



**LOWER SIOUX COMMUNITY TRIBAL COURT IN MINNESOTA**

Rochelle Ducheneaux, Associate Judge  
Deborah DuBray, Associate Judge  
Rita Tellinghuisen, Clerk of Court

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**CLERK'S NOTICE**

Date: April 18, 2007

To: **PLAINTIFF(S):**  
Mr. Thomas Fabel  
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80 South Eighth Street  
Minneapolis, Minnesota 55402-2274

**U.S.MAIL**  
**&**  
**FACSIMILE 4/18/07**

**DEFENDANT(S):**  
Mr. Steven D. Sandven  
GENERAL COUNSEL FOR LOWER  
SIOUX  
300 Hundred Building - Suite #106  
Sioux Falls, South Dakota 57104

**U.S. MAIL**  
**&**  
**FACSIMILE 4/18/07**

Re: **DEANNA BARTH & LORI NELSON vs LOWER SIOUX  
COMMUNITY COUNCIL  
TRIBAL COURT FILE NO.: APP-07-001**

Enclosed please find a certified copy of an **OPINION AND ORDER** in regards to the above-referenced matter.

  
Rita M. Tellinghuisen, Court Clerk

/rmt

w/enclosure

Lower Sioux Community  
in Minnesota  
TRIBAL COURT

Filed  
on  
APR 18 2007

LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA  
COURT OF APPEALS

LOWER SIOUX INDIAN RESERVATION

STATE OF MINNESOTA

DEANNA BARTH and  
LORI NELSON,

Appellants,

vs.

THE LOWER SIOUX COMMUNITY  
COUNCIL,

Respondent.

Tribal Court Appellate Case No.: APP-07-001

OPINION AND ORDER

Per Curiam (Chief Justice Frank Pommersheim and Associate Justices Danelle Daugherty and Sherman Marshall)

I. Introduction

This action involves a motion for a preliminary injunction filed by Deanna Barth and Lori Nelson, Plaintiffs-Appellants. The motion was filed pursuant to Lower Sioux Community Appellate Rule 130(a)<sup>1</sup> and seeks to enjoin the Special Election set for April 25, 2007<sup>2</sup> to fill a vacancy on the Lower Sioux Indian Community Council. This motion is part of a broader appeal

<sup>1</sup> Appellate Rule 130(a) provides:

[Procedure] Application for a stay of the underlying judgment or order of Tribal Court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the Tribal Court. A motion for such relief may be made to the Appellate Court, or to a Justice thereof, but the motion shall show that application to the Tribal Court is not practicable, or that the Tribal Court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the Tribal Court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. Reasonable notice of the motion shall be given to all parties. In cases where relief has not been previously requested in the Tribal Court, the Appellate Court may, if it determines such action to be appropriate under the circumstances, remand the motion to the Tribal Court for its initial determination.

<sup>2</sup> More precisely, Appellants motion seeks "an order temporarily enjoining respondent and its agents from conducting any election for the Lower Sioux Indian Community of Minnesota, including but not limited to an election for any vacancy on the Community Council, until a final decision has been rendered by the Courts of the Lower Sioux Community upon the issues presented in the Complaint of Appellants in the above-captioned matter; or, in the alternative, an order enjoining Respondent and its agents from conducting any election or any vacancy on the Community Council, in which the electorate includes non-residents of the Community, as authorized by Community Council Resolution 06-51, until further Order of this Court."

that seeks reversal of the trial court's decision dismissing Plaintiffs complaint on standing and sovereign immunity grounds, which sought a declaration that Lower Sioux Community Council Resolution 06-61 permitting *all* adult members of the Lower Sioux Indian Community regardless of residence to vote in tribal elections violated Article III Section 3 of the Lower Sioux Indian Community Constitution.<sup>3</sup> For purposes of this motion, the Court does *not* reach the standing and sovereign immunity issues,<sup>4</sup> but simply considers the motion for a preliminary injunction on its merits.

