IN THE COURT OF THE
LOWER SIOUX COMMUNITY IN MINNESOTA

| LOWER SIOUX INDIAN RESERVATION | STATE OF MINNESOTA |
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| Maxine V. Eidsvig,<br><br>Plaintiff,<br><br>vs.<br><br>Lower Sioux Indian Community,<br><br>Defendant. | Court File No. CIV-449-02<br><br>**MEMORANDUM OPINION AND ORDER** |

## BACKGROUND

Plaintiff Maxine Eidsvig filed a Complaint against the Community in this Court on March 11, 2002 challenging the Community Council's determination that she has lost membership privileges as a result of not residing on or near the Reservation for a period of two years and asserting the Community Council has violated the law in its distribution of revenues derived from gaming activities on the Reservation. The Community filed an Answer and then a request to amend that Answer in response to a new ordinance enacted by the Community Council governing judicial review of certain Community Council decisions. Eidsvig opposes the Community's proposed Amended Answer.

The Community has also filed a motion to dismiss Eidsvig's claim that the Community has violated the law in its distribution of gaming revenues, which the parties refer to as Count II of the Complaint, and a motion for summary judgment on her challenge to loss of membership privileges, which the parties refer to as Count I of the Complaint. Eidsvig responded in opposition to both motions and the Community filed its replies. The Court did not hold any hearings or oral argument

on either motion, as the Community urged that no hearing or argument was necessary and Eidsvig did not request any hearing or oral argument.

## DISCUSSION

As noted, the Court is faced with a motion to dismiss and motion for summary judgment. The Court will deal with each motion in turn.

### I. MOTION TO DISMISS

The Community's motion to dismiss is only directed at Count II of the Complaint and asserts that Eidsvig has failed to state a claim upon which relief can be granted, that she lacks standing to bring the claims, and that the claims are barred by sovereign immunity. The Community asserts each of these grounds independently in that any one of them standing alone requires dismissal of Count II. Because the Court finds that the issue of standing must be dealt with first and resolves the motion to dismiss in its entirety, the Court does not reach the other grounds raised by the Community.

To the Court's knowledge, the issue of standing has never before been raised in the Courts of the Community and the parties have not directed the Court to any cases of the Community's Courts dealing with the issue. However, the issue of standing has been dealt with extensively in the courts of the United States and this Court can look to those cases for guidance. LOWER SIOUX COMMUNITY IN MINN. JUDICIAL CODE t. 1, ch. VII, § 6(b).

In United States courts, standing finds its source in the United States Constitution's requirement that federal courts only hear "cases and controversies." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Neither the Lower Sioux Community Constitution nor the Judicial Code impose any similar express requirement on the matters this Court hears. Nonetheless, this Court was established to exercise judicial functions only. As a result, it is this Court's role and obligation to interpret the law and decide controversies arising within its jurisdiction. However, in

general, the Court will best serve this role and fulfill its obligations only if it is faced with concrete issues from parties who are specially effected by the matters at issue. Therefore, the Court finds that the concepts embodied in the requirement of standing in the courts of the United States are appropriately applied in this Court.

The issue of standing goes directly to the Court's jurisdiction over Eidsvig's Count II claims. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996) (noting that standing is jurisdictional and cannot be waived). Like subject matter jurisdiction, standing is paramount and can be raised at any stage of the proceedings, even on appeal. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). Since the Court must be satisfied that it has jurisdiction over Eidsvig's claims, the Court must resolve the standing issue before any other issue, including whether Eidsvig has properly stated a claim. *See Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 512 (5th Cir. 1980) (noting that if allegations do not survive a jurisdictional attack, there is not jurisdiction to consider claims, much less a motion to dismiss for failure to state a claim).

For purposes of a motion to dismiss for want of standing, courts accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). At the same time, however, standing "focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The minimum requirements of standing, as expressed by the Federal courts, consists of three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally-protected interest which is (a) concrete and particularized, [] and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" []. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." [] Third,

> it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

*Defenders of Wildlife*, 504 U.S. at 560-61 (citations omitted). Here, the Community apparently takes issue with the first element of the requirement of standing – specifically, the particularized nature of Eidsvig's claim that the Community Council violated the law related to gaming revenue allocations.

