This Reply Memorandum is submitted on behalf of the Lower Sioux Indian Community ("LSIC") – a federally-recognized Indian Tribe – in accordance with this Court's Scheduling Order dated February 13, 2007. Appellee respectfully submits that the decision of the Tribal Court dismissing Appellants' complaint be upheld, because the Appellants have failed to satisfy the standing requirements adopted by the Tribal Court, failed to evidence an express and unequivocal waiver of the Community Council's sovereign immunity, and ignores well-established law rejecting identical vote dilution claims. Further, the underlying complaint of this appeal is largely identical to the unsuccessful election protest filed by the Appellants' attorney for another Tribal member in which the Tribal Court again upheld the expansion of voting rights to all at-large members regardless of residency.

STATEMENT OF THE FACTS

On May 16, 1936, the Community members of the Lower Sioux Indian Community adopted the Community's original Constitution requiring that individuals be 21 years of age and a member of the Community to cast their votes in Tribal elections. **Enclosure 1.** This provision remained unchanged until 1977 when the Community members voted in a Secretarial election to reduce the age requirement from 21 years of age to 18. **Enclosure 2**. Since 1977 no subsequent changes have been made to Article VI – ELECTIONS, Section 3 of the Constitution that still defines eligible voters as follows:

> In order to acquire the right of franchise, a voter must qualify by having reached the age of ***18 years of age*** or older, on the day of the election and be a ***member of the Community*****.** Emphasis added. **Enclosure 3.**

Past practices illustrate that Community members residing off-reservation were allowed to vote in both Tribal and Secretarial elections. For example, in a June 20, 1977 Secretarial Election, Community Members residing in Minneapolis, Minnesota were

allowed to vote. **Enclosure 4.** Further, the Community often imposed differing residency requirements upon the right to vote via resolutions. For example, Resolution No. 6-82 was adopted on February 21, 1982 enacting Membership Ordinance No. 1 that allowed Community members to vote who had physical residence for only six (6) months on the reservation or maintained property on the reservation:

> § 2 Definitions (e) Resident – A person who meets at least one of the following: 1. ***Has maintained physical residence on the reservation for a period of six (6) months.*** 2. Is a student attending an education institution. 3. Is serving in the armed forces of the United States. 4. Is absent because of illness requiring treatment. 5. Is employed off the reservation but maintains property on the reservation. Emphasis added. **Enclosure 5.**

According to the October 18, 1990 Lower Sioux Community Council Meeting Minutes, a twelve (12) month residency period was required. **Enclosure 6.** According to the June 24, 1991 Community Council Meeting minutes, Community Members were allowed to vote after residing on or near the reservation for approximately eleven (11) months:

> Election Ordinance – Denny [Prescott] made the motion to have the following criteria for the election ordinance … 3. Any enrolled member of the Lower Sioux Indian Community, age 18 years or older, who has been a resident since July 26, 1990 is eligible to vote in this election … All in favor/passed. **Enclosure 7.**

On July 29, 1993, the Community Council adopted the Membership Privilege and Gaming Revenue Allocation Ordinance that purported to restrict the right to vote to only those Community members who received per capita benefits as follows:

> Qualified Members shall have all the privileges of Community membership, ***including voting privileges*** (subject to such other voting regulations as the Community from time to time may enact), the privileges of participating in Community programs, and the privilege of receiving per capita distributions from Community gaming enterprises conducted pursuant to the federal Indian Gaming Regulatory Act in the manner provided in section 302 of this ordinance. Section 200. Emphasis added. **Enclosure 8.**

The adoption and subsequent amendments to the Membership Privilege and Gaming Revenue Allocation Ordinance were not subject to a vote of the Community membership via referendum. In other words, the former Community Council was able to unilaterally disenfranchise over 200 enrolled members without recourse.

On May 15, 2001, a former Administration of the Lower Sioux Indian Community Council adopted Resolution 50-01 requesting a Secretarial election on Article III, Section 3 of the Constitution proposed to be amended as follows:

> (a) Full Membership Privileges. All adult enrolled members of the Community shall have full membership privileges subject to the limitations of this section. **Full membership privileges shall include the privilege of voting in Community elections, receiving Community land assignments, participating in Community health, safety, and general welfare programs, and receiving Community per capita distributions.** (b) Loss of Membership Privileges. Any adult enrolled member of the Community who ceases to maintain residency in the Community for a period of two consecutive years shall automatically lose membership privileges to the following extent: (1) Any adult enrolled member who loses membership privileges on or after September 1, 2001, **shall lose the privileges of voting in Community elections**, receiving Community land assignments, and participating in Community health, safety and general welfare programs, but shall not lose the privilege of receiving Community per capita distributions. (2) An adult enrolled member who loses and does not reacquire membership privileges before September 1, 2001, **shall lose the privileges of voting in Community elections**, receiving Community land assignments, participating in Community health, safety, and general welfare programs, and receiving Community per capita distributions. Emphasis added. **Enclosure 9.**

In response to the Community's request for a Secretarial election, the Bureau of Indian Affairs responded to the request on January 22, 2002, noting that:

> The Community is now proposing to amend Section 3 in its entirety. Additional privileges to be forfeited now include the right to vote in Community elections, participation in Community health, safety, and general welfare programs. **Although the Constitution does not require residency to vote in Community elections, we have been advised by Mr. Schoessler that members are not allowed to vote if they leave the reservation for more than two years.** Since the changes to Section 3 affect Article VI, Section 5, we suggest

> that the Community also amend Article VI, Section 5 to avoid possible conflict with each other.
>
> As stated earlier, the proposed changes to Article III, Section 3 affect the voting rights of the members. **Section 5 of Article VI-Elections, as amended on June 28, 1977, states "In order to acquire the right of franchise, a voter must qualify by having reached the age of 18 years or older, on the day of the election and be a member of the Community." According to this section of the Constitution, the right to vote in tribal elections is not based on residency.** We suggest amending Article IV, Section 5 to correspond with the proposed language of Article III, Section 3. The Community may want to add the phrase "with full membership privileges" at the end of the sentence. Emphasis added. **Enclosure 10.**

Based upon the unambiguous requirements of the Constitution, the Community Council passed Resolution No. 06-61 on May 18, 2006, that provides in relevant part:

> WHEREAS, The Constitution and Bylaws Art. VI. Sec. 5 states that "[i]n order to acquire the right of franchise, a voter must qualify by having reached the age of 18 years or older, on the day of the election and be a member of the Community"; and,
>
> WHEREAS, Article VI §5 allows Community members the ability to exercise their fundamental right to vote after establishing two (2) conditions - attaining the age of eighteen (18) and being a member of the Lower Sioux Indian Community in Minnesota. The Constitution does not require an individual be a qualified member in order to participate in the electoral process"; and,
>
> WHEREAS, Former administrations have imposed excessive residency requirements upon Community members before allowing them to vote in violation of the Constitution and the Indian Civil Rights Act.
>
> NOW, THEREFORE BE IT RESOLVED, the Community Council hereby approves the revisions to the attached Election Ordinance for Regular Elections (incorporated herein) that gives all Community Members who have reached the age of 18 the right to vote in Community Elections. **Enclosure 11.**

The following revisions denoted by double-underlined/italicized and stricken font to the Regular Election Ordinance were incorporated into Resolution No. 06-61 that was enacted on May 18, 2006:

> Section 3 Nominations Subd. 2. Nominations for candidates shall be made from the floor at the meeting required by this section, and every nomination must receive a second in order to be valid. ~~Only Qualified Members of the Community, as defined in the Lower Sioux Community Membership Privilege and Gaming Revenue Allocation ordinance, may become candidates, make nominations, or second nominations~~.
> Section 4 Election Procedures Subd. 1. Within five days after the meeting of the Community at which nominations for the Regular Election are made, the Community Council shall appoint two election judges and two election clerks. The election judges and election clerks ~~shall be Qualified Members of the Community, and~~ shall not be members of immediate family of any nominee in the Regular Election. "Immediate family" shall mean father, mother, son, daughter, brother, or sister.
> Section 5 Eligible Voters. ~~Only Qualified Members of the Lower Sioux Community, as defined in the Lower Sioux Community Membership Privilege and Gaming Revenue Allocation Ordinance, shall be eligible to vote in Regular Elections~~. *The Constitution of the Lower Sioux Indian Community in Minnesota Art. VI. Sec. 5 provides that "[i]n order to acquire the right of franchise, a voter must qualify by having reached the age of 18 years or older, on the day of the election and be a member of the Community."* The Community Council shall post a list of all *Community Members who are 18 years or older* ~~eligible voters~~ in the Community government center at least fourteen days before the day of the election. A person may protest the presence or absence of names from the eligible voting list, provided that the protest is written and signed, and filed with an election judge at least seven days before the election. The election judges shall decide the protest. If the election judges cannot reach agreement, the question shall be decided by a majority of the election judges and election clerks together. In the event of tie vote among the election judges and election clerks, the President of the Community Council shall break the tie. The decision on the protest made pursuant to this section shall be final, and there shall be no appeals allowed.
> **Enclosure 12.**