## II. Discussion

For purposes of deciding whether a preliminary injunction should be awarded the Court adopts the four part test set out in *Dataphase Sys. Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8<sup>th</sup> Cir. 1981) (*en banc*). The four parts of the test are: 1) the moving party's probability of success on the merits; 2) the threat of irreparable harm to the moving party; 3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and 4) the public interest in granting the injunction. The burden of proof rests on the moving party to prove all the factors. *Id.* No one of the factors is determinative, but they "must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." *Id.* at 113. Each factor will be evaluated in turn.

### A. Probability of Success on the Merits

This appeal is essentially a case of first impression for this Court, in which the core issue involves the interpretation of two sections of the Lower Sioux Community Constitution as they

<sup>3</sup> Article III, Section 3 of the Lower Sioux Indian Community Constitution provides:  
Any person who is a member of the Community, but has removed therefrom for a period of two (2) years, shall automatically forfeit all rights and privileges to the benefits of said community such as land assignments and sharing in community profits.

<sup>4</sup> These issues are reserved for consideration as part of the (pending) full appeal in this matter.

pertain to the right to vote in Tribal elections.<sup>3</sup> One reading of the provisions would uphold Resolution 06-61 as constitutional, while a different reading would require striking down Resolution 06-61 as unconstitutional. Plaintiffs/Appellants argue the latter interpretation, while the Defendant/Respondent argues the former. As a case of first impression, raising a unique issue of constitutional interpretation, there simply is no way, at this point, to conclude that Plaintiffs/Appellants probability of success on the merits is very high. This is especially true in light of the absence of relevant precedent concerning these provisions of the Community's Constitution.

**B. Irreparable Harm**

Appellant's claim of irreparable harm is speculative and contingent. Appellants will be able to exercise their right of franchise in the election and suffer no loss of that important right. Their candidate may even prevail completing mooted their challenge. If their candidate does not prevail, he may raise the very same issues in challenging the election result and process.

**C. Balancing of Irreparable Harm and Harm to Others.**

The balance here tips in favor of Defendant/Respondent. As noted, the irreparable harm to Plaintiffs/Appellants is speculative and contingent, while the potential harm to Defendant/Respondent is significant. Any action to enjoin a duly authorized Tribal election causes likely harm to the Tribe as a whole, as well as its members, by unnecessarily calling into question the integrity of the Tribal electoral process.

**D. Public Interest**

Again, the balance tips in favor of Defendant/Respondent Tribe. Similar to Part II, enjoining a duly authorized Tribe election would likely have an adverse effect on the public

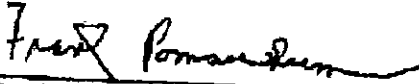
<sup>3</sup> These two sections are Article III, Section 3, (see note 2 *supra*) and Article VI, Section 5, which provides: In order to acquire the right of franchise, a voter must qualify by having reach the age of 18 years or older, on the day of the election and be a member of the Community.

confidence in the Tribal electoral process. In addition, it might even potentially cause undue friction within various branches of Tribal governance.

III. Conclusion

For all the above-stated reasons, Appellants' motion for a preliminary injunction is denied and the full appeal shall be heard forthwith.

Dated: April 18, 2007  
Decided on the briefs.

  
\_\_\_\_\_  
Frank Pommersheim  
Chief Justice

**CERTIFICATE OF SERVICE**

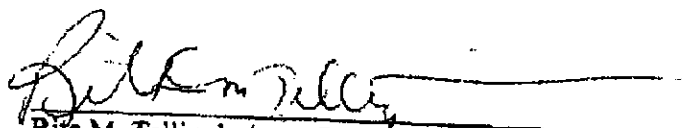
I hereby certify that, on April 18, 2007, I mailed a certified copy of an **OPINION AND ORDER** by sending that copy via United States Mail to:

**PLAINTIFF(S):**

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**FACSIMILE 4/18/07 @ 10:45 AM**

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**FACSIMILE 4/18/07 @ 10:55AM**

  
Rita M. Tellinghuisen, Court Clerk