The requirement that injury to a plaintiff be particularized means that "the injury must affect the plaintiff in a personal and individual way." *Id.* at 560, n. 1. In Count II of her Complaint, Eidsvig claims that the Council has violated the Community's Membership Privilege and Gaming Revenue Allocation Ordinance's requirement that the Community Council only utilize a maximum of 75% of gaming revenues for the purpose of making individual per capita payments to members. She claims that the Council appropriated more than 75% of gaming revenues to per capita payments in prior years and requests that the Court remedy that violation or prevent future violations through the issuance of declaratory and injunctive relief.

The Community asserts that, even if the Council violated the provisions of the Membership Privilege and Gaming Revenue Allocation Ordinance, Eidsvig has not suffered any personal or individual injury, but only an injury shared amongst all of the members of the Community. In the United States' courts, the general rule is that "a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not [have standing]." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). The United States Supreme Court "repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered

according to law." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-83 (1982) (internal quotation marks omitted). The Court's reasoning is that "[s]uch claims amount to little more than attempts to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Id.* (internal quotation marks omitted). The United States Supreme Court has found that this aspect of standing has a prudential aspect to it by serving to limit the role of the courts in resolving public disputes. *Warth*, 422 U.S. at 500.

It must be remembered that, when dealing with standing, the fundamental issue focuses on the party attempting to have his case heard by the court and not the merits of the issues he or she wishes to have adjudicated. *Flast v. Cohen*, 392 U.S. 83, 99 (1968). Still, the issue of standing often turns on the nature and source of the claim asserted. *Warth*, 422 U.S. at 500. Thus, although the Court takes the allegations of the Complaint as true, it is not determinative whether those facts demonstrate that the Community Council violated the Membership Privilege and Gaming Revenue Allocation Ordinance. Instead, it is whether that violation, assuming it occurred, injures Eidsvig in a personal and individual manner. The Community is correct, however, that Eidsvig's claim of a violation of the Membership Privilege and Gaming Revenue Allocation Ordinance is an injury shared with Community members at large or, at least, all qualified members receiving per capita payments. But, "[a]n interest shared generally with the public at large in the proper application of the Constitution and laws will not do." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997).

"[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth*, 422 U.S. at 499. However, in some cases, in the United States' courts, a citizen can bring

what is otherwise a generalized grievance if the plaintiff, first, establishes a logical link between his or her status as a citizen or taxpayer and the legislative action under attack and, second, the plaintiff asserts an individual right infringed by that governmental action. *Flast*, 392 U.S. at 102-03. Thus, for example, a federal taxpayer has been found to have standing when challenging the expenditure of significant amounts of tax monies pursuant to the taxing and spending clause when that spending violates the Establishment Clause. *Id.* at 103. Essentially, however, the standing question in cases such as this is whether the constitutional or statutory provision on which the plaintiff's claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief. *Warth*, 422 U.S. at 500.

In addition, the United States' courts have acknowledged that the legislature can establish standing. *Id.* at 501. In these cases, however, the United States' courts still require a distinct and palpable injury to the plaintiff, even if shared with a large class of others. *Id.* But, so long as this requirement is satisfied, the legislature can grant a right of action to persons who otherwise would not have it. *Id.* But, to find such legislatively created standing, the legislature must act expressly or by clear implication. *Id.*

In this case, Eidsvig has nowhere alleged that the Community Council's violation of the Membership Privilege and Gaming Revenue Allocation Ordinance has violated any of her individual rights. In her Complaint, she asserts that she is being deprived of property without due process, but this is in reference to her claim that she is still a qualified member, not her claim that the Community Council has violated the Membership Privilege and Gaming Revenue Allocation Ordinance. Nor does the Membership Privilege and Gaming Revenue Allocation Ordinance grant her standing to challenge the allocation of gaming revenues as being in compliance with that Ordinance. The provisions of the Ordinance related to revenue allocation reference this Court four times. First, it

mentions orders from this Court declaring an adult incompetent for purposes of establishing a trust for the deposit of per capita payments. Lower Sioux Indian Community Membership Privilege and Gaming Revenue Allocation Ord. § 302(C)(1). Second, it permits review in this Court of determinations of the Community Council that a person is incompetent for purposes of per capita distributions. *Id.* § 302(C)(5). Third, it grants jurisdiction to this Court to issue orders directing payments from trust funds established for minors' per capita payments for their health and welfare. *Id.* § 302(D)(1). Finally, it waives the Community's sovereign immunity in this Court for purposes of allowing review of official determinations made under the Ordinance. *Id.* § 500. None of these references grant an individual member the right to come to this Court and challenge the Community Council's compliance with the Ordinance in terms of its allocation requirements and limitations. Thus, the Community Council has not granted Eidsvig standing.