STATEMENT OF THE CASE

The voting rights of Community Members who did not receive per capita benefits was initially challenged before the Tribal Court on August 28, 2006, where these same

Plaintiffs-Appellants attempted to enjoin the Community from implementing or recognizing the outcome of a special election for a vacant seat on the Community Council scheduled for September 15, 2006, based upon the expansion of voting rights to all at-large members as required by the Constitution of the Lower Sioux Indian Community. On September 13, 2006, the Tribal Court denied their request for injunctive relief finding that the Plaintiffs-Appellants had not demonstrated a strong likelihood of success on the merits and that the possibility of irreparable injury to Plaintiffs was substantially outweighed by the public interest. **Enclosure 13.**

The issue of voting rights emerged a second time in the case entitled In the Matter of the Election Protest of Denny Prescott, CIV 06-051, where Protester Prescott challenged the outcome of the September 15, 2006, special election for a seat on the Community Council. Again, on October 4, 2006, the Tribal Court ruled that the Constitution of the Lower Sioux Indian Community does not impose residency requirements on the right to vote in Community elections. **Enclosure 14.**

This action is the third lawsuit where the voting rights of Community Members who do not receive per capita payments have been challenged. On January 24, 2007, the Tribal Court dismissed the action based upon the Appellants' lack of standing and that the action was barred by the Community's sovereign immunity.[1] **Enclosure 15.** This latter proceeding is the subject of Appellants' appeal.

[1] Appellants cite this Court's Advisory Opinion dated May 29, 2006 when discussing "the right to travel". However, Appellants fail to mention this Courts' analysis of ARTICLE VI ELECTIONS § 3 on pp. 5-6 of the described opinion that recognizes the discretion of the Community Council to interpret voter qualifications under the Constitution: "This constitutional provision does not refer to which concept of membership that the Community intended to apply to the right of franchise. This section could be interpreted to mean that only qualified members of the Community, as that term is defined in Chapter 6 of the Lower Sioux Code, have the right of franchise. This would mean that the right to vote in tribal elections is coterminous with the right

STATEMENT OF THE ISSUES

The Appellants raise the following issues for review in this appeal:

1. Whether the Appellants have standing to challenge amendments to the Election Ordinance of the Lower Sioux Indian Community that enfranchises all enrolled members of the Community as required by the Constitution.

2. Whether Appellants' action is barred by the doctrine of sovereign immunity.

Although the Appellee will address the merits of Appellants' request for injunctive relief, Appellee objects to this Court's consideration of any issues other than standing and sovereign immunity. The Appellants failed to meet their burden to justify injunctive relief in their August 28, 2006, request in this matter. Based upon their failure to appeal the Tribal Court's decision in a timely manner, they are foreclosed from asking this Court for such relief as a collateral matter in this appeal.

STANDARD OF REVIEW

The standard of review established by this Court for the interpretation of a statute is de novo. To the extent the Court must address factual determinations, the standard which this Court will apply is clear error. It is only in matters where the Tribal Court clearly is accorded discretion pursuant to the provisions of an Ordinance or other law that this

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to share in per capita benefits. Another interpretation is just as plausible, however, and that is that "member", as utilized in Article VI Section 3, refers back to the substantive requirements of membership as defined in Article III, Sections (1) and (2), Article III of the Constitution uses the term 'member' in certain contexts when it is clear that the term is not being used synonymously with 'qualified member', as that term is defined at Chapter 6, 200. For example, the Constitution states at Article III, Section (3)(a) that 'any member who does not have the rights and privileges of membership ….' This sentence is vacuous unless the Community intended to recognize two types of members – those with full privileges and those who are eligible to obtain full privileges. The question thus becomes whether the Constitution compels either interpretation. ***The Court finds that Article VI, Section 3, is unclear on this issue and until clarified by vote of the people, the Community Council, which is charged with interpreting and enforcing the Constitution, may consistently with the Constitution interpret Article VI, Section 3 in either way.***"

Court will review the trial court's finding applying an abuse of discretion standard. LSCT v. Scott, 93-100. **Enclosure 16.**

OTHERS CASES AFFECTED BY THIS APPEAL

On October 4, 2006, the Tribal Court issued an opinion in the case entitled In the Matter of the Election Protest of Denny Prescott, CIV 06-501 where a Tribal member protested the results of a special election held on September 15, 2006, based upon the inclusion of all at-large members in the voting process. The Tribal Court concluded:

> The Court agrees with and gives great deference to the Community Council's plain meaning interpretation of Article VI, Section 5 that to be a qualified voter one must be 18 years old and a member of the Community and need not be a resident of the Community. Thus, the Court finds that the Community Council's interpretation is not unreasonable and that said interpretation sensibly conforms to the very clear, plain language of Article VI, Section 5 of the Constitution. Memorandum Opinion and Order, p. 14-15. Internal citations omitted.

The Lower Sioux Indian Community's Ordinance for Regular Elections Section 8 Election Protests prohibits Appellate Court review of an election protest as follows:

> Subd. 1. A protest of the election may be filed only by a candidate. A candidate protesting an election shall prepare a written Notice of Protest stating the specific reasons for his/her protest, and shall file such Notice of Protest with the Lower Sioux Community Court by 5:00 p.m. of the fifth day following the day of the election. The Court must actually receive the Notice of Protest by the foregoing time, although timely submission by telefax followed by filing by mail shall be adequate. The Court may order such hearings and submissions as the Court deems desirable, and shall make a decision on the protest within thirty (30) days following the day the Notice of Protest was filed. ***The decision of the Court shall be final, and there shall be no appeals allowed.*** Emphasis added.

Because the Election Ordinance provides no right of appeal from the Tribal Court's decision, the order in said case still stands.

SUMMARY ARGUMENT

Appellants are two (2) members of the Community who desire this Court to believe that they are among the powerless minority of the Community whose voting rights are being trampled by the present Community Council. However, not once have the Appellants considered the rights of the approximately 200 members who were illegally disenfranchised by the Council's adoption of the Membership Privilege and Gaming Revenue Allocation Ordinance in 1993. In the interest of continuing the illegal disenfranchisement of said members, the Appellants argue that inclusion of same in the Community's electoral process dilutes their voting power. However, the concept of "vote dilution" is defined as "a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy." Reno v. Bossier Parish School Board, 528 U.S. 320, 120 S. Ct. 866 (2000). Clearly, the Appellants have failed to demonstrate, or even effectively argue, that they do not have an equal opportunity to participate in the political process of the Community. This failure, and the fact that the Constitution of the Lower Sioux Indian Community does not impose residency requirements upon the right to vote, is fatal to Appellants' complaint.

Further, the Tribal Court properly dismissed the action against the Community Council, because Appellants have failed to satisfy the Community's standing requirements as adopted by the Tribal Court in Eidsvig v. Lower Sioux Indian Community, CIV-449-02 (LSTC September 26, 2002). The Appellants bear the burden of establishing jurisdiction. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992). The Appellants have not demonstrated an injury in fact since they

have not shown how their vote will be diluted by restoration of voting rights to all enrolled members as required by the Constitution of the Lower Sioux Indian Community. Further, the Appellants have not shown a causal connection between any alleged injury and the actions of the Community Council, and therefore, they cannot show that their alleged injury is redressable by this Court. Hence, Appellants have failed to satisfy the requirements of standing that bars this Court from exercising jurisdiction over this matter.

