LOWER SIOUX COMMUNITY TRIBAL COURT IN MINNESOTA

B. J. Jones, Chief Judge
Michael T. Swallow, Associate Judge
Rita M. Tellinghuisen, Clerk of Court

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CLERK'S NOTICE

Date: January 24, 2007

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Re: ***DEANNA BARTH & LORI NELSON vs. LOWER SIOUX COMMUNITY COUNCIL***
TRIBAL COURT FILE NO.: CIV-06-031

Enclosed please find a true and correct copy of the **MEMORANDUM OPINION AND ORDER** in regards to the above-referenced matter.

Rita M. Tellinghuisen, Court Clerk

/rmt

w/enclosure

LOWER SIOUX INDIAN COMMUNITY IN MINNESOTA
TRIBAL COURT

JAN 24 2007

LOWER SIOUX INDIAN RESERVATION	STATE OF MINNESOTA
Deanna Barth and Lori Nelson, Plaintiffs,	File No.: CIV-06-031
vs.	MEMORANDUM OPINION AND ORDER
The Lower Sioux Community Council, Defendant.	

This matter is before the Court on Defendant's Motion to Dismiss Plaintiffs' May 23, 2006 Complaint alleging that Community Council Resolution 06-61 violates Article III, Section 3 of the Lower Sioux Indian Community Constitution and that, 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. Plaintiffs also assert that the amendment deprives them 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). Defendant moved to dismiss the Complaint on the grounds 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.

I. FACTS AND PROCEDURE

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 Court heard Plaintiff's motion on September 12, 2006. On September 13, 2006, the Court denied Plaintiff's motion for temporary restraining order or temporary injunction.

On October 30, 2006, Plaintiff filed a motion for entry of judgment and a memorandum in support of said motion. Thereafter, the Clerk of Court contacted the parties concerning whether either side wanted to present additional argument on the issues. The parties responded in the negative.

II. LEGAL STANDARD

A motion to dismiss for lack of jurisdiction challenges the Court's power to hear the case. *Mortenson v. First Savings and Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977). The Court must always decide jurisdictional issues and "has broad power to decide its own right to hear a case." *Osborne v. United States*, 918 F.2d 724, 729 (8th Cir.

1990). Jurisdiction is a threshold question and must be decided at the onset. *Id.* at 729. In order to hear a case, a court must be vested with both subject matter and personal jurisdiction. *Omaha Tribe of Nebraska v. Darland Construction Company, et al.*, CV#: 14-14-92 (NPITCA May 28, 1993). A court has subject matter jurisdiction if it has authority under the constitution and laws to hear and determine cases of a general class to which a particular action belongs. *Id.*

A motion to dismiss on jurisdictional grounds should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Tanner v. Heise*, 879 F.2d 572, 576 (9th Cir. 1989) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court must accept all allegations of material fact as true and construes the allegations in the light most favorable to the non-moving party. *Id.* The court "should not approve dismissal of [a] complaint unless it appears beyond a doubt that [plaintiff] can prove no set of facts in support of his claim which would entitle him to relief." *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Court must impute to the non-moving party all reasonable inferences. *Deuser v. Vecera*, 139 F.3d 1190, 1191 n. 3 (8th Cir. 1998). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. See *Basso v. Utah Power and Light Co.*, 495 F.2d 909 (10th Cir. 1994).

In this case, Defendant has challenged the jurisdiction of the Court to hear this matter on two grounds; the Plaintiff's lack standing to bring this cause of action and the Defendant's immunity from suit. Alternatively, Defendant also argues the issue before the Court is one that is committed solely to the legislative branch of the government; thus, should be dismissed under the political question doctrine. Accepting its obligation

to determine its jurisdiction in this matter and after having carefully considered the parties arguments and the relevant legal authority, the Court looked beyond the same and to the results of its own research and has reached the following conclusion.

III. DISCUSSION

A. Plaintiffs Lack Standing to Bring this Action

The Court will not engage in a lengthy analysis of the issue of standing as the Court did so in an earlier decision in *Edsvig v. Lower Sioux Indian Community*, CIV-449-02 (LSTC September 26, 2002).[1] However, given the Court's thorough analysis of the standing issue in that case, the Court will register its surprise that neither party cited this case in support their arguments for or against standing. In *Edsvig*, the Court found that the Plaintiff lacked standing because she:

> ...[h]as not suffered any personal or individual injury, but only an injury shared amongst all of the members of the Community. In the United States' courts, the general rule is that 'a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizens' interest in proper allocation of the constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not [have standing].' The Unites States Supreme Court 'repeatedly has rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered accordingly to law...
>
> [I]t must be remembered that, when dealing with standing, the fundamental issue focuses on the party attempting to have his case heard by the court and not the merits of the issues he or she wishes to have adjudicated...Still, the issue of standing often turns on the nature and source of the claim asserted...Thus, although the Court takes the allegations of the Complaint as true, it is not determinative whether those facts demonstrate that the Community Council violated the Membership Privilege and Gaming Revenue Allocation Ordinance. Instead, it is whether that violation, assuming it occurred, injures Edsvig in a personal and individual manner. The Community is correct, however, that Edsvig's claim of a violation...is an injury shared with Community members at large, or, at least, all qualified members...But, '[a]n interest shared generally with

[1] The standing issue in Edsvig was a case of first impression for the Court and its decision is now case law precedence in this Court.