Regardless of the violations which may or may not have occurred, Eidsvig simply lacks standing, as a Community member, to bring suit against the Community for those violations. "[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220 (1974). This is especially true here where the issues raise the proper role of this Court versus the role of the Community Council. There are simply certain activities which are appropriate for the legislature and certain activities which are appropriate to the courts. *Lujan*, 504 U.S. at 559-60. Eidsvig has challenged the manner in which the Community Council has appropriated Community funds. In the absence of an individual right of the plaintiff being violated as a result of Community spending, the appropriation of public monies is a matter affecting all members of the Community which is most appropriately dealt with by the legislative body – the Community Council – and is not an

adjudicative matter appropriate for the Court, even if a violation of law has occurred. The requirement of standing helps maintain such appropriate roles by keeping the Court from deciding generalized grievances better handled by the political arms of the Community.

Because Eidsvig lacks standing to bring her Count II claims, the Court finds that it lacks jurisdiction over those claims. As a result, Count II must be dismissed. Since the Court lacks jurisdiction, it cannot reach the issue of whether Eidsvig has properly asserted a claim upon which relief can be granted and it is not necessary to determine whether the Community has waived its immunity for Count II.

## II. MOTION FOR SUMMARY JUDGMENT

The Community has also moved for summary judgment as to Count I of Eidsvig's Complaint – her claim that the Community Council erred in finding she has removed from the Community Area and, as a result, is no longer a qualified member. However, before reaching the merits of the Community's motion, there are some preliminary issues the Court must resolve.

### A. Eidsvig's Alleged Bankruptcy

After the Community filed its motion for summary judgment, Eidsvig's counsel wrote a letter to the Clerk of Court informing the Clerk that Eidsvig currently has a petition for bankruptcy pending before the United States Bankruptcy Court and inquiring as to whether the Court "recognizes" automatic stays in bankruptcy. The Court responded that, if Eidsvig desired to stay the current proceedings before this Court, she would need to file a proper pleading or motion in accordance with the Court's rules of procedure. However, she never filed any request for a stay.

Nonetheless, Eidsvig did note the bankruptcy proceeding again in her response to the Community's motion for summary judgment. Therefore, the Court will consider the effect of the

bankruptcy proceeding on the matter at hand.[1] The filing of a petition in bankruptcy operates as an automatic stay of certain proceeding involving the debtor in the bankruptcy proceeding. 11 U.S.C. § 362(a). The automatic stay expressly applies to the "continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that arose before the commencement of the [bankruptcy proceeding]." *Id.* § 362(a)(1). By its terms, this section does not apply to proceedings initiated *by* the debtor, in this case, Eidsvig. Here, Eidsvig initiated this case by filing a complaint with the Court. While it is true that an appeal is subject to the stay if the case in the trial court was subject to the stay, *e.g., Assoc. of St. Croix Condo. Owners v. St. Croix Hotel*, 682 F.2d 446 (3d Cir. 1982), and a review of an administrative proceeding is somewhat akin to an appeal, this case arises from a challenge to an action of the governing body of the Community, not a review of administrative agency action.

This case is more akin to a debtor bringing a challenge to the legality of a legislative action than a review of an administrative proceeding. Claim II, although dismissed, is a direct challenge to legislative action in the form of appropriations. Claim I is a challenge to the Community Council's membership determination. But, membership determinations by the Community Council are governmental actions not administrative or judicial actions. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n. 32 (1978). Even the United States Supreme Court has acknowledged that membership determinations are core issues of self-government. *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997). That the actions of the Community Council are not administrative is further demonstrated by the fact that there is an administrative body which does handle certain aspects of Community membership, the Enrollment Committee. Therefore, the Court finds that the proceeding

[1]The Court would point out that Eidsvig did not file any proof of the bankruptcy proceeding, such as the petition. But, the Court will assume the bankruptcy proceeding is actually pending since, in the end, it has no effect on the continuation of this case.

here is a judicial proceeding initiated *by* Eidsvig and, therefore, not subject to the automatic stay in bankruptcy.

