

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

LOWER SIOUX INDIAN RESERVATION)	STATE OF MINNESOTA
IN THE MATTER OF THE ELECTION)	CIV#: 06-051
PROTEST OF DENNY PRESCOTT,)	
)	MEMORANDUM OPINION
PROTESTOR.)	AND ORDER
)	

Protestor Prescott protests the outcome of the September 15, 2006 Lower Sioux Community election for a seat on the Community Council. Protestor alleges that substantial and grave irregularities occurred which affected the outcome of the election. On September 27, 2006, the Lower Sioux Community and the Community Election Board filed a Memorandum in Opposition to Election Protest. On that same day, Protestor filed his Memorandum in Support of Election Protest.

On September 28, 2006, the Court heard the protest. Appearing at the hearing were Protestor Prescott, appearing in person and through Thomas Fabel, his Counsel of Record, and the Lower Sioux Community Council and Community Election Board, appearing through Steven Sandven, their Counsel of Record. In addition to Protestor's testimony, the Court heard testimony from Protestor's witnesses, Linda Whittaker, Deanna Barth, and Loren Johnson and the Community Council's witnesses, Marie O'Keefe, Kateri O'Keefe and Gabby Strong.

For the reasons set forth below, the Court finds that Protestor has failed to prove by clear and convincing evidence there were grave and substantial irregularities that affected the outcome of the September 15, 2006 special election.

I. LEGAL STANDARD

The Court, *In Re Protest to the August 5, 2005 Regular Elections in the Lower Sioux Indian Community in Minnesota*, Court File Nos. EP-735-05 and EP-736-05 (LSTC, August 26, 2005), said that:

In accordance with Section 8, subdivision 2 of the Lower Sioux Indian Community Election Ordinance for Regular Elections, . . . the burden of proof of irregularities rests with the Protestors. . . in no case shall the Court order that a new election be held unless the Protestors demonstrate by clear and convincing evidence that there were substantial and grave irregularities which affected the outcome of the election. Proof of minor or technical irregularities shall not require that a new election be held.

II. PROTESTOR'S CLAIMS OF GRAVE AND SUBSTANTIAL IRREGULARITIES IN THE SEPTEMBER 15, 2006 SPECIAL ELECTION

Protestor claims that the following grave and substantial irregularities which occurred in the September 15, 2006 special election affected the outcome of said election:

1. Lower Sioux Community Council Resolution 06-61 unconstitutionally extended the right of franchise to nonresident voters.
2. Absentee ballots were sent to nonresident voters without request in violation of Section 6 of the Election Ordinance.
3. Community Election officials refused to provide Protestor with a complete list of mailing addresses for nonresident voters who received absentee ballots thereby preventing him from presenting his campaign material to them.
4. Community Election officials advantaged Protestor's opponent by providing him a list of mailing addresses of nonresident voters.
5. Community officials advanced Protestor's opponents' candidacy by publishing his campaign materials in the Community news outlets.

6. Community officials published information about Protestor that defamed and injured his candidacy.

The Court will address Protestor's claims 2 through 5 first as they are more easily disposed of.

III. LOWER SIOUX COMMUNITY GOVERNMENT DID NOT DEFAME PROTESTOR

After hearing testimony of the parties and other evidence, the Court finds that Protestor has failed to prove by clear and convincing evidence that Lower Sioux Community government officials defamed him through publication of materials in Community news media about Protestor's two removals from the Community Council. If an alleged defamatory statement is substantially true it provides an absolute defense for an action of defamation. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.) cert. denied, 479 U.S. 883 (1986). At hearing, Protestor presented no evidence that the published materials were false or that they were made with reckless disregard for the truth. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The evidence clearly shows that the information published and distributed by Community Council officials to the Lower Sioux membership concerning Protestor's leasehold interest and a referendum election on said interest and his removals from the Community Council is true. Protestor is the holder of a Community lease for a convenience store, a referendum was held on whether Protestor should continue to hold said lease and Protestor was twice removed him his seat on the Community Council.