Further, the Tribal Court properly dismissed the action against the Community Council, because the Appellants have failed to establish that there has been an express and unequivocal waiver of sovereign immunity to allow this Court to assert subject matter jurisdiction over this dispute. In fact, no waiver of sovereign immunity in any form has been authorized that would allow the Appellants to bring this action against the Community Council. Sovereign immunity is a jurisdictional barrier to suit. It goes to the power of a court to hear a matter brought before it. Puyallup Tribe, Inc. v. Dep't of Game, 433 U.S. 165, 172 (1977). The doctrine of sovereign immunity provides the Community with a fundamental right not to be sued in any court unless it waives its sovereign immunity. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978); *see also* California v. Quechan Tribe, 595 F.2d 1153, 1155 (9th Cir. 1979) ("Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize.") This fundamental right is a bar not only to entry of judgment against a Tribe, but to suit in the first instance. *See, e.g.*, Puyallup Tribe, 433 U.S. at 172. Because the recognition of immunity is mandatory, not discretionary, the decision of the Tribal Court must be upheld.

ARGUMENT

I. THE APPELLANTS HAVE FAILED TO SATISFY BOTH THE CONSTITUTIONAL AND PRUDENTIAL REQUIREMENTS FOR STANDING, AND THEREFORE, THE DECISION OF THE TRIBAL COURT MUST BE UPHELD.

In order for a federal court to exercise jurisdiction over a matter, the party seeking relief must have standing to sue. "Since the Court must be satisfied that it has jurisdiction over the plaintiff's claims, the Court must resolve the standing issue before any other issue, including whether plaintiff has properly stated a claim." Eidsvig v. LSCT, CIV-449-02 (LSIC 2002). As this Court noted in Eidsvig, "[i]t is the 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 found the concepts embodied in the requirement of standing in the courts of the United States are appropriately applied in this court." Based upon this adoption of federal standing requirements, precedent from foreign jurisdictions is instructive.

A. Appellants Have Not, Nor Can They, Satisfy the Constitutional Requirements for Standing to Invoke the Power of the Tribal and Appellate Court of the Lower Sioux Indian Community.

In order to have standing to invoke the power of a federal court, a plaintiff must establish, at a minimum, three propositions. First, a plaintiff must demonstrate that they have suffered an "injury in fact" which is "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Second, the injury must be fairly traceable to the challenged action of the defendant. Id. Third, it must be likely, and not merely speculative, that the injury will

be redressed by a favorable judicial decision. Id. The plaintiff bears the burden of establishing each of these three elements. The failure to demonstrate any one of these constitutional requirements is a fatal defect, mandating dismissal. *See* id.; *see also* Johnson v. City of Dallas, Tex., 61 F.3d 442, 444 (5th Cir. 1995)(Plaintiffs must "allege ... facts essential to show jurisdiction. If [they] fai[l] to make the necessary allegations, [they have] no standing.")

1. Appellants Have Not Suffered an Injury-in-Fact.

Appellants cannot nor have they shown they have suffered an injury in fact by the actions of the Community Council in adopting Resolution No. 06-61 that effectively reaffirmed the voting rights of enrolled Community members who had been illegally disenfranchised by a prior Community Council in 1993. Appellants' designation of their injury as dilution of voting power cannot pass without scrutiny. Rather, this Court must determine whether Appellants' complaint asserts a judicially cognizable injury, or whether their alleged injury instead is the product of speculation and conjecture.

In support of their argument that they have suffered an injury-in-fact, the Appellants contend that allowing the non-residents of the Community to vote in Tribal elections dilutes the value of their votes in violation of some unspecified law that Appellee can only assume is the equal protection clause of the Indian Civil Rights Act. At the outset, it is quite apparent that the Appellants are misconstruing "vote dilution" with the "dilutive consequences" of an overinclusive electorate. The former refers to a distinct type of voting rights claim. "The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of the

minority." Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752 (1986). A vote dilution claim requires proof that the electoral structure which facilitates such vote dilution was adopted with a discriminatory purpose and has the discriminatory effect of depriving the minority group of the ability to elect their preferred candidates. *See* Shaw v. Reno, 509 U.S. 630, 639-40, 113 S.Ct. 2816 (1993); City of Mobile v. Bolden, 446 U.S. 55, 66, 100 S.Ct. 1490 (1980). Here, the Appellants do not allege even the most basic elements of a vote dilution claim - purposeful discrimination and exclusion from the political process.

In contrast, the "dilutive consequences" simply refer to the consequential effects of an alleged overinclusion in terms of some unquantified reduction in the representation of the Appellants interests on the Community Council or on a specific issue. This purported reduction in representation has been rejected by the Supreme Court as an unrealistic theoretical assessment of voter ability to effect the outcome of an elected body's decisions. *See* Presley v. Etowah County Commission, 502 U.S. 491, 112 S.Ct. 820 (1992) (changes to the "internal operations of an elected body" that affect the allocation of power on the board do not bear a sufficiently "direct relation to voting and the election process" to come within the right to vote, as there is no judicially "workable standard for distinguishing between changes in rules governing voting and changes in the routine organization and functioning of government"). Appellants' alleged injuries fall within this category, and therefore, do not constitute an injury-in-fact to satisfy the constitutional requirements of standing.

An understanding of the true character of the Appellants' claim of "vote dilution" requires some preliminary discussion of the constitutional scope and content of the right to vote in the general purpose government context at the state level. The Supreme Court

has long held that "the Constitution of the United States does not confer the right of suffrage upon any one ...." City of Mobile v. Bolden, 446 U.S. 55, 76, 100 S.Ct. 1490 (1980), *quoting*, Minor v. Happersett, 21 Wall. 162, 178 (1875). Rather, it is for the States "to determine the conditions under which the right of suffrage may be exercised ..., absent of course the discrimination which the Constitution condemns." Id. at 77. Because the Constitution of the United States does not apply to Indian Tribes, the Tribes, as sovereign governments, may also determine the conditions for their electoral processes.

The Equal Protection Clause provides the primary constitutional source of protection against state election laws and practices which impinge upon the right to vote. In Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964), a case cited by the Appellants, the Supreme Court held that the Equal Protection Clause required the apportionment of state legislative electoral schemes to abide by the "one person-one vote" population equality principle. The "one person-one vote" rule guarantees the right of each voter to "have his vote weighted equally with those of all other citizens." Id. at 576. The Supreme Court has clarified that the Reynolds' "one person-one vote" rule is limited to requiring a quantitative analysis of whether an equal number of voters have elected an equal number of representatives. City of Mobile, 446 U.S. at 78. It does not include any "entitlement to group representation" as Appellants would like this Court to believe. Id.

When the Court first applied the "one-person, one-vote" rule to a general purpose local government in Avery v. Midland County, Texas, 390 U.S. 474, 88 S.Ct. 1114 (1968), it emphasized that "the form and functions of local government and the relationships among the various units are matters of state concern." Id. at 480. The Court

concluded its opinion by reaffirming the constitutional authority of the states to structure local government and the limitations of the "one person-one vote" rule:

> [T]he Constitution and this Court are not roadblocks in the path of innovation, experiment, and the development among units of local government... Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.

Id. at 485-486.

As in Avery, the complaint in this case falls on the wrong side of the boundary between permissible challenges to voting restrictions and impermissible challenges to the structure of local government. Unlike any other recognized voting rights claim, the Appellants' challenge is leveled not at an election law or regulation that interferes with their right to vote, but instead at the very structure of Tribal government. The remedy the Appellants seek is not a new electoral system or a declaration as to the legality of election laws: instead, Appellants seek a new form of government that restricts at-large enrolled members from participating in the electoral process. The Appellants cannot change the true nature of their claim simply by casting it in terms of voting rights. In other words, the type of "dilution" of which the Appellants complain does not come within the Reynolds "one-person, one-vote" principle. The "one-person, one-vote" rule guarantees only that each individual voter receive an equally weighted vote; it does not require that all persons voting in an election have identical interests in each of the services provided by local government. The one person-one vote requirement is quantitative, not qualitative, and thus does not require that each person voting be equally interested in the outcome. In fact, the Court has specifically held that groups do not have a right to

representation proportional to their interests. City of Mobile v. Bolden, 446 U.S. at 78-79. 100 S.Ct at 1505-1506; Davis v. Bandemer, 470 U.S. 109, 130-32, 106 S.Ct. 2797, 2809 ("Our cases... clearly foreclose any claim that the Constitution requires proportional representation.).