> the public at large in the proper allocation of the Constitution and laws will not do…
>
> [W]hen the asserted harm is a 'generalized interest' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. (All internal citations omitted.)

In this case, Plaintiffs have asserted a harm that is of a "generalized interest shared in substantially equal measure" by all eligible voting members of the Lower Sioux Community who reside on the Reservation. There is no evidence to show that Plaintiffs are mind readers and neither is the Court. Thus, there is no way of knowing how the off-reservation Community members to whom the right of franchise has been extended under Resolution 06-61 at issue here will vote in future Tribal elections. Will they, as Plaintiff's maintain, consistently vote in such a way as to deprive Plaintiffs of any meaningful chance of electing the candidate of their choice? Any answer to this question, without evidence showing a consistent voting pattern over a series of Tribal elections, would be speculative and, thus, under the Court's holding in *Edsvig*, it is unlikely the claimed injury can be redressed by a favorable decision. *Edsvig* @ 4.

Moreover, given the historical vagaries of tribal member voting patterns and the switching of alliances for often the slightest of real or perceived transgressions by a tribal official or candidate for tribal office, there is a strong possibility that a candidate of Plaintiffs' choice could be elected with or without the votes of the newly enfranchised off-reservation voters. Thus, the Court finds that, under the standard articulated in *Edsvig*, Plaintiffs have failed to show that the injury they allege is personal and individual and, accordingly, they lack standing to bring this matter.

B. The Community Council Enjoys the Tribe's Absolute Immunity from Suit

Even if the Court had found that the Plaintiffs have standing to bring this suit, they would still have to overcome Defendant's assertion of sovereign immunity and they cannot. The Court agrees with Defendant's analysis of the issue of the Lower Sioux Tribe's immunity from suit. The Court also accepts Plaintiff's reading and interpretation of the Court's holding in *Prescott and Goodthunder v. Wolfchild, Adolpson and Blue*, CIV-06-043 (August 2, 2006 Memorandum Decision). However, the Court believes that both parties have missed a critical point in their analysis of whether Defendant Lower Sioux Community Council is immune from suit, to wit: is the *named* defendant in this action immune from suit under Tribal law.

The Court reviewed the original complaint in this matter which is entitled, "Deanna Barth and Lori Nelson v. Lower Sioux Community Council, Defendant." On page 2 of the Complaint, the parties are identified as:

> The Plaintiffs are adult members of the Community, and are eligible to vote in election of the Community, under Article III, section 3 of the Constitution.
>
> *The Defendant is the governing body of the Lower Sioux Indian Community, and is the body charged with the duty to implement the provisions of the Constitution, including the provisions of Article III, section 3 thereof.* (Emphasis supplied.)

None of the individual Community Council representatives are named as defendants in their official or individual capacities, which raised the question in the Court's mind, "In such a case, does the Tribal Council, as the only named defendant, stand on the same footing as the Tribe and enjoy its absolute immunity from suit absent an express and unequivocal waiver thereof?"

Finding no Lower Sioux Tribal Court case on point, the Court looked to its sister tribal courts for guidance. The Colville Confederated Tribes Court of Appeals, in a case

involving an alleged civil rights violation, answered in the negative the question of "whether there is a distinction between Tribal Business Council as sued herein and the Tribe itself" finding, "We see no meaningful distinction between the Business Council as sued herein and the Tribe itself, and the same rules should apply in this case as if the Tribe itself had been named as a defendant. The (Business Council) is immune from suit..." *Colville Business Council v. George*, 1 CCAR 15 (Colville Confederated 11/08/84). The Court went on to say, "Official immunity is not an issue that is before us, and it was not before the Trial Court because no individual official was named, nor was an individual's official capacity designated or pleaded." *Id.*

In 1994, the Cheyenne River Sioux Tribe Court of Appeals, in a case involving a range unit dispute, said essentially the same thing. The Court interpreted an earlier decision wherein it held that tribal officials could be sued for injunctive or declaratory relief saying, "While perhaps containing some excessively broad dicta, *LeCompte* should not be read as providing anything more than an implied injunctive or declaratory relief action against *tribal officials* for actions taken in violation of the federal or tribal law. It did not hold that any such action could be filed directly against the Tribe as a named party defendant." *Clement v. LeCompte, et al.*, No 93-009-A (Chey.Riv.Sx.Tr.Ct.ofApp. 1994) (Emphasis original.)

In a more recent case, the Oneida Court of Appeals, in a case involving public release of private and confidential information, said, "As the Legislative Branch of the Oneida Government, the Business Committee was established by the Oneida Constitution and is therefore generally immune from suit." The Court went on to say, "The Court of Appeals agrees with...(and) supports the Respondent's contention that the Oneida

Business Committee is the government of the Oneida Nation in Wisconsin and that the Oneida Business Committee did not waive its sovereign immunity." *Matthew J. Denny, et al. v. Oneida Business Committee*, No. 03-TC-001 (Oneida Appeals 07/28/2002).