Furthermore, Protestor is a public official and as such, in order to prove defamation, must show that Community officials acted with malice. *New York Times*, 376 U.S. 254. The limited testimony Protestor offered at hearing failed to prove by clear

and convincing evidence that Community officials acted with malice in the publication of the materials in question. Thus, the Court finds that the Community Council officials' publication of the materials in question does not constitute a grave and substantial irregularity that affected the outcome of the election.

IV LOWER SIOUX COMMUNITY OFFICIALS DID NOT FURTHER
PROTESTOR'S OPPONENT'S CAMPAIGN BY PUBLISHING HIS
CAMPAIGN LITERATURE IN THE COMMUNITY NEWS OUTLETS

Protestor testified that Lower Sioux Community officials advanced his opponent's candidacy by publishing his campaign literature in the Community Newsletter and New Notes, which were delivered to all resident and nonresident Community members prior to the September 15, 2006 special election. Community officials, Marie O'Keefe, Kateria O'Keefe and Gabby Strong, testified that all candidates were invited to submit campaign materials to be published in the Community's two news outlets, the Community Newsletter and News Notes. Marie O'Keefe, Community Election Board Chairperson, testified that Protestor opted to not take advantage of the Community's invitation to publish his campaign materials and that he had informed Community officials that he wished to publish his own campaign materials through the mail.

Protestor admitted that he had not accepted the Community's invitation to submit campaign materials for publication in the Community's news outlets. He testified that he wanted to distribute his own campaign materials and had asked for, but had been refused, a copy of the mailing addresses of all Community members eligible to vote.

The evidence shows that Community Council and Community Election Board officials offered all candidates the opportunity to submit campaign materials to be published in the Community Newsletter and New Notes. Accordingly, the Court finds

that Community officials did not advance the candidacy of Protestor's opponent as Protestor was afforded the same opportunity to publish his campaign materials in the Community news outlets. Thus, the Court finds that the fact that Community officials publication of Protestor's opponents' campaign materials does not constitute a grave and substantial irregularity which affected the outcome of the September 15, 2006 election.

V. **LOWER SIOUX COMMUNITY ELECTION OFFICIALS REFUSAL TO PROVIDE PROTESTOR AND HIS OPPONENT THE ADDRESSES OF COMMUNITY MEMBERS¹ DOES NOT VIOLATE THE BYLAWS**

Two of Protestor's allegations of grave and substantial election irregularities stem from Community Election Officials' refusal to provide Protestor with the mailing addresses for nonresident voters and their alleged provision of the same list to Protestor's opponent. Protestor argued that, under the Lower Sioux Community Bylaws, as a Community member, he is entitled to a copy of the mailing addresses of the Community members. In support of his argument, Protestor cites the Bylaws, Article I, Section 3, which provides in relevant part, "All official records of the Secretary shall be open to inspection of the members of the Community at all reasonable time." The Community Council argues that it did not provide the mailing addresses to Protestor or his opponent because the Community Council has determined that the release of this information could potentially adversely affect the privacy of Community members.

At hearing, Protestor testified that, on several occasions, he had attempted to obtain the mailing addresses of nonresident Community members so that he could mail them his campaign materials. He testified that the Tribal Secretary and Election Board officials refused to give him the addresses citing the May 19, 2006 policy that the names

¹ At hearing, the Court ordered the parties to brief the issue of whether the Community Council had the power to classify as private the mailing addresses of Community members.

and addresses of the Community members were private and would not be given out to anyone for any purpose

Community Councilman-elect Johnson testified that, contrary to Protestor's claim, he had not been given a copy of the mailing addresses of the Community members over the age of 18 years. He testified that he obtained the names and addresses of the nonresident voters through a list created by an organization on whose governing body he serves and through contacting friends and relatives.