The Second Circuit affirmed the dismissal of a claim virtually identical claim to that of Appellants as "plainly unsubstantial" in Clark v. Town of Greenburgh, 436 F.2d 770, 771 (2nd Cir. 1971). The Town of Greenburgh was a political subdivision of the state that included several self-governing incorporated municipalities, called villages, and a large unincorporated area. The Town's primary function was to govern the unincorporated area, in which less than half (47 percent) of the Town's population lived. To a lesser extent, the Town also performed some governmental services for the entire Town, including residents of the incorporated villages. The Town's governing board was elected in a town-wide election, in which residents of both the villages and the unincorporated area were allowed to vote. The plaintiffs, who resided in the unincorporated area argued that the Town violated the Equal Protection Clause by allowing incorporated village residents to participate in the election of officials whose "primary function was to govern the unincorporated area." Id. at 771. As here, the plaintiffs argued that the Town was diluting the value of their votes by giving the vote to persons having "no substantial interest in and deriving no substantial benefit from" the Town government. Id at 772. The court rejected the claim as "plainly unsubstantial," stating:

> That the village residents may have less interest in Town elections than the residents of the unincorporated area does not 'dilute' the votes of the latter group; if anything, their votes are thereby strengthened since the less interested group will be less likely to vote. More fundamentally, the voter 'interest' in this sense

> will always vary from group to group and issue to issue, but this does not 'dilute' the vote of any group in the constitutional sense.

Id. at 772. Of course, both cases ultimately suffer from the same fundamental legal defect; namely, a misreading of the Equal Protection Clause to include a requirement of substantive equality in terms of each voters' relative interests in local government.

The Second Circuit considered another similar dispute in Town of Goshen v. Collins, 635 F.2d 954 (2nd Cir. 1980). In that case, the residents of Arcadia Hills, an unincorporated area within the Town of Goshen, alleged that their votes were being diluted because residents of the incorporated Village of Goshen voted in Town elections. The unincorporated area residents were particularly concerned with the Town's creation of the Arcadia Hills Water District ("AHWD"), to take over a private developer's water system, because they felt they were receiving too little water at too high a price compared to residents of the Village. The court's description of the Arcadia Hills' plaintiffs' claim fits the Appellants' claim in this case as well:

> Plaintiffs claim that they have been 'effectively disenfranchised' and thereby rendered powerless to correct the alleged discrimination .... They also assert that Town officials have been unresponsive to their claims.

Id. at 956. Faced with assertions similar to those made by Appellants in this case, the court voiced concern about the vague nature of the plaintiff's claim:

> It is not clear precisely what plaintiffs' disenfranchisement claim is. Allowing all qualified voters in the Town to vote for the Town Board is surely not unconstitutional since the board performs many town-wide functions. Even if there are constitutional limits on at-large voting aside from situations in which such a scheme has been deliberately used to disadvantage a racial or ethnic minority, they surely have not been reached in a township of this size and character. The claim thus must be that it was a denial of equal protection to allow the Town Board, elected by all the voters and predominantly by those in the Village, which controls its own water supply, to manage the AHWD.

Id. at 957.

> On the following grounds, the Court rejected the Plaintiffs' claims:
>
> > This is not a case in which persons denied the franchise challenge their exclusion from the ballot box. Plaintiffs have the right to vote in the elections in which the officials that govern their water district-the members of the Town Board-are chosen. This case therefore is not controlled by the Supreme Court's decisions concerning schemes 'denying the franchise to citizens who are otherwise qualified by residence and age.' ... [W]hat plaintiffs object to is that the officials in charge of their water district are elected by all the residents of the Town, not just the residents of Arcadia Hills.

Id. at 959.

This case, too, "is not a case in which persons denied the franchise challenge their exclusion from the ballot box." Appellants have the right to vote in the elections in which the officials that govern the Tribe are chosen. Id. Again, to establish a constitutional claim of vote dilution the plaintiff group must prove (1) purposeful discrimination and (2) that the group has been effectively deprived of the ability to influence the political process. Shaw v. Reno, 113 S.Ct 2816, 2823 (1993); City of Mobile, 446 U.S. at 66, 100 S.Ct. at 1499. The Appellants' complaint is devoid of any allegations setting forth these essential elements of a vote dilution claim. Instead, the Appellants base their vote dilution claim upon the alleged deprivation of their right to proportional suffrage. However, the decisions of the Supreme Court uniformly hold, however, that the equal protection clause does not provide any such right to proportional representation. *See, e.g.,* Thornburgh v. Gingles, 478 U.S. 30, 98, 106 S.Ct. 2752, 2791 (1986) (The Court has "flatly rejected the proposition that any group with distinctive interests must be represented in legislative halls"); Bandemer, 478 U.S. at 130-132, 106 S.Ct. at 2809-10 (The Court's decisions "clearly foreclose any claim that the Constitution requires proportional representation.");

accord, City of Mobile, 446 U.S. at 66, 100 S.Ct. 1499; White v. Regester, 412 U.S. 755, 765-66, 935 S.Ct. 2332, 2339-40 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149, 153, 156, 91 S.Ct. 1858, 1874, 1876, 1878 (1971). The Lower Sioux Indian Community is not divided into districts, and as far as one can tell, there are no distinct parties. Hence, Appellants' arguments frivolous.

Moreover, the essence of any vote dilution case is the interaction of the challenged electoral practice with established patterns of voting behavior. While the Appellants appear to allege that those Community members residing outside the Community area have no interest in the local affairs of the Tribe, there the Appellants have failed to provide any concrete evidence that either group votes cohesively or of patterns of antagonistic voting. These are essential components of any constitutional claim of vote dilution. It is difficult to comprehend how the Appellants could establish their votes have been diluted without first showing that the allegedly adverse interests between residents and non-residents actually result in adverse voting behavior. For example, if, notwithstanding their claimed different interests, the voting patterns of these two groups are not antagonistic, how has any vote been diluted? The theoretical basis of a vote dilution claim is the existence of a numerical minority that is capable of being submerged by a block voting majority. Absent such minority status, the Appellants' claimed need for judicial protection of their right to vote must fail.

Further, Appellants here cannot mathematically establish their vote dilution claim, but can only contend that restoration of voting rights to all enrolled members of the Community as required by the Constitution will dilute their vote. Such an assertion obviously is not readily capable of proof, and Appellants therefore confront a substantial

obstacle in their attempt to demonstrate concrete injury. Other Courts have uniformly held that enfranchisement, in contrast to disenfranchisement, does not violate the equal protection clause. *See* Jackson v. Consolidated Gov't. of City of Jacksonville, 255 So.2d 947 (Fla. 1969) (allowing residents of urban service areas to participate in countywide elections did not violate equal protection even though their interests were not the same as other county voters); Bjornestad v. Hulse, 229 Cal.App.3d 1568 (3d Dist. 1991)(rational basis test not violated by allowing the non-resident landowners to vote as well as residents as well, rejecting dilution claim); May v. Town of Mountain Village, 132 F.3d 576 (10th Cir. 1997) (no violation of residents' equal protection rights to permit non-resident property owners to vote in town elections); Duncan v. Coffee County, Tenn., 69 F.3d 88, 104 Ed. Law Rep. 567, 1995 FED App. 321P (6th Cir. 1995) (claim of county residents that their votes were diluted by the inclusion of a city within the county whose children attend school within the school district; out-of-district voters in another district's election valid if those out-of-district have substantial interest; city residents provided sufficient money to rural county district that franchise not irrational; only with support of county residents could city residents control the board thus no dilution); Area G Home and Landowners Organization, Inc. (HALO) v. Anchorage, 927 P.2d 728 (Alaska 1996) (where new larger police service area established upon vote of entire affected area, no violation of equal protection despite earlier rejection by smaller service area votes and despite city charter requirement of majority approval as right is not that community has its own separate vote but that every voter is afforded an equally powerful vote).

Based upon the foregoing, Appellants' injury is too conjectural to satisfy the "injury in fact" necessary to establish standing.

2. Appellants' Alleged Injury is not Traceable to the Appellee.

Next, having addressed the "injury in fact" element, Appellants also must allege that their alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324 (1984). Causation and redressability are related elements of standing that frequently have been treated as one. Generally, if a plaintiff can demonstrate that their injuries were caused by the defendant, the courts are in a position to redress the situation. In recent years, however, the Supreme Court has treated these two requirements separately. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 568-71, 112 S.Ct. 2130, 2140-42 (1992) (finding that redressability presented a particular obstacle to standing).

Here, Appellants cannot trace an alleged injury in fact to the Appellees' alleged wrongful conduct because the Appellees' conduct is sanctioned by the plain language of the Constitution of the Lower Sioux Indian Community. The wrongful conduct arises from a prior Council's attempt to circumvent the clear mandates of the Constitution by amending Tribal ordinances that are not subject to the approval of the membership via the referendum process. Hence, Appellants cannot nor have they established their alleged injury arises from the Appellee's alleged wrongful conduct.

