

SEP 13 2006

**LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA
TRIBAL COURT**

LOWER SIOUX INDIAN RESERVATION	STATE OF MINNESOTA
Deanna Barth and Lori Nelson Plaintiffs,	CV#: 06-031 ORDER DENYING PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION
vs.	
The Lower Sioux Indian Community Defendant.	

I. INTRODUCTION

Plaintiffs seek to enjoin Defendant from conducting the September 15, 2006 Tribal election to fill the vacancy that currently exists on the Lower Sioux Community Council, to enjoin Defendant from implementing or providing legal effect to the amendment to the Election Ordinance for Regular Election, as authorized by Community Resolution No. 06-61, and to enjoin Defendant from implementing or giving effect to the outcome of any election for which the list of eligible voters was expanded by the amendment to the Election Ordinance for Regular Election, as authorized by Community Council Resolution No. 06-61. Having carefully considered the arguments and record before the court, and for the reasons stated herein, the Court hereby denies Plaintiffs' Motion for Temporary Restraining Order or Temporary Injunction.

II. FACTUAL AND PROCEDURAL BACKGROUND

On May 18, 2006, Defendant passed Resolution No. 06-61 which amended the Tribal Election Ordinance to allow all members of the Lower Sioux Indian Community (on and off reservation) to vote in Tribal elections. On May 23, 2006, Plaintiffs filed a complaint alleging that the amendment violates Article III, Section 3 of the Lower Sioux

Indian Community Constitution because, if implemented, it would radically dilute the voting power of the Plaintiffs and all members of the Community who have established and maintained Community residence in accordance with said Article, and that the amendment deprives Plaintiff's of their rights to liberty and property without due process of the law under the Indian Civil Rights Act, 25 U.S.C. §1302(8). On August 3, 2006, Defendant filed a Motion to Dismiss the Complaint alleging that Plaintiffs lack standing to bring the lawsuit, that the lawsuit is barred by sovereign immunity, and, in the alternative, that the matter involves a political question.

Before the Court could hear Plaintiffs' complaint, Defendants scheduled an election for September 15, 2006 to fill a vacancy on the Community Council (caused by the removal of one of its members), pursuant to the Election Ordinance as amended by Resolution No. 06-61. On August 28, 2006, Plaintiffs filed a Motion for Temporary Restraining Order or Temporary Injunction.

The motion has been fully briefed by both sides, and the Court has heard oral argument from the parties. For the reasons set forth below, the Court concludes that Plaintiffs have not demonstrated a strong likelihood of success on the merits. Moreover, the possibility of irreparable injury to Plaintiffs is substantially outweighed by the advancement of the public interest.

In their underlying case, Plaintiffs have asked the Court for declaratory and injunctive relief concerning Resolution No. 06-61. During the September 12, 2006 hearing, the Court heard some argument on the issues raised in their complaint. However, because the matter before the Court today is a motion for restraining order/injunction against Defendants holding the September 15, 2006 election, the Court

has elected not to address those issues in this opinion, but merely address whether Plaintiffs are entitled to injunctive relief.

III. PRELIMINARY INJUNCTION STANDARD

As a general rule, the party seeking a preliminary injunction bears the burden of proving the following: (1) they have a strong likelihood of prevailing on the merits; (2) there is the possibility of irreparable harm; (3) the balance between said harm and that to the nonmoving party, and (4) the public interest will be served by the issuance of an injunction. *Dataphase Systems v. C.L. Systems, Inc.*, 640 F.2d 109,114 (8th Cir. 1981).

IV. ANALYSIS

A. Probability of Success on the Merits

Plaintiffs argue that, at a hearing on the merits, they can prove that, if the September 15, 2006 Tribal election proceeds as scheduled under the Election Ordinance as amended by Resolution No. 06-61, their vote will be unconstitutionally diluted. Plaintiffs claim that amendment increased the previous Tribal electorate of 368 eligible voters (on-Reservation voters) to 568 voters by the addition of approximately 200 off-Reservations voters. In support of their dilution claim, Plaintiffs cite the most recent Tribal election (a referendum election) held on August 16, 2006. They allege that in that election 363 ballots were cast, 117 of which were absentee ballots. *Barth Aff'd*. Plaintiffs compare this election to two previous Council elections that occurred in August 2005 and December 2006. In the August 2005 election, Plaintiffs claim that 304 ballots were cast, approximately 15 of which were absentee. *Id.* In the December 2006 election, Plaintiffs claim that 260 ballots were cast, approximately 12-15 of which were absentee. *Id.*

Plaintiff assert that "there is nothing speculative about the likely impact (on them) of those additional (approximately 200) voters." They argue that the right to vote must be held in high regard and that, "Any significant dilution of that right through an illegal enactment must be regarded as irreparable injury per se." Plaintiffs cite no authority for these claims.