In his post-hearing letter brief, Protestor did not cite any authority on the issue of whether the Community Council has the power to classify as private the mailing addresses of Community members. Instead, he argued that Community officials could not enact a policy classifying as private the mailing addresses because the policy would, in effect, amend the Bylaws, Section 3 as it pertains to official records of the Community. Protestor argued that the Bylaws can only be amended in the manner prescribed therein. Protestor asserted, "The Bylaws of the Lower Sioux are as much its fundamental law as the Constitution itself" Protestor's Letter Brief, p. 2. As such, Protestor argued, "The denial of his (Protestor's) access to that information... was a significant violation of the fundamental law of the Lower Sioux Community." *Id.* at 4.

In its post hearing brief, the Community Council argued that it could classify as private the mailing addresses of the Community members because the mailing lists are not "official records" of the Community. Community Council Brief, pp. 2, 3. The Community Council also argued that it had, on May 19, 2006, chosen to restrict access to the addresses of Community members, well in advance of the September 15th election and that, because "there is no guidance to what constitutes an 'official record,' the

Community Council interpreted the Bylaws in a manner that allows access to the membership list but not the addresses or telephone numbers of enrolled members." *Id.* at 4. The Community Council said that its interpretation of the Bylaws was "consistent with how other Tribes treat personal information of its members." *Id.*

The Community Council argued that the Election Ordinance does not require that a mailing list of the Community members be provided to candidates, but that a "list of all Community members who are 18 years or older" be posted in the Community Center. *Id.* at 6. The Community Council also argued that past practices of the Community Council support its action in this regard, citing Community Council Resolution 105-01 (classifying as private financial information concerning the Community and its members) and citing past examples of former Community Councils' refusals to provide information to Community members.

At hearing, the Community Council argued that, by classifying as private the mailing addresses of Community members, it wanted to prevent an intrusion into the lives of Community members through the mail of unwanted solicitations and other potentially offense materials. The Community Council argued that doing this supported a compelling Community interest to protect the privacy of the members of the Community.

The Constitution and Bylaws, the Judicial Code and other Community laws do not address the issue of privacy. Thus, the Court looked to the Federal courts for guidance on this issue. The United States Supreme Court has held that an individual has a reasonable expectation of privacy with respect to their home address. See, e.g. *Rowan v. United States Post Office Department*, 397 U.S. 728, 737 (1970) (individuals have a right to reject unwanted mailings, based upon Congress' desire to protect the privacy of

the home); *Federal Labor Relations Authority v. Department of Navy*, 966 F. 2d 747, 756 (3rd Cir. 1992) (en banc) (disclosure of an individual's home address infringes upon a recognized privacy interest), *Federal Labor Relations Authority v. Department of Treasury*, 884 F. 2d 1453 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990) (Privacy Act prohibits release of home addresses).

The Court finds that the Community Council has a compelling interest in protecting the privacy of Community members. The Court finds that the Community Council's classifying as private the mailing addresses of Community members does not violate the Lower Sioux Community Bylaws pertaining to official records of the Community and the members' right to inspect the same.

Accordingly, the Court finds that Protestor has failed to prove by clear and convincing evidence that the Community Council officials' and the Community Election Board Chairman's refusal to provide the mailing addresses of Community members to Protestor constitutes a grave and substantial irregularity that affected the outcome of the September 15, 2006 special election.

VI. COMMUNITY ELECTION OFFICIALS ACTED PROPERLY IN SENDING ABSENTEE BALLOTS TO NONRESIDENT MEMBERS WITHOUT REQUEST

Protestor argues that the Community Election Board mailed absentee ballots to non resident voters without first receiving a request for the same as required by the Election Ordinance Section 6. However, the Community Council asserts that the Election Ordinance was amended on August 28, 2006 to remove said request requirement and that the Election Board sent absentee ballots to all nonresident members whose names appeared on the Community Voter's lists. The Community Council argues that

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the Constitution, Article IV, Section 1(k) imbues it with the power to amend the Election Ordinance as it did. Thus, the Community Council argues it did not violate the Election Ordinance when it sent absentee ballots to all nonresident members without request.