Even assuming that the Appellants have properly pled a legally cognizable injury in fact, which they have not, the Appellants cannot show the requisite causation linking their claimed injury to any conduct of the Appellee, much less to any "putatively illegal conduct of the defendant." See Valley Forge Christian College, 454 U.S. at 472 (the injury in fact requirement of standing is fulfilled when plaintiffs allege some actual or

threatened injury "as a result of the putatively illegal conduct of the defendant"). At best, the Appellants' claims amount to a difference of opinion with the Community Council, the body duly elected by a majority of the Community members, as to the proper interpretation of the Constitution. This difference of opinion cannot sustain standing where that difference of opinion has no practical significance. The power of the federal courts is "to correct wrong judgments, not to revise opinions." Richardson v. Ramirez, 418 U.S. 24, 6 1 (1974). In short, the Appellants have not alleged the required causation element to establish standing.

3. The Appellants Have Not Established that their Alleged Injury is Redressable.

Finally, it follows that the redressability element of standing also is lacking; were the Court to strike the provisions in question from the Election Ordinance, the Constitution still provides that in order to "acquire the right of franchise, a voter must qualify by having reached the age of 18 years of age or older, on the day of the election and be a members of the Community." Constitution, Article VI- ELECTIONS, Section 3. Accordingly, the Appellants' alleged injury will not be redressed by a favorable ruling as the Court does not have the authority to amend the Constitution.[2]

Because the Appellants have failed to satisfy all three (3) elements necessary to establish constitutional standing, the decision of the Tribal Court must be upheld.

[2] The Appellants apparently agree that the Court does not have the authority to overturn a provision in the Tribe's Constitution. "One final observation should be made in this context: Appellants are aware of no cases that ever have permitted a tribe's constitutional provision to be overturned in an action brought under the Indian Civil Rights Act. Appellants respectfully submit that although the Indian Civil Rights Act is available to challenge tribal ordinances or regulations, applying it to a tribe's federally approved Constitution would be an unacceptable infringement on tribal self-government and sovereignty." Appellants' Brief, p. 32.

B. Appellants Have Not, Nor Can They, Satisfy the Prudential Requirements for Standing to Invoke the Power of the Tribal and Appellate Court of the Lower Sioux Indian Community.

As this Court stated in Eidsvig, the requirement of standing helps maintain appropriate roles by keeping the Court from deciding generalized grievances better handled by the political arms of the Community. Other courts have long recognized this principle by imposing a set of prudential limitations in order to assure that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." Wyoming Outdoor Council v. U.S. Forest Service, 165 F.3d 43, 47 (D.C. Cir. 1999)("Even where these constitutional requisites for Article III standing are present, a party may still lack standing under "prudential" principles. .. Litigants seeking to assert the rights of third parties, proffering grievances unrelated to the "zone of interests" intended to be protected or regulated by a particular statutory or constitutional provision, or seeking adjudication of generalized grievances more appropriately addressed in the representative branches have been found to lack standing on prudential grounds.") *See also* American Immigration Lawyers Ass'n v. Reno, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000) ("in this circuit we treat prudential standing as akin to jurisdiction ... in part because the doctrine serves the institutional obligations of the federal court").

Were this Court to give credence to Appellants' claims resulting in a judicially cognizable injury, that claim of injury presumably would be shared by all Community members - a fact noted by the Tribal Court. Courts, however, do not entertain such generalized grievances. *See* Eisdvig; Warth v. Seldin, 422 U.S. 490, 502-508 (1975); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974). Indeed, in

Lampkin v. Connor, 239 F. Supp. 757 (D.D.C. 1965), *aff'd on other grounds*, 360 F.2d 505 (D.C. Cir. 1966), a district court denied standing to the plaintiffs challenging the Department of Commerce census for this reason. In Lampkin, the plaintiffs sued the Department of Commerce seeking an order that would require the Department, as part of its decennial census, to reapportion electoral votes among the states in manner that would account for the disenfranchisement alleged to exist in particular states as mandated by the Fourteenth Amendment. These plaintiffs alleged that "unless such reduction is accomplished their votes will be debased and diluted to the extent that they will be of less value than the votes of the voters in the States which deny and abridge the right to vote." Id. at 759. In finding that the plaintiffs lacked standing, the court held that:

> their complaint ... that their votes are debased and diluted in value is a condition they share in common with citizens of all States where the right to vote is neither abridged or denied. ... [W]hat the ... plaintiffs would have this Court do is decide a question and afford a remedy as to which their interest is remote and speculative and shared by millions of others. They are not personally aggrieved or affected in a legal sense by defendants' refusal to take future action in connection with the 1970 census in the manner these plaintiffs demand. They lack standing to sue.

Id.at 761; *see also* Jones v. Bush, 122 F. Supp. 2d 713, 2000 WL 1800567 (N.D. Tex., Dec. 1, 2000) ("Plaintiffs' allegation that a violation of the Twelfth Amendment would infringe their constitutional rights does not of itself establish an injury in fact to them personally. A general interest in seeing that the government abides by the Constitution is not sufficiently individuated or palpable to constitute such an injury"). The Appellants' interest here, such as it is, is far too abstract to give rise to an injury sufficient to support standing under either Article III or the prudential limitations recognized in Eidsvig.

C. Contrary to Appellants' Assertions an Individual's Status as a Voter Does Not Eliminate the Need to Satisfy the Constitutional and Prudential Standing Requirements.

Appellee does agree with the Appellants that the "right to vote is fundamental in a democratic society."[3] However, Appellee disagrees with the concept that every individual has standing just because they also participate in the electoral process. Appellants cite Baker v. Carr, 369 U.S. 186 (1962) as support for their assertion that all voters have standing to contest a reapportionment scheme. As that may be true, that case is easily distinguishable from Appellants' claims. Baker involved a claim that a representative appointment scheme gave voters in certain counties a disproportionately less weighted vote than voters in irrationally favored counties. By its very terms, such a claim alleges that the voters in the affected counties had an interest more particularized than voters across the rest of the state. The Supreme Court found that the plaintiffs alleged injuries were both direct and palpable--the plan "disfavor[ed] the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* voters in irrationally favored counties." Id. at 207-08. In other words, the Baker case dealt with apportionment and redistricting, which have a direct impact on the relative weight of the votes of individuals from different districts. Here, Appellants still have an equal vote on equal terms as all other members of the Lower Sioux Indian Community.

The Appellants are not seeking to enforce their own right to vote; instead, they seek to restructure the government to prevent others from voting on matters that they believe are unique to them. The courts have repeatedly rejected exclusionary claims of this nature, aimed not at securing the Appellants' own right to vote, but at limiting others

[3] It is interesting to note that Appellants claims the expansion of voting rights affects a fundamental right, but then when it suits their needs, the right to vote becomes nothing more than "a right and privilege to the benefits of the Community."

rights to vote. Based upon the foregoing, the Appellants fail to demonstrate the viability of their claims under either the Constitutional or prudential concepts of standing. Because the Appellants have failed to satisfy these standing requirements, the decision of the Tribal Court must be upheld.

II THE APPELLATE COURT DOES NOT HAVE JURISDICTION OVER THIS DISPUTE BECAUSE THE COMMUNITY HAS NOT WAIVED ITS IMMUNITY FROM SUIT.

Because the Appellants are suing a sovereign Indian Tribe, the Appellants must "as a jurisdictional predicate, establish that the nation's immunity from suit has been waived." Raymond v. Navajo Agricultural Products Industry, 22 Indian L. Rep. 6100, 6101 (Nav. Sup. Ct. July 20, 1995). They have failed to satisfy this burden.

It is settled that Tribal sovereign immunity must be clearly abrogated by Congress or unequivocally waived by a Tribe itself. "The fact that Congress grants jurisdiction to hear a claim does not suffice to show Congress has abrogated all defenses to that claim. The issues are wholly distinct." Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 n.4 (1991); U.S. v. Nordic Village Inc., 503 U.S. 30, 38 (1992), *see*, U.S. v. Mottaz, 476 U.S. 834, 846 (1986) ("That federal courts may have general subject-matter jurisdiction . . . does not therefore mean that the United States has waived its immunity . . ."). For example, the Second Circuit recognized that federal courts, when first interpreting the Indian Civil Rights Act, often ignored "two related elements of the jurisdictional inquiry: whether Title I of the ICRA creates a federal, civil cause of action; and whether Title I constitutes a waiver of tribal sovereign immunity." Poodry v. Towanda Band of Seneca Indians, 85 F.3d 874, 885 (2nd Cir. 1996). In other words, even if jurisdiction otherwise existed, "[t]here is a difference between the right to demand compliance with (federal) laws and the means available to enforce them." Kiowa Tribe of

Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 1702 (1998).