But, even if this proceeding were subject the bankruptcy stay, Eidsvig has not filed any motion requesting a stay of these proceedings or described how they would effect the bankruptcy estate, even after the urging of the Court in response to her letter. Nor has Eidsvig provided the Court with actual proof that she has indeed filed a petition for bankruptcy. Under these circumstances it would not be appropriate for the Court to stay these proceedings regardless of the effect of the bankruptcy stay. Therefore, the Court can reach the merits of the motion for summary judgment.

**B. Application of Administrative Procedures Ordinance**

The basis of the Community's motion for summary judgment is that the Community Council's decision that Eidsvig did not relocate to the Community Area within sixty days from graduation from the University of Minnesota in order to remain a qualified member should be upheld under the newly enacted Administrative Procedures Ordinance. The Administrative Procedures Ordinance, which was enacted while this matter was pending, provides for a cause of action in this Court to review certain determinations of the Community Council based on a defined standard of review similar to review of administrative agency determinations in other jurisdictions. The Court would note that a motion for summary judgment is not necessarily the appropriate method for obtaining a decision under the Administrative Procedure Ordinance. The standard for a motion for summary judgment is whether there exists any undisputed material facts and, if not, whether the undisputed material facts entitle the moving party to judgment as a matter of law. The standard of review urged by the Community under the Administrative Procedure Ordinance is whether the Community Council's decision is supported by substantial evidence and not arbitrary and capricious.

This is quite different than a summary judgment standard. Further, the precise dispute in this case surrounds the disputed fact of whether Eidsvig relocated to the Community Area within the time prescribed by the Membership Privilege and Gaming Revenue Allocation Ordinance. The parties have each pointed to facts, supported by evidence, which would support both an affirmative and a negative conclusion to this factual dispute. Under such circumstances, summary judgment would be wholly inappropriate.

Nor is it appropriate for Eidsvig to urge the Court to permit discovery and trial in a case subject to review under the Administrative Procedures Ordinance. Under such review, the evidence is to be considered already entered before the Community Council and it is the Court's duty to review that evidence, if urged by the complaining party, to determine whether that evidence supports the Community Council's decision. Eidsvig's desire for discovery and trial would essentially be a rehearing of the matter challenged – something not contemplated or allowed under the Administrative Procedures Ordinance.

If this Court is to review this matter and matters similar to it under the Administrative Procedures Ordinance, it would be more appropriate for the parties to submit briefs in support of the their respective positions based upon the review standard set forth in the Administrative Procedures Ordinance. But, in this case, the Court will treat the parties' briefs related to the Community's motion for summary judgment as briefs in support of their respective positions as to the merits of the case.

But, before the Court can consider the merits under the Administrative Procedure Ordinance, there remains the overriding issue of whether that ordinance applies to the pending proceedings because it was enacted by the Community Council after these proceedings were initiated. The Community filed a motion to amend its Answer as a result of the enactment of the Administrative

Procedure Ordinance, which also raises the issue of the applicability of that ordinance to Eidsvig's action.

When a court is faced with the question of whether a new law applies retroactively to a pending proceeding, the court first must determine whether the legislature "has expressly prescribed the statute's proper reach. If . . . so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994). In this case, the resolution enacting the ordinance provides that the "Ordinance shall take effect immediately, and that it shall be applied to any action currently pending in the Lower Sioux Community Court." Lower Sioux Community Council Res. No. 2-9-02. This is a clear statement that the Community Council desired the Administrative Procedures Ordinance to apply retroactively to cases pending at the time of its enactment. Where this legislative intent is clear, it governs the temporal application of the statute. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990). Therefore, the Administrative Procedures Ordinance applies to Eidsvig's claims under the general rule.

But, even if the Community Council did not express its intent to apply the ordinance to pending cases, new laws affecting the jurisdiction and authority of courts are generally applied to pending cases. The United States Supreme Court has itself "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Landgraf*, 511 U.S. at 274. When a statute changes the court's jurisdiction or authority, it "takes away no substantive right but simply changes the tribunal that is

to hear the case." *Hallowell v. Commons*, 239 U.S. 506, 508 (1916). "Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Landgraf v. USI Film Products*, 511 U.S. 244, 274 (1994) (internal quotation marks and citations omitted).