The Court agrees that the Community Council has the power under the Constitution to amend the Election Ordinance. Generally, most Tribes, prescribe a specific time in which such amendments must be done prior to an election. However, the Lower Sioux Election Ordinance is silent on this issue. Thus, the Court finds that the Election Board did not violate Section 6 of the Election Ordinance, as amended on August 28, 2006, and the Board's mailing of the absentee ballots to nonresident voters without request does not constitute a grave and substantial irregularity which affected the outcome of the September 15, 2006 special election.

VII. THE LOWER SIOUX CONSTITUTION DOES NOT LIMIT THE RIGHT TO VOTE TO RESIDENT MEMBERS

The Lower Sioux Constitution Article VI-Elections, Section 5, as amended on June 28, 1977, provides:

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."

Protestor agrees that Section 5 does not include residency as a qualification to vote, but argues that Article VI, Section 5 must be read in *pari materia* with Article III, Sections 3 and 3(a). Section 3 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) provides:

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 privileges of membership under such Community law as was in effect prior to the date of such vote.

Protestor argues that, while Article VI, Section 5 does not include residency as a qualification for the right to vote in Community elections, Article III, Sections 3 and 3(a) are unambiguous in their intent that the right of franchise be further qualified by the requirement of residency. He contends that voting is one of the "rights and privileges of membership" contemplated under these two sections.

The Community Council argues that Protestor is mixing apples and oranges as Article VI, Section 5 addresses qualifications to vote and Article III, Sections 3 and 3(a) address the manner in which Community members lose and reacquire the right to participate in the benefits of the Community and that they have nothing to do with the right to vote. The Community Council contends that voting is not one of the "benefits" of membership contemplated under Sections 3 and 3(a). They argue that, if the Community members involved in amending the Constitution to include the Section 3(a) language had meant to include the right to vote as one of the "rights and privileges" to Community benefits, they would have included such language and they did not.²

In support of its argument, the Community Council cites the January 22, 2002 letter from the Bureau of Indian Affairs, Acting Regional Director, to former Community Council Chairperson Ann Larsen concerning the 2001 Community Council's proposed amendment to Article III, Section 3. The Bureau official warned Chairman Larsen that the proposed amendment was inconsistent with Article VI, Elections as the proposed

² The Lower Sioux Community Constitution was amended in 1998 to include Section 3(a).

amendment affected the voting rights of the members. Thus, the Community Council argues that, since the Secretary of Interior (who must review for constitutionality and approve proposed amendments to the Lower Sioux Constitution) clearly distinguished between Articles III, Sections 3 and 3(a) and Article VI, Section 5, the two Articles are separate and distinct and should not be read in *pari materia*.

Protestor also argues that Community custom and tradition supports his reading of the Constitutional provisions at issue. He asserts that the Lower Sioux Community has always been a "residential" Community and cites the Preamble to the Constitution and Article IX, Land, Section 1, in support thereof. The Preamble begins, "We, the Minnesota Mdewakantan Sioux residing on the Lower Sioux Reservation..." Article IX, Section 1, provides in relevant part, "The land... was purchased by the United States for the Mdewakantan Sioux residing in the State of Minnesota..." Protestor argues that the Constitution's framers' inclusion of the word "residing" in the Preamble and Article IX clearly shows that the framers intended that residency be a requirement to vote in Community elections. Finally, he argues that, with the exception of Secretarial elections, the Lower Sioux Community's customary practice is to limit the right to vote to residential Community members.

Community officials only response to Protestor's argument that residency is required by Lower Sioux Community custom and tradition is that Lower Sioux Community customs and traditions predate the Community's 1936 adoption of the 1934 Indian Reorganization Act Constitution and Bylaws and that there is no Community custom and tradition relating to residency as a prerequisite to voting.