Contrary to the Appellants' assertions, the Indian Civil Rights Act, (the "ICRA"), 25 U.S.C. § 1302 *et seq.*, does not operate as an automatic waiver of the Community's sovereign immunity. In fact, it is settled law that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the Act." State of Florida v. Seminole Tribe of Florida, 181 F.3d 1237, 1241-42 (11th Cir. 1999), *quoting* Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida, 166 F.3d 1126, 1131 (11th Cir. 1999).

Significantly, in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court held that the ICRA does not waive a Tribe's sovereign immunity from suit. In Santa Clara Pueblo, the Court concluded that suits against a Tribe under the ICRA are barred by its sovereign immunity and held that:

> [U]nless and until Congress makes clear its intentions to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that s 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribes of its officers.

436 U.S. at 72.

Because nothing in Title I of the ICRA, including the Act's equal protection clause, could be read as general waiver of sovereign immunity, suits against the Tribe itself under the ICRA are barred. Id. at 1677. Based on Santa Clara Pueblo's clearly stated holding and contrary to Appellants's assertions, the weight of Tribal Court authority concludes that Congress did not waive the sovereign immunity of tribes under

the ICRA unless the Tribe itself has expressly and unequivocally waived its immunity thereunder. *E.g.*, Gonzales v. Allen, 17 Indian L. Rep. 6121, 6122 (Shoshone-Bannock Tribal Ct. 1990) ("[t]he vast majority of both federal and tribal court cases have held that the Indian Civil Rights Act is not a waiver of tribal sovereign immunity").[4] As one tribal court explained, ICRA does not give "any new jurisdiction to the tribal court, because tribal court jurisdiction comes from the sovereignty of the tribe or nation which establishes the court." Nez v. Bradley, 3 Nav. R.126, 130-31 (1982). Similarly, this Court has held that "Tribal courts are entities created by tribal law and as such have only the jurisdiction the law grants them." Morse v. LSIC, CIV-218-98. Furthermore, since immunity from suit is an inherent attribute of the nation's sovereignty, a federal law must expressly waive the nation's immunity from suit to be "applicable federal law." *See* TBI

[4] *See also* Pawnee Tribe of Oklahoma v. Franseen, 19 Indian L. Rep. 6006, 6008 (Ct. Ind. App.-Pawnee 1991) (in a contract action, the court stated "[ICRA] did not explicitly waive a tribe's immunity in tribal court actions. Furthermore, we will not imply such a waiver where none is specifically made in the federal statutes."); *see also* Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033, 6036 (N. Plains Intertribal Ct. App. 1990); Garman v. Fort Belknap Community Council, 11 Indian L. Rep. 6017 (Ft. Belknap Tribal Ct. 1984) ("tribal self-government must surely embody the concept that Indian tribes decide for themselves how to implement laws forced upon them by Congress"); Satiacum v. Sterud, 10 Indian L. Rep. 6014, 6015 ("plaintiff argues that the Martinez decision represents an explicit waiver of the tribe's immunity where a violation is alleged under the [ICRA]. This court rejects that argument and holds that a waiver of the tribe's immunity must be unequivocally expressed."); Worthen v. Mohegan Tribal Gaming Authority, No. GDTC-T-99-100 (Mohegan Gaming 02/14/2002)("[T]he fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it,' Garcia v. Akwesasne Housing Authority, et al., 268 F.3d 76, 86 n.5 (2d Cir. 2001), *quoting* Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 357 (2d Cir. 2000). The United States Court of Appeals for the Ninth Circuit has found no support for the proposition that a Tribe's incorporation of the Indian Civil Rights Act into its constitution shows an intent to waive sovereign immunity. Demontiney d/b/a v. United States, et al., 255 F.3d 801, 814 (9th Cir. 2001)."); Saint Regis Mohawk Tribe v. Basil Cook Enterprises, No. 95-001 (Saint Regis Mohawk 06/26/1996)(The facts and pleadings leave little doubt that the Saint Regis Mohawk Tribe has not waived its sovereign immunity to suit to permit claims pursuant to the Indian Civil Rights Act or any other law unless otherwise granted knowingly, specifically and narrowly.); Johnson v. Navajo Nation, No. A-CV-16-85 (Navajo 10/20/1987)(We agree with the United States Supreme Court that the ICRA does not expressly waive the sovereign immunity of Indian tribes, including the Navajo Nation in any court.)

Contractors v. Navajo Nation, 16 Indian L. Rep. 6037 (1987). Based upon the Tribe's continued assertions of sovereign immunity and the failure of ICRA to waive Tribal immunities, the Appellants' assertions that ICRA waives the sovereign immunity of the Community must be denied.

Finally, the only other means of finding that a Tribe has waived its sovereign immunity from suit is by examining Tribal law for an express and unequivocal waiver. Rule 109(k) of the Judicial Ordinance of the Lower Sioux Indian Community explicitly provides that waivers of sovereign immunity must be made in the following manner:

> The sovereign immunity of the Tribe and any elected Lower Sioux Community Council member or tribal official with respect to any action taken in an official capacity, or in the exercise of the official powers of any such office, in any action filed in the Tribal Court with respect thereto, may only be waived by a formal resolution of the Lower Sioux Community Council. ***All waivers shall be unequivocally expressed in such resolution. No waiver of the Tribe's sovereign immunity from suit may be implied from any action or document. Waivers of sovereign immunity shall not be general but shall be specific and limited as to the jurisdiction or forum within which an action may be heard, duration, grantee, action, and property or funds, if any, of the Tribe or any agency, subdivision or governmental or commercial entity of the Tribe subject thereto***. No express waiver of sovereign immunity by resolution of the Lower Sioux Community Council shall be deemed a consent to the levy of any judgment, lien or attachment upon property of the Tribe or any agency, subdivision or governmental or commercial entity of the Tribe other than property specifically pledged or assigned therein. Emphasis added.

Based upon the unambiguous language of Rule 109(k) of the Judicial Ordinance, the Appellants rely upon Council Resolution No. 30-95 in support of their contentions that the Community Council has waived its sovereign immunity for suits arising under the ICRA. Said Resolution provides:

> NOW THEREFORE BE IT RESOLVED that the Community Council of the Lower Sioux Indian Community in Minnesota does waive, in a limited fashion, the immunity from uncontested suit which the Community's institutions and officials otherwise possess, to permit litigation of claims for injunctive and

> declaratory relief under the Indian Civil Rights Act of 1968, 20 U.S.C. §1302 (1968) in, but only in, the Court of the Lower [S]ioux Indian Community. The foregoing waiver shall not include any waiver as to any claims for money damages against the Community's institutions or officials.

The Appellants have not sued the members of the Community Council in their individual capacities, and therefore, an analysis of whether Resolution No. 30-95 is sufficient to effectuate a waiver of the official's sovereign immunity from suit is not necessary.

By its express language, Resolution No. 30-95 does not waive the Community's sovereign immunity but that of the "Community's institutions." The starting point in interpreting any statute is always the language of the statute itself. United States v. Talley, 16 F.3d 972, 975 (8th Cir. 1994). If the plain language of the statute is unambiguous, that language is conclusive absent clear legislative intent to the contrary. Id. Therefore, if the intent of the legislative body can be clearly discerned from the statute's language, the judicial inquiry must end. Citcasters v. McCaskill, 89 F.3d 1350, 1354-55 (8th Cir. 1996). Here, the plain language of Resolution No. 30-95 is clear – it contains no provisions that hold or even infer that the sovereign immunity of the Community – in contrast to its "institutions" - is waived for actions arising under the ICRA.

Based upon the foregoing, the Appellants have failed to allege any waiver of sovereign immunity that would grant this Court the necessary jurisdiction to hear the instant matter. Because they have failed to satisfy their burden of establishing jurisdiction, the decision of the Tribal Court must be upheld.