When Eidsvig filed her Complaint, the Membership Privilege and Gaming Revenue Allocation Ordinance did not provide for any judicial review of Community Council determinations that a member had moved away from the Community Area and, therefore, lost his or her qualified status. That Ordinance does grant the Court authority to hear cases involving the acquisition and reacquisition of membership privileges, but it is notably silent as to any Court authority over Community Council decisions regarding the loss of such privileges. This strongly indicates that the Community Council did not desire to give the Court any authority to review the loss of membership privileges since, if it desired to do so, it would have expressly provided for it as it did in the other areas of the same ordinance. Therefore, the Administrative Procedure Ordinance granted jurisdiction to this Court which it did not before have. As a result, it applies to the pending proceedings.

In responding to the Community's request to amend its Answer, Eidsvig asserted that applying the Administrative Procedure Ordinance to this case would constitute the enactment of a prohibitory ex post facto law. While it is true that the Indian Civil Rights Act ("ICRA") provides that no Indian tribe shall pass an ex post facto law, 25 U.S.C. § 1302(9), it is fundamental that the prohibition against ex post facto laws only applies to penal legislation. *See Calder v. Bull*, 3 Dall. 386, 390-391 (1798). Since the Administrative Procedures Ordinance is not a penal ordinance, Eidsvig's argument is unavailing. The Administrative Procedures Ordinance applies to Eidsvig's Claim I and the Court must determine the merits of Eidsvig's claim in accordance with it.

### C. Eidsvig's Challenge to the Community Council's Decision

The Administrative Procedure Ordinance expressly permits the Court to review Community Council decisions made under Section 201 of the Membership Privilege and Gaming Revenue Allocation Ordinance – the section under which the Community Council revoked Eidsvig's membership privileges. The Ordinance provides that the Court "shall affirm the final action if it was reasonable and supported by substantial evidence in the record, and if the final action was not arbitrary or capricious." Lower Sioux Indian Community Admin. Proc. Ord. § 7, subd. 3.

Although the Court is not reviewing the actions of an administrative agency, the standard of review in the Administrative Procedures Ordinance is notable very similar to the standard of review in United States' courts for administrative agency actions. Therefore, United States cases involving the review of agency actions are very instructive. Under United States case law, an agency action is considered arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Court finds that this definition is appropriate in this context. However, the Court notes that the reliance upon factors not intended to be considered by the legislature is not appropriate to apply to actions of the legislature itself. Therefore, the Court will consider an action of the Community Council subject to review under the Administrative Procedures Ordinance arbitrary and capricious if the Community Council failed or refused to consider an important aspect of the matter before it, its explanation for its decision runs counter to the evidence presented, or its decision is completely implausible. In addition, the Court will consider an action arbitrary and capricious if the ordinance

or other law under which the Council made its decision limits the factors or evidence that can be considered in making its determination and the Council considered other factors or evidence not permitted by that ordinance or other law.

As for substantial evidence, the United States Supreme Court has defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966). The Court finds that this is an appropriate standard and, therefore, will consider an action of the Community Council supported by substantial evidence if it is the type of evidence a reasonable Community member might accept as adequate to establish a particular fact when that fact is understood to be serious and of great importance. In addition, the Court recognizes, along the same lines as United States courts, that, in determining whether the Council's decision is supported by substantial evidence, the record must be viewed as a whole and the Court cannot single out particular matters of evidence to exclusion of others. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Most importantly, the Court should not supplant the Council's findings merely by identifying alternative findings that could be supported by substantial evidence. *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

In this case, from the parties' briefing, there appears to be two distinct but related issues surrounding the Community Council's determination. First, there seems to be a legal issue as to what constitutes a "place" for purposes of residency under the Membership Privilege and Gaming Revenue Allocation Ordinance. The Community has argued that renting a room in a house is insufficient to constitute a "place" for residency purposes. This is a question of legal interpretation, not a factual issue. The second issue the parties dispute is the ultimate question of whether Eidsvig relocated to the Community Area within 60 days of graduation from the University of Minnesota,

as required by the Membership Privilege and Gaming Revenue Allocation Ordinance. This is a purely factual question. The parties do not apparently dispute that Eidsvig graduated from the University on May 11, 2001 and, pursuant to the terms of the Membership Privilege and Gaming Revenue Allocation Ordinance had to return to the Community Area permanently 60 days after that, by July 11, 2001.