A. The May 29, 2006 Advisory Opinion

The Court will address Protestor's residency arguments in turn. But, before it does, it will first discuss its departure in this Opinion from the Advisory Opinion of B.J. Jones, former Lower Sioux Tribal Court Chief Judge gave concerning membership and voting. In May 2006, the Lower Sioux Community Council petitioned the court for an advisory opinion on whether Tribal law allowing only those members who qualified for per capita benefits to vote in Community elections violated the Constitution or the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.

After discussing the Articles III and VI of the Constitution and other Tribal laws, Judge Jones found that the Community government's practice of allowing only those members who qualified for per capita benefits to vote in Community election did not violate the Constitution or the Indian Civil Rights Act. Judge Jones said that he did not believe that, "residency requirements for tribal elections are ipso facto violate of due process." Advisory Opinion, p. 9. He said that tribal communities encounter differing political and economic realities than their non-Indian counterparts. He speculated that nonresident tribal members may not be as sensitive or not at all sensitive to these realities. Thus, he concluded that limiting the right to vote to resident Community members was a sufficiently compelling governmental interest to withstand Indian Civil Rights Act scrutiny.³

The Court disagrees with Judge Jones' conclusion that, in addition to a substantive requirement, Community membership has a procedural requirement which is found in Article III, Section 3(a)'s five year residency requirement to reacquire the rights

³ Judge Jones also rendered an opinion on whether the Article III, Section 3(a) violates an individual's constitutional right to travel. His analysis and conclusion are not important to the Court's decision here today and will not be discussed in this opinion.

and privileges of membership. Advisory Opinion, p. 3. It does not. Section 3(a)'s procedural requirement deals with re-establishing and maintaining residency in the Community for the purpose of reacquiring the rights and privileges OF THE BENEFITS of the Community, such as land assignments and per capita. Section 3(a) does not address how one reacquires membership in the Community. Under the Constitution, a member who removes himself from the Community for two years loses the rights and privileges to the benefits of the Community, but does not lose his right to be a member of the Community.

The Constitution is silent on how one loses membership in the Community. However, Article III, Section 4 provides that the Community Council can enact ordinances "governing the acquisition and loss of membership, subject to the approval of the Secretary of Interior. The Lower Sioux Enrollment Ordinance provides for disenrollment in cases of fraud and dual tribal membership and for voluntary relinquishment of membership by an individual. Thus, it appears that, unless one is disenrolled or voluntarily relinquishes membership, continuing membership in the Community is unaffected by one's ceasing to be a resident of the Community.

Other parts of the Judicial Code address the issue of membership. For example, the Membership Privilege and Gaming Revenue Allocation Ordinance and the Civil Banishment Ordinance address membership but only in the context of how a member reacquires the rights and privileges to the benefits of the Community, specifically receiving per capita payments. However, since these ordinances address membership in the context of the loss of membership rights and privileges and not the loss of

membership per se, they are not central to the Court's inquiry and are not included in its analysis.

B. Article III, Section 3(a) and Article VI, Section 5 When Read in *Pari Materia* Do Not Limit Voting to Resident Members

The Court agrees with Protestor that the term "resident" or "residency" can be found in more than one section of the Lower Sioux Constitution. As noted supra, the Preamble contains the phrase, "residing on the Lower Sioux Reservation." Article III, Section 1(a) states "The bona fide Indian residents of the Lower Sioux Reservation..." Article III, Section 3(a) states, "Any member... may acquire rights and privileges by establishing residency in the Community..." Article IX, Section 1 states, "The land... purchased by the United States for the Mdewakatan Sioux residing in the State of Minnesota."

However, the Court disagrees with Protestor that the cumulative effect of the use of the terms "resident" and "residency" in the Constitution supports his conclusion that to be a qualified voter in Community elections one must be a resident of the Community. 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.⁴ See Lower Sioux Community Council Resolution 06-19; *Fidsvig v. Lower Sioux Community*, CIV-449-02 (LSCTC, Sept. 26, 2002) (Court should not supplant Council's findings merely by identifying alternative findings that could be supported by substantial evidence); *Pearsall v. Tribal Council for the Confederated Tribes of Grand Ronde*, A-03-

⁴ Lower Sioux Community Resolution 06-19, enacted February 21, 2006, provides that that Community Council can issue written opinions concerning the meaning and interpretation of the Tribal Constitution and that said opinions shall be conclusive and final as to the meaning and interpretation of the Constitution.