III. APPELLANTS ARE NOT ENTITLED TO INJUNCTIVE RELIEF.

Although recognized as not controlling, the decisions of the 8th Circuit Court of Appeals provide guidance as to when the imposition of extraordinary remedies is proper. When deciding a motion for a preliminary injunction, the Court should consider: (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 the issuance of the injunction. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). "None of these factors by itself is determinative; rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219, 1222 (8th Cir. 1986) (citing Dataphase, 640 F.2d at 113). The party requesting injunctive relief bears the "complete burden" of proving all the factors." Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Cir. 1987). The Appellants have failed to meet their burden to justify the imposition of injunctive relief against a federally recognized Indian Tribe.

A. Appellants Cannot Prevail on the Merits of their Claims.

The Eighth Circuit has held that of the four factors to be considered by the district court in considering preliminary injunctive relief, the likelihood of success on the merits is "most significant." S&M Constructors, Inc. v. Foley Co., 959 F.2d 97, 98 (8th Cir. 1992).

1. The Constitution and Bylaws of the Lower Sioux Indian Community Only Require that a Community Member be 18 Years of Age or Older and a Member of the Community to Participate in the Electoral Process.

The Appellants have failed to successfully contest the unambiguous language of the Constitution. Article VI § 5 clearly states that "[i]n order to acquire the right of franchise, a voter must qualify by having reached the age of 18 years or older, on the day of the election and be a member of the Community." Said Article could not be clearer on its face regarding the requirements necessary for voting in Tribal elections. To add the additional requirement of residency with substantial duration has no basis when reading the plain language of Article VI §5.[5]

Instead of relying upon the plain language of Article VI, the Appellants rely upon Article III – MEMBERSHIP, Section 3 and 3(a) to support their contentions that the right to vote depends upon residency. Said sections 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.
>
> Section 3(a) Any member who does not have the rights and privileges of membership may acquire such rights and privileges by establishing residency in the Community for a period of five continuous years; provided that, if a member was a bona fide resident of the Community on the date this subsection (a) was approved by the required Community Vote, such member may acquire the rights and privilege of membership under such Community law as was in effect prior to the date of such vote.

[5]The first step in interpreting a statute is to examine the text of the statute carefully to determine if the language at issue has an unambiguous meaning regarding the particular dispute. Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed. 2d 808 (1997); U.S. v. Vig, 167 F. 3d 443, 447 (8th Cir. 1999); Friends of Boundary Waters Wilderness v. Dombeck, 164 F. 3d 1115, 1122 (8th Cir. 1999). The court's inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." Robinson v.Shell Oil Co., supra, U.S. at 540 (*quoting from* United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240, 103 L.Ed. 2d 290, 109 S.Ct. 1026 (1989)). Thus, if the statutory language is unambiguous, it is unnecessary to look to administrative interpretations or legislative history. Ratzlaf v. United States, 510 U.S. 135, 147-148, 114 S.Ct. 655, 126 L.Ed. 2d 615 (1994); Northern States Power Co. v. United States, 73 F. 3d 764, 766 (8th Cir. 1996) ("(When) statutes are straightforward and clear, legislative history and policy arguments are at best interesting, at worst distracting and misleading, and in neither case authoritative.")

An examination of the Constitution's legislative history illustrates that the Community did not intend to impose residency requirements on members seeking to cast their vote in Community elections. The Lower Sioux Indian Community adopted its original Constitution on May 16, 1936. The core provision of Article III – MEMBERSHIP, Article III, Section 3(a) has not changed from the 1936 version.[6] In other words, Section 3 of the Constitution has never been amended and stands today as it did in 1936. Interestingly, as a right and not a benefit, if the Community desired to restrict voting rights, it logically follows that the membership would have clearly enumerated said restriction as it did "land assignments and sharing in community profits." For example, Article IX – LAND, Section 6 of the 1936 Constitution provides: "If the holder of any land assignment absents himself, with his family, from residence upon his assignment for a period of 2 years, such absence becomes evidence that he has relinquished his claim to such assignment." Hence, the Community was aware that if they restricted benefits in one area of the Constitution, similar restrictions must be placed upon corresponding sections. However, it was not until 2001 that the Community attempted to amend Article III, Section 3(a) of the Constitution to include loss of voting rights as a repercussion for leaving the jurisdiction of the Community.[7]

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[6] The Community added Section 3(a) to Article III in 1998.

[7] On May 15, 2001, the Lower Sioux Indian Community Council adopted Resolution 50-01 requesting a Secretarial election on Article III, Section 3 of the Constitution proposed to be amended as follows: (a) Full Membership Privileges. All adult enrolled members of the Community shall have full membership privileges subject to the limitations of this section. **Full membership privileges shall include the privilege of voting in Community elections, receiving Community land assignments, participating in Community health, safety, and general welfare programs, and receiving Community per capita distributions.** (b) Loss of Membership Privileges. Any adult enrolled member of the Community who ceases to maintain residency in the Community for a period of two consecutive years shall automatically lose membership privileges to the following extent: (1) Any adult enrolled member who loses

The Community opted to forgo the Secretarial election on this proposed amendment, because the Bureau of Indian Affairs, in accordance with how the present Community Council has interpreted the Constitution, responded to the request on January 22, 2002, noting that:

> The Community is now proposing to amend Section 3 in its entirety. Additional privileges to be forfeited now include the right to vote in Community elections, participation in Community health, safety, and general welfare programs. **Although the Constitution does not require residency to vote in Community elections, we have been advised by Mr. Schoessler that members are not allowed to vote if they leave the reservation for more than two years.** Since the changes to Section 3 affect Article VI, Section 5, we suggest that the Community also amend Article VI, Section 5 to avoid possible conflict with each other.
>
> As stated earlier, the proposed changes to Article III, Section 3 affect the voting rights of the members. **Section 5 of Article VI-Elections, as amended on June 28, 1977, states "In order to acquire the right of franchise, a voter must qualify by having reached the age of 18 years or older, on the day of the election and be a member of the Community." According to this section of the Constitution, the right to vote in tribal elections is not based on residency.** We suggest amending Article IV, Section 5 to correspond with the proposed language of Article III, Section 3. The Community may want to add the phrase "with full membership privileges" at the end of the sentence. Emphasis added.

Hence, the BIA's interpretation of the Constitution is in accordance with the present Community Council's interpretation as embodied in Resolution No. 06-61. Further, a legislature's interpretation of a statute or resolution involved in pending litigation is entitled to substantial deference. *See* Edelman v. Lynchburg College, 122 S.Ct 1245 (2002). This Court has a duty to interpret and apply legislative codes in the manner

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membership privileges on or after September 1, 2001, **shall lose the privileges of voting in Community elections**, receiving Community land assignments, and participating in Community health, safety and general welfare programs, but shall not lose the privilege of receiving Community per capita distributions. (2) An adult enrolled member who loses and does not reacquire membership privileges before September 1, 2001, **shall lose the privileges of voting in Community elections**, receiving Community land assignments, participating in Community health, safety, and general welfare programs, and receiving Community per capita distributions. Emphasis added.

offered by the Community Council, and therefore, the Appellants' attempts to make qualified membership status a requirement of voting simply must fail because the Constitution clearly allows all members who have obtained the age of 18 the right to vote.

Should regulations regarding elections contain clauses or sections which are inconsistent with the Constitution in that they violate the Constitutional rights of members then these clauses or sections must be void or invalid and seen as an attempt to amend the Constitution indirectly. In Deborah Thomas et al. v. Saint Regis Mohawk Tribal Council, Saint Regis Mohawk Tribal Clerk, and Saint Regis Mohawk Election Board (June 7/96), the Petitioners filed an action that challenged a voting regulation requiring U.S. residency as a prerequisite for exercising the right to vote. The Court held the Mohawk Tribal Election and Voting Act was invalid and void where no such residency requirement was stated in the Constitution. It further held that the residency requirement in the Mohawk Tribal Election Act was void for inconsistency with the Constitution and that specific requirement alone was struck. In essence the Tribal Court and this Judge in particular, spoke of the denial of a member's voting privileges which had been guaranteed by the Constitution.

Article VI § 5, on its face, allows Community members the ability to exercise their franchise upon establishing two (2) conditions-attaining the age of eighteen (18) and being a member of the Lower Sioux Indian Community in Minnesota. The Constitution does not require an individual be a qualified member in order to participate in the electoral process. Should the membership of the Lower Sioux Indian Community in

Minnesota as a whole wish to make residency a requirement for voters they must do so directly through the Amendment process as found in the Constitution.

2. The Affidavits Presented by Appellants Constitute Post Enactment Legislative History, and Therefore, Cannot Be Given Weight by this Court.