Eidsvig asserts that she moved into a room in another person's house in Redwood Falls within 60 days of graduating. The Community has argued, and the Council found, that this is not sufficient to establish residency as it is defined in the Membership Privilege and Gaming Revenue Allocation Ordinance. "Residency" is defined as "the place where a person physically dwells or abides with the intent of dwelling or abiding there permanently, in such a manner that Community members would reasonably conclude based on day-to-day observations that the person has made the place his/her permanent home. A person who merely visits a place, or stays there without intending to make the place a permanent home, shall not be construed as establishing residency there." Lower Sioux Indian Community Membership Privilege and Gaming Revenue Allocation Ord. § 201. Notably, this definition combines the elements of both residency and domicile, as those terms are commonly used in Anglo-American jurisprudence. In Anglo-American law, residency is generally the place a person resides while domicile is the place a person intends to permanently remain and to return to whenever he or she leaves.

What the parties truly dispute is what constitutes a "place" under the definition of residency. On the one hand, the Community seems to argue that "place" refers to a particular residence rather than an area, such as a city. The Court believes that "place" references a larger area, like the Community Area. Otherwise, a member would be restricted from moving from one house to another within the Community Area without jeopardizing his or her residency. Therefore, so long as Eidsvig

physically relocated to the Community Area with the intent of remaining, she would generally meet the requirements of residency even if she moved to another abode later. Notably, the record contains Eidsvig's documents from her original establishment of residency in 1993. Within those documents, Eidsvig used rent receipts from two different homes in Redwood Falls. The Community did not object to Eidsvig being found a qualified member or the fact that she lived in two different places within the Community Area during the five years prior to her petition, which is the time required by the Membership Privilege and Gaming Revenue Allocation Ordinance. Therefore, the Community's practice and prior interpretation of the definition residency clearly contemplates that "place" refers to a larger geographical area, not a single abode.

Additionally, the Community argues that "place" does not mean a room in another person's house. The Community argues, and the Council found, that a person must do more than rent a room in a house within the Community Area in order to be considered residing within the Community Area. The Community argues that a person must rent a house or apartment or something similar. But, this places a standard of living element into the definition of residency. There is nothing in the definition or elsewhere in the Membership Privilege and Gaming Revenue Allocation Ordinance which would support such a conclusion. The definition of residency is clearly concerned with the physical location of a person, not the standard of abode they live in within that location. Furthermore, the Court recognizes that in the Lower Sioux Indian Community, which is based on the extended family, there are many family members who share the same house or other abode. The Community Council's addition of a standard of living requirement in the definition of residency would mean that, for example, a grandparent who moves into a room in the home of his or her grandchildren would no longer be residing in the Community Area. The terms of the Ordinance simply do not support this conclusion. Therefore, the Court finds that the Community's argument

and the Council's finding that renting a single room in the house of another is insufficient is in error as it is not supported by the language of the Membership Privilege and Gaming Revenue Allocation Ordinance.

Although the Community's finding that something more than a room in a house is required for residency was in error, that does not mean that the Community's determination is subject to reversal. The ultimate question of whether Eidsvig in fact relocated within 60 days must still be resolved since the Community Council found that she had not done so. This issue comes down to the evidence in the record. On the one hand, the Community has argued that mail sent to Eidsvig at her Minneapolis address and picked up there, as evidenced by signed return receipts, proves that she had not relocated to the Community Area. On the other hand, Eidsvig argues that her rent receipts for the months of July and August prove she was living in Redwood Falls. Therefore, there is competing evidence which could support either conclusion.

Eidsvig argues that the mail was sent to her son's house, where she lived while at the University, but there is nothing in the record which even suggests it was her son's house and the signature on each return receipt says "Maxine V. Eidsvig," not her son. Nor is there anything in the record which suggests it was not Eidsvig herself that signed these return receipts or that she happened to be visiting her son when they were delivered. In fact, Eidsvig did not apparently present anything to rebut the validity of the return receipts. Nonetheless, the Court does note that at least one of the letters mailed to Eidsvig after July 11, 2001 was also sent to her address at Redwood Falls and she signed for it there.