02-002 (Jan. 30, 2004) (The Council's interpretation of TESO is entitled to substantial deference...), citing, *Chevron, U.S.A., Inc. v. Natural Resources defense Council*, 467 U.S. 837, 843-44 (1984) (considerable weight should be accorded to executive department's construction of the statutory scheme it is entrusted to administer); *Providence Health System-Washington v. Thompson*, 353 F.3d 661, 664-65 (9th Cir. 2003) (a reviewing court should give effect to an agency's interpretation of its own regulation so long as it is reasonable, that is, so long as the interpretation sensibly conforms to the purpose and wording of the regulation). 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.

Furthermore, the Court's decision to defer to the Community government's interpretation of Article VI, Section 5 of the Constitution is consistent with the current Federal government policy of deferring to tribal interpretation of tribal governing documents. The Interior Board of Indian Appeals has held that "tribes have primary authority to interpret their own law and where the tribe has put forth a reasonable interpretation of its law, the Bureau must defer to that interpretation." *Paula Brady, Leta K. Jim, and Patricia Stevens, v. Acting Phoenix Area Director*, 30 IBIA 294 (1997); *Shakopee Mdewakanton Sioux Community v. Acting Area Director*, 27 IBIA 163 (1995). "In furthering the doctrines of tribal sovereignty and self-determination, the Bureau recognizes the right of tribes to interpret their own laws and gives deference to the tribe's interpretation of its own law." *San Manuel Band of Mission Indians v. Sacramento Area Director*, 27 IBIA 204 (1995); *Donna Van Zile & James Crawford v. Minneapolis Area*

Director, 21 IBIA 258 (1992); *United Kectoowah Band of Cherokee Indians in Oklahoma v. Muskogee Area Director. et al.*, 22 IBIA 75 (1992); *James C. Greendeer v. Minneapolis Area Director*, 22 IBIA 91 (1992). "Review of tribal ordinances, even though required by a tribal constitution, is an intrusion into tribal self-government. Review should therefore be undertaken in such a way as to avoid unnecessary interference with tribal self-government." *Cheyenne River Sioux Tribe v. Aberdeen Area Director*, 24 IBIA 55 (1993).⁵

The Lower Sioux Constitution requires that the Secretary of Interior review and approve proposed constitutional amendments before a constitutional amendment election can be held. LSConst., Article XIII (no amendment shall become effective until it shall have been approved by the Secretary of Interior). As discussed *supra*, in 2001, the Community Council, by resolution, requested the Secretary of Interior to hold an election on a proposed amendment to Article III, Section 3. On January 22, 2002, the Secretary of Interior, through his agent, the Midwest Regional Office, responded to the Community Council's request. The Secretary informed the Community Council that the proposed amendment, which, *inter alia*, sought to include a loss of voting privileges in Section 3(a)⁶ affected Article VI, Section 5 and that it should be amended as well to avoid conflict. The Secretary said:

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(sic) age or older, on the day of the election

⁵ See <http://www.ibiaelections.com/ibiaservices/ibiaTribalGovSurvey>. Overview of IBIA Decisions on Tribal Government Issues.

⁶ The proposed amendment to Section 3(a) reads as follows: "Full Membership Privileges. All adult 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." (Emphasis supplied.)

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 VI, 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. Section 5 would then read:

Section 5. 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 with full membership privileges. (Emphasis original.)