The Appellants do not rely on the unambiguous language of the Constitution itself to support their assertions that residency is required in order to exercise the right to vote in Community elections. Rather, the Appellants ask this Court to consider certain affidavits, namely statements from individual Community members, to assist in the interpretation of the Community's governing document that was originally adopted in 1936 – over seventy (70) years ago. The Appellants' submission must be rejected.

Affidavits signed by Community members, who are similarly not disinterested parties to this litigation, in 2006 should not be used to interpret the Constitution that was originally passed over seventy (70) years earlier by the entire Community. Well-established case law unequivocally holds that post-enactment legislative materials should be given little or no weight in interpreting the congressional intent of an earlier legislative body. *See* Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 117-18 n.13 (1980) (the Court refused to give weight to remarks by a member of Congress and statements of the Conference Report of a later-enacted bill that amended the CPSA because a "mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty"); United States v. X-Citement Video, Inc., 513 U.S. 64, 77 n.6 (1994) ("the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight"); United States v. Southwestern Cable Co., 392 U.S. 157, 170 (1968) ("the views of one Congress as to the construction of a statute adopted many years before by another

Congress have very little, if any significance"); Pierce v. Underwood, 487 U.S. 552, 566 (1988) ("it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means"); Slaven v. BP America, Inc., 973 F.2d 1468, 1475 (9th Cir. 1992) ("[i]t is well settled that the views of a later Congress regarding the legislative intent of a previous Congress do not deserve much weight"); Longview Fibre Co. v. Rasmussen, 980 F.2d 1307, 1311-12 (9th Cir. 1992) ("This legislative history does not persuade us, because it is not part of the law, was written long after the law was passed . . . . This is 1997 'history' about a 1972 law"). Similarly, in Lower Sioux Community v. Susan Scott, No. 93-100, this Court held:

> While this Court could remand to require the Trial court to take additional testimony regarding legislative intent, the Court must be wary about "post-enactment legislative history.' As the United States Supreme Court found in South Eastern Community College v. Davis, 442 U.S. 397, 411-12, n.11 (1979), 'isolated statements by individual members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment.'

As these cases make clear, the affidavits that accompany the Appellants' complaint cannot be used to determine what the entire Community intended when it passed the original Constitution in 1936 and thus should be disregarded.

B. The Appellants Will Not Suffer Irreparable Harm in the Absence of Injunctive Relief.

To justify injunctive relief, the Appellants must first establish that irreparable harm will result without injunctive relief and that such harm will not be compensable by money damages. *See* In re Travel Agency Com'n Antitrust Litig., 898 F. Supp. 685, 689 (D. Minn. 1995) ("[A]n injunction cannot issue based on imagined consequences of an alleged wrong. Instead, there must be a showing of imminent irreparable injury.")

The Appellee agrees with the Appellants that in the past "by the vote of a mere majority of the quorum on a five person Council, the electorate can be redefined in a manner more favorable to the Council majority, or electoral procedures can be unfairly modified to strengthen its power, and the injured minority is without judicial redress." This is exactly what occurred when the Council adopted the Membership Privilege and Gaming Revenue Allocation Ordinance in 1993 that essentially disenfranchised over 200 enrolled Community members.

However, despite the Council's unilateral disenfranchisement of over 200 Community members, the fact remains that the Appellants are still among the majority. Again, the Appellants contend that the inclusion of the non-residents in the Community's electoral process dilutes their vote. As previously stated, a vote dilution claim requires proof that the electoral structure which facilitates such dilution was adopted with a discriminatory effect of depriving the minority group of the ability to elect their preferred candidate. *See* Shaw v. Reno, 509 U.S. 630, 639-40, 113 S.Ct. 2816 (1993). Obviously, the Tribal Court was correct in denying the Appellants' request for injunctive relief based upon the inadequate proof that the non-resident voters would influence the outcome of Community elections. In fact, Appellants' own calculations prove that the Appellants are still among the majority even with the inclusion of the non-resident voters. For example, Appellants appear to be dividing the Community into "residents" and "non-residents" and basing their assertions of vote dilution thereon.[8] Appellants contend that the adoption of Resolution 06-61 increased the voter pool from 368 to approximately 568. Appellants' Brief, p. 16. In other words, there are 368 residents in comparison to 200 non-residents

[8] "The resident's rights candidates was successful in the election before the franchise expansion, but unsuccessful in the two elections since the franchise expansion." Appellants' Brief, p. 34.

thereby placing the Appellants in the majority. Without being able to prove they are in the minority, the Appellants are unable to establish a vote dilution claim, and therefore, cannot prove that they have suffered or will suffer any harm in the absence of injunctive relief.

The Appellants have failed to demonstrate that they will suffer an irreparable injury if the Court does not issue a preliminary injunction, and the fact that they have suffered no injury warrants a dismissal of their complaint.

C. Balancing the Harm and the Public Interest Does Not Favor the Issuance of Injunctive Relief.

In order for a preliminary injunction to issue, the benefit of a preliminary injunction to the Appellants must outweigh any detriment to the Appellee and it must also serve the public interest. The likelihood that Appellant ultimately will prevail is meaningless in isolation. In every case, it must be examined in the context of the relative injuries to the parties and the public. Dataphase, at 113. The balance of hardships and the public interest also tilts decidedly in the Appellee's favor.

By denying the Appellants' request for a temporary injunction, they will not be denied access to the electoral process of the Lower Sioux Indian Community. Hence, any harm to the Appellants is de minimus. In the alternative, the Community will suffer greater harm than the Appellants if their request for injunctive relief is granted. The Community Council has an interest in ensuring that its Tribal laws are adhered to by its Community members, and even more importantly, its Tribal Court. The Community Council has formalized the Community's interpretation of the Constitution via Resolution

06-61. The interpretation must be deferred to by this Court. In the Eisdvig case, the Tribal Court held:

> 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. 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 and 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 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 the Court's authority to substitute its judgment for that if 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. Emphasis added.

In fact, the Tribal Court in Eidsvig found it legally proper for the Community Council to interpret the Constitution to allow members to leave the area for more than the mandated two (2) years period despite the explicit language of the Constitution. The Court further held that it should not supplant the Council's findings merely by identifying alternative findings that could be supported by substantial evidence. Eidsvig v. LSCT, CIV-449-02. "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." Id. The Council's ability to interpret the Constitution will be substantially impaired if the Tribal Court grants the Appellants' request for injunctive relief.

Finally, the public has an interest in maintaining a separation of powers between the Community's legislative and judicial bodies. As the Supreme Court explained in Baker v. Carr, 369 U.S. 186, 228, 82 S.Ct. 691 (1962), a challenge to a government's structure cannot be made justiciable simply by characterizing it as a violation of equal protection. Regardless of the label, where, as here, the essence of the claim involves an attack on the fundamental voting structure of a government, the claim cannot be adjudicated. The Supreme Court stated:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment for multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217, *quoted with approval in*, Davis v. Bandemer, 478 U.S. 109, 121, 106 S.Ct. 2797, 2804-2805 (1986). If any one of these factors is present, the claim, whether denominated a violation of the equal protection, due process or any other constitutional provision, must be dismissed for "nonjusticiability on the ground of a political question's presence." Id. at 217. At least one of these factors is present in this case.

The first Baker factor applies to the Appellants' claim - "a textually demonstrable commitment of the issue to a coordinate political department." Id. at 217. Decisions concerning the structure of local governments are "constitutionally committed" to the

Community members, and do not, therefore, give rise to justiciable claims, even when labeled a violation of equal protection. The Appellants in this action ask for nothing less than a judicial restructuring of Tribal government by creating a three (3) tiered system – Community Council, resident members, and non-resident members. If the Appellants desire to amend the current system of Tribal government, they must seek an amendment to the Constitution via a Secretarial election. The Appellants cannot disguise their attack on the fundamental structure of the Tribal government simply by invoking the ICRA. A claim seeking such relief is not justiciable, and therefore, the public interest factor seriously favors the denial of the preliminary injunction.

CONCLUSION

"The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). The Appellants have failed to satisfy not one, but two, jurisdictional requirements. First, they have failed to satisfy the Constitutional and prudential standing requirements adopted by this Court. Second, the Appellants have failed to evidence an express and unequivocal waiver of the Community's sovereign immunity to allow this Court to assert jurisdiction over this dispute. For the foregoing reasons, the Appellee respectfully urges the Court to uphold the decision of the Tribal Court and dismiss this action with prejudice.

Respectfully Submitted,

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