There is definitely evidence in the record which suggests that Eidsvig relocated to the Community Area within 60 days of graduating – specifically, the rent receipts. The Court notes that rent receipts are one of the exclusive forms of evidence under the Membership Privilege and Gaming

Revenue Allocation Ordinance which can be used to acquire or reacquire membership privileges. Lower Sioux Indian Community Membership Privilege and Gaming Revenue Allocation Ord. § 203(B). There is also other evidence, such as presence at Community meetings and participation in elections. However, there is also evidence, in the form of signed return receipts, which suggests that Eidsvig did not relocate within 60 days. Thus, the Court is essentially faced with evidence which can lead to either conclusion. However, in such a case, the Court must defer to the Council's finding. The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Council's finding from being supported by substantial evidence. *Illinois Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 69 (1966). Just because the Court could possibly come to a different conclusion based on other evidence in the record does not allow it to find that the determination is in error or not supported by substantial evidence. Therefore, the Court finds that the Council's determination that Eidsvig did not return to the Community Area within 60 days of graduation is supported by substantial evidence.

The Court notes that Eidsvig alleged in her Complaint that the Council's finding that she is no longer a qualified member has deprived her of property (her per capita payment) without due process of law in violation of the United States Constitution. It has been settled elemental law for over a century that the Bill of Rights of the United States Constitution, including the due process clause, does not constrain the actions of Indian tribes. *E.g.*, *Talton v. Mayes*, 163 U.S. 376 (1896). Therefore, Eidsvig has no claim for a violation of the due process clause of the United States Constitution. But, the Court does recognize that the ICRA does prohibit the Community from depriving any person of property without due process of law. 25 U.S.C. § 1302(8). However, Eidsvig did not support this claim with any argument in her briefing. Nonetheless, the Court notes that Eidsvig was provided with notice of the Community Council's proposed action and an

opportunity to respond and defend herself against the loss of membership privileges. This is sufficient to meet any requirements of due process – notice and an opportunity to be heard – even assuming per capita payments are property subject to due process.

Finally, the Court notes that in her brief, Eidsvig has asserted that the 60 day requirement for returning to the Community Area after graduation in the Membership Privilege and Gaming Revenue Allocation Ordinance is arbitrary and capricious. The Court views this as a challenge to the Ordinance itself and not the Community Council's decision. Although Eidsvig has not provided any legal basis for striking down a legislative enactment on the grounds it is arbitrary and capricious, the Court notes that the residency requirement for membership privileges is contained in the Community's Constitution itself – the supreme law of the Lower Sioux Indian Community. The Constitution does not provide for any exceptions to the residency requirement. However, the Community Council has interpreted the residency requirement of the Constitution as permitting members to leave the Community temporarily for certain purposes, including higher education. Under a strict reading of the Constitution, Eidsvig ceased becoming a resident of the Community two years after she left to attend the University of Minnesota. The Community Council has provided that her leaving for this purpose would not have been deemed ceasing residency on the condition that she return after graduating. The Community Council has set the time for returning as 60 days. If she did not return within 60 days, then she was deemed to have left at the time she left for higher education purposes.

The Court finds nothing arbitrary or capricious about the Council's legislative interpretation of the Constitution that a member who leaves temporarily for further education and returns is still deemed to be a resident of the Community for membership purposes. Nor does the Court find the 60 day return requirement arbitrary or capricious. This is the time selected by the Council and it is

not the Court's place to substitute its judgment for that of the Council as to what is a reasonable amount of time to return to the Community Area after graduation in order for a member to demonstrate continued residency. It is beyond this Court's authority to substitute its judgment for that of the constitutionally established legislative body. So long as the ordinance does not violate the Constitution, it is the Court's duty to apply the law as enacted by the Council, not to rewrite it. Therefore, the Court finds that Eidsvig's argument that the 60 day requirement is arbitrary and capricious unavailing.

The Community Council's decision is supported by substantial evidence and is not arbitrary or capricious. As a result, the Court must uphold the Community Council's determination that Eidsvig ceased residing in the Community Area for purposes of membership privileges.

**ORDER**

Based on the foregoing, IT IS ORDERED:

1. Defendant's Motion to Dismiss Count II of the Complaint is GRANTED.

2. The decision of the Community Council in this matter is AFFIRMED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 26, 2002

Kurt V. BlueDog

Kurt V. BlueDog, Chief Judge

I hereby certify that the foregoing Order constitutes the JUDGMENT AND DECREE of the Court.

ATTEST: Carrie Blesener
Clerk of Court
Lower Sioux Community in Minnesota Tribal Court

By: _____
Clerk of Court