There is no evidence before the Court which shows how the Community Council responded to the Secretary's review. However, documents entered into evidence by the Community Council show that no Secretarial election was called on the proposed amendment and the Constitution, with respect to the qualifications to vote in Community elections, stands as it was written in 1936 and amended in 1977 (to lower the voting age from 21 years to 18 years), to wit: one need only be 18 years of age on the day of the election and be a member of the Community. Accordingly, the Court finds that, under the Constitution, there is no residency requirement to vote in Community elections.⁷

C. The Residency Requirement to Vote in Community Elections is Not a Community Custom and Tradition

Protestor also argues that Lower Sioux Community custom and tradition limit the right to vote to resident Community members, to wit: "...the Community has a tradition and culture of allowing only members who have not lost membership to vote in tribal elections." Protestor's Memorandum, p. 13. Blacks' Law Dictionary defines "custom and usage" as, "A usage or practice of a people, which, by common adoption and

⁷ It is a mystery to the Court why, given the Secretary's concerns over the proposed amendment to Article III, Section 3(a) creation of a conflict between it and Article VI, Section, the Secretary would subsequently, in 2003, approve changes to the Membership Privilege and Gaming Revenue Allocation Ordinance which tie the right of franchise to the reacquisition of membership privileges through a period of residency. However, since the Constitution takes precedence over a subsequent ordinance enacted by the Community Council which conflicts with the Constitution, the Court will not include the provisions of the Ordinance in its analysis of the issues herein.

acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates." In response to the Court's query as to when the Court should date the beginning of the Community customs and traditions as it pertains to this matter, Counsel for Protestor said that the beginning date should be 1936 when the Community adopted the Indian Reorganization Act Constitution, or when, he stated that the Community became a legal entity.⁹ Counsel for the Community Council argued that the beginning parameter of Community customs and traditions dates much farther back in time.

Since neither party offered any expert testimony on Lower Sioux Community customs and traditions as they relate to elections, the Court will not reach any conclusion concerning whether the Community's custom of limiting the right to vote to resident members should have the force and effect of law and supercede the plain language of the Constitution, Article VI, Section 5, which does not require residency to vote.⁹ However, even if the Court were to find that the Community has adopted a custom of requiring residency to vote in Community elections, said custom cannot "trump" the plain language of the Constitution. See *Nicholas Conway, et al. v. Pasadena Humane Society*, 45 Cal.App. 4th 163 (1996), citing *People v. Ortiz*, 32 Cal. App. 4th 286 (1995). Furthermore, a continuing violation of the Constitutional does not, over time, legalize said violation. The only way to put this alleged "custom" on an equal footing with the

⁹ The Court was taken by surprise by Counsel for Protestor's assertion that the Community became a legal entity in 1936, since the United States Supreme Court has recognized that tribal sovereignty predates that of the United States. See *The Marshall Trilogy: Johnson v. McIntosh*, 21 U.S. (8 Pet.) 543 (1813); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

⁹ Protestor did offer as evidence of the Community's limiting the right to vote to resident members the affidavits of nine Community members who had served on the Community Council.

Constitution -- and render it enforceable by this Court -- is to amend Article VI, Section 5 of the Constitution to include the language the Secretary proposed in January 2002.

For the foregoing reasons, the Court finds that Protestor has failed to prove by clear and convincing evidence that the Community Council's enactment of and implementation of Resolution 06-061 unconstitutionally extended the right to vote to nonresident Community members which constituted a grave and substantial irregularity that affected the outcome of the September 15, 2006 special election.

VIII. CONCLUSION AND ORDER

Protestor Denny Prescott has failed to prove by clear and convincing evidence that the Community government unconstitutionally extended the franchise to nonresident voters by enacting and implementing Resolution No. 06-061 or that the actions of Community government officials or the Community Election Board in conducting the September 15, 2006 special election constitute grave and substantial irregularities that affected the outcome of said election.

Accordingly, as the Court ORDERED on October 4, 2006, Protestor Prescott's protest of the September 15, 2006 special election is DENIED.

BY THE COURT:


ROCHELLE DUCHENEAUX
CHIEF JUDGE

ATTEST:

RITA TELLINGHUISEN, CLERK OF COURT