The Court disagrees. All of Plaintiffs' claims concerning the dilution of their vote in the September 15, 2006 are speculative and speculation is not proof. Plaintiffs' analysis of the past elections fails to show how their vote was diluted. Plaintiffs contend, based on the past three elections, only one of which was conducted under the amended Election Ordinance, "that nearly one third of the voters in any election under the amended ordinance will be non-residents." However, there is simply no way to know this based on the results of one election. The results of the September 15, 2006 election could be that no absentee ballots are cast or substantially fewer absent ballots could be cast than the 117 cast in the August 16, 2006 election.

Voter dilution is the practice of reducing the potential effectiveness of a group's voting strength by limiting its opportunity to translate that strength into voting power. In attempting to prove voter dilution, however, the United States Supreme Court has said "Relying on a single election to prove unconstitutional discrimination is unsatisfactory." *Davis, et al. v. Bandemer*, 478 U.S. 109 (1986). The Court went on to say, "...an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively... a finding of unconstitutionality must be supported by evidence of CONTINUED frustration of the will of a majority of the voters or effective denial to a

minority of voters of a fair chance to influence the political process.” Id. (Emphasis supplied.)

Plaintiffs place too much reliance on the results of the previous Tribal elections to prove that they can succeed on the merits. To reiterate, Plaintiffs have not shown that the one election Defendant has held under the amended Election Ordinance, the August 16, 2006 referendum election, has diluted their vote. They have not shown a “continued frustration” of the will of a majority of the voters of the Lower Sioux Community or that there has been a denial to the minority of voters a fair chance to influence the political process. Accordingly, the Court finds that it is unlikely that Plaintiffs can succeed on the merits.

B. Irreparable Injury

Dilution of a right so fundamental as the right to vote constitutes irreparable injury. See *Reynolds v. Sims*, 377 U.S. 533 (1964). However, there is some question whether Plaintiffs can prove that, if the September 15, 2006 election is held, they will be denied a chance to influence the political process or that their vote will be diluted. However, since under the Election Ordinance as amended, the only post-election remedy to challenge the results of the election is limited to a defeated candidate, the Court finds that any injury Plaintiffs may suffer by the election going forward will be irreparable.

C. Balance of Hardships

The Court must weigh the potential hardship to the Plaintiffs and those Tribal members similarly situated, the risk of having their votes diluted, against the hardship to the Defendant, having to cancel or postpone the scheduled election and having an indefinite vacancy on the governing body of the Tribe. Here the Court finds that the

greater hardship is to the Defendant. "Under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court withholding the granting of immediately effective relief... In awarding or withhold relief, a court is entitled to and should consider the proximity of the forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 585.

The Lower Sioux Community's election machinery is already in progress and the election will be held in less than 48 hours. Thus, the Court finds that the balance of harms to the parties must weigh in favor of the Defendant.

D. Public Interest

The Supreme Court said in *Davis v. Bandemer*:

Moreover, even if the election (a recall election) could somehow be conducted at a later date, it is relevant to the public interest analysis to consider whether such a delayed election would not itself work strongly against the voting rights of Californians. Because an election reflects a unique moment in time, the Court is skeptical that an election held months after its scheduled date can in any sense be said to be the same election. In ordering the contemplated remedy, the Court would prevent all registered voters from participating in an election scheduled in accordance with the California Constitution. Arguably, then, the Court by granting the relief sought could engender a far greater abridgement of the right to vote than it would by denying the relief." 478 U.S. 109.

The Court concluded saying, "Implicit in a recall election, and explicit in the time frame provided by the California Constitution, is a strong public interest in promptly determining whether a particular elected official should remain in office. *Id.*

In this case, acting upon general equitable principles, the Court finds that the public interest is best served by denying Plaintiffs' motion for injunctive relief. Where "the possibility of corrective relief at a later date exists, even an established (Voting

Rights Act) violation does not in and of itself merit a preliminary injunction." *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996) (quoting *Watkins v. Mabus*, 771 F. Supp. 789, 805 n. 16 (S.D. Miss. 1991) (citation omitted), *aff'd in part and vacated in part on other grounds*, 112 S. Ct. 412 (1991)). Plaintiffs have other corrective remedies available to them through this Court and under Tribal law.

V. CONCLUSION


Balancing all of the foregoing factors with the public interest, the Plaintiffs motion for temporary restraining order is DENIED.

IT IS SO ORDERED this 13th day of September, 2006.

BY THE COURT:


ROCHELLE DUCHÉNEAUX
ASSOCIATE JUDGE

ATTEST:


CLERK OF COURT