fiduciary duties to the constitutionally qualified members of the Community by approving and/or refusing subsequently to invalidate the Third

Adoption Ordinance, despite the fact that it was substantively identical to Amended Adoption Ordinance Number 11-30-93-002, which was invalidated when former Assistant Secretary Gover issued his February 2, 1999, decision rescinding the IBIA's approval of the Ordinance and reinstating the BIA Area Director's prior disapproval of the Ordinance, pursuant to a remand by this federal Court.

89. The May 23, 1997, decision of the BIA Area Director, in approving the Third Adoption Ordinance, despite the fact that the substantively identical Second Adoption Ordinance was being reviewed by the DOI pursuant to a federal court remand, constituted a final agency action.

90. Moreover, the subsequent actions and inaction of the DOI/BIA in refusing to: (1) clarify the February 2, 1999 Opinion of former Assistant Secretary Gover; (2) rescind the Area Director's approval of the Third Adoption Ordinance; or (3) enforce the February 2, 1999 decision by prohibiting the SMSC from continuing to treat the Second and Third Adoption Ordinances as valid, constituted final agency actions.

91. This Court previously recognized that the IBIA consistently has held that individual members of a Community, such as the Plaintiffs, have no standing to appeal an Area Director's decision regarding an Ordinance to it. *See Feezor, supra*, at ¶ 29. Moreover, Plaintiffs have no legal basis for challenging Defendants' actions and failure to act in Tribal Court. Plaintiffs have, therefore, exhausted their administrative remedies and their only redress is in a federal court.

92. Each of Defendants' actions and omissions described in this Count have caused and continue to cause Plaintiffs and all constitutionally qualified members of the Community serious and irreparable harm through the improper dilution of their voting rights, the illegal

takeover of their Community government by non-members, and the improper depletion of their shared tribal assets.

93. The Community's constitution incorporates the due process and equal protection guarantees of the United States Constitution.

94. As a result of the foregoing, the Plaintiffs, who have challenged every adoption practice, have been damaged as set forth more fully above.

REQUEST FOR RELIEF

WHEREFORE, as to each Count, Plaintiffs respectfully request an Order granting the following relief:

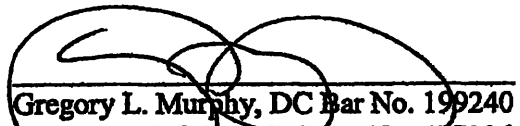
- a. Declaring that the Third Adoption Ordinance was not validly enacted by the Community due to the fact that a large number of non-members were permitted to vote on the Ordinance, and the validity of any such Ordinance depends upon its passage by a majority vote of a quorum of the constitutionally qualified and eligible voting members of the Community; and
- b. Declaring that the BIA's May 23, 1997, decision approving the Third Adoption Ordinance be rescinded because it is wholly inconsistent with the Defendants' decision regarding the substantively identical Second Adoption Ordinance, and that the Defendants have failed to explain the inconsistency or articulate a rational connection between the undisputed facts and the decision the Defendants made regarding the Second and Third Adoption Ordinances; and
- c. Ordering the Defendants to rescind the effectiveness of and declare invalid, ineffective, null and void the Area Directors' May 23, 1997, approval of the Third Adoption Ordinance; and

- d. Ordering the Defendants to issue a decision regarding the Third Adoption Ordinance which is consistent with the Defendants' disapproval of the Second Adoption Ordinance; and
- e. Ordering Defendants to declare that the Third Adoption Ordinance is immediately rescinded, invalid, ineffective, and, null and void, retroactive to the date of its purported passage; and
- f. Ordering Defendants to declare that any and all adoptions of members, which purportedly have been or may be recognized pursuant to the Third Adoption Ordinance, as immediately rescinded and, therefore, considered ineffective, null and void; and
- g. Ordering Defendants to enforce the Area Director's disapproval of the Second Adoption Ordinance, which was reinstated by the February 2, 1999, decision of the Assistant Secretary, made pursuant to this Court's remand; and
- h. Ordering Defendants to declare that, for the purposes of any federal statute or regulation or in connection with its federal trust responsibilities, any past informal adoptions of purported members accomplished through the actions of the Community's Business Council or General Council are immediately rescinded and, therefore, null and void in the absence of their individual and formal ratifications pursuant to the terms of a validly enacted and secretarially approved Adoption Ordinance which complies with the Community's constitution; and
- i. Ordering Defendants immediately to establish a certified list of eligible and duly enrolled members of the Community, comprised only of those individuals who meet the constitutional qualifications for membership in the Community; and

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- j. Ordering Defendants to investigate past election practices and other votes of the purported Community, including elections and the passage of ordinances and resolutions, and to declare ineffective, null and void any and all actions that were taken by a General Council or Business Council which included individuals who were not constitutionally qualified members of the Community; and
 - k. Ordering Defendants, upon completion of the certified list of duly enrolled members, to organize and oversee an immediate election conducted by and involving only those individuals who meet the constitutional requirements for membership in the Community; and
 - l. Ordering Defendants to declare that the votes of any individuals, who do not meet the Community's constitutional criteria for membership, shall be considered invalid, null and void in connection with the purported passage of any ordinance or the taking of any action by the Community; and
 - m. Ordering Defendants to ensure that tribal documents are not destroyed during the period of time in which an investigation is conducted into the qualifications of individuals for membership; and
 - n. Ordering Defendants to appoint a special master or other appropriate individual to: (i) oversee the creation of a constitutionally consistent membership roll, (ii) oversee the necessary restructuring of the faux leadership of the Community, and (iii) ensure that gaming operations and the distribution of gaming proceeds are conducted in accordance with federal law, including the IGRA; and

- o. Ordering Defendants to reject any future Adoption Ordinance until there is a valid determination of those who are constitutionally qualified to vote or a Final Order from this Court resolving this matter;
- p. Awarding Plaintiffs their costs and reasonable attorneys' fees; and
- q. Ordering Plaintiffs such other and further relief as the Court deems just and equitable.

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