Similarly, in a redistricting and reapportionment case, the Ho-Chunk Tribal Court said:

> The Court previously dismissed the Ho-Chunk Nation as a named party to the action. *See Mot. Hr'g* (LPER at 1, 09:06:12 CST). The Supreme Court has clearly articulated that "[s]uits based upon the legal argument that someone has acted outside of their authority specifically name the individual(s)."...A failure to do so will most likely result in a dismissal in the absence of a properly executed waiver of sovereign immunity...However, a plaintiff may permissibly seek an equitable remedy, in the form of declaratory and injunctive relief, if the plaintiff alleges that named defendants have exceeded the scope of their constitutional authorities. (Internal citations omitted.)

Mudd v. Ho-Chunk Nation Legislature, CIV-03-01 (HCNC February 3, 2003).

Thus, the Court finds that, since Plaintiffs have not sued the individual Community Council members in their official or individual capacities, the Community Council stands on the same legal footing as the Tribe itself for purposes of determining whether it enjoys the Tribe's immunity from suit.

C. The Court's Previous Holding on this Issue is not Dispositive

In this case, Plaintiffs' argue that the issue of sovereign immunity has already been decided in the *Prescott and Goodthunder v. Wolfchild, Adolphson and Blue* case and that it is dispositive of the immunity issue in this case as well. However, *Prescott/ Goodthunder* is distinguishable from this case as there the dispute was among the members of the Lower Sioux Community Council, which lead the Court to opine:

> The second basis for dismissal alleged by the Defendants is sovereign immunity...and the qualified immunity of each of the Defendants in their capacity as elected leaders. The complaint is not clear on whether the defendants are being sued in their official or individual capacities, although it is clear that the Plaintiffs contend that the Defendants exceeded their authority to enact the resolution and constitutional interpretation they challenge...In a prior litigation between these

> Parties, the Court rejected the sovereign immunity defense in the context of a dispute arising under the Constitution of the Community and the Indian Civil Rights Act.

The *Prescott/Goodthunder* Court quoted the previous court's analysis of the issue of sovereign immunity which concluded with the finding that the Community Council's enactment of Resolutions #39-93 and #30-95 were unambiguous waivers of sovereign immunity; thus, the tribal officials were not immune from suit.[2]

Cognizant of the fact that the Community Council had subsequently enacted a resolution rescinding Resolution #39-93, the *Prescott/Goodthunder* Court dismissively said, "The Court acknowledges that there have been resolutions since that decision attempting to rescind the resolutions cited therein and to curtail the Court's authority to review Council actions. *Notwithstanding those efforts*, the Court finds that sovereign immunity or qualified immunity would not protect a tribal officer from a suit requesting declaratory and injunctive relief alleging an excess of authority under the Lower Sioux Constitution and By-Laws or the Indian Civil Rights Act." (Emphasis supplied.)

This Court, however, finds that one of the "efforts" or resolutions of which the *Prescott/Goodthunder* Court was so dismissive -- coupled with the Court's finding that a suit against the Tribal Council is a suit against the Tribe -- to be dispositive of the sovereign immunity defense Defendant has raised in this case. Resolution No. 06-08 was enacted on January 17, 2006, approximately four months before the Complaint in this case was filed. It rescinded Resolution No. 93-39 because the Community Council found that it was "not in the best interest of the Lower Sioux Indian Community to allow a broad waiver of its sovereign immunity."

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[2] The Prescott/Goodthunder Court did not cite the case from which it quoted.

Given the plethora of cases filed against the Lower Sioux Indian Community since the Defendants took office in 2005[3], the Court assumes that in enacting Resolution No. 06-08, the Community Council wanted to curtail or lessen the number of lawsuits it had to defend and to get on with the task of governing. See *Barr v. Matteo*, 360 U.S. 564 (1959) (Officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties – suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of the policies of government.)[4] Regardless of what the Community Council's motive in enacting Resolution No. 06-08, the fact remains that it was a legitimate exercise of the authority given to it under the Constitution, Article V, Section (l).[5]

In its decision, the *Prescott/Goodthunder* Court said that the Community Council's enactment of Resolution No. 06-080 was simply an "attempt to rescind" Resolution No. 93-39. However, this Court finds that the Community Council's enactment of Resolution No. 06-08 was not an "attempt to rescind" Resolution No. 93-39; it clearly rescinded Resolution No. 93-39. Thus, the Court finds that, absent an express waiver of immunity, the Tribe, the Community Council and tribal officials are immune from suit as set forth in the Judicial Code, Chapter II, Section 3, which states in relevant part:

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[3] There have been 10 cases filed by these same or related individuals since September 2005.
[4] One commentator said, "According to the Court, sovereign immunity…protects the public purse, protests against vexatious lawsuits, encourages citizens to assume important governmental positions by alleviating employees' fear of being sued, and promotes the orderly administration of justice. Kaufman & Canoles, http://www.kaufmanandcanoles.com.
[5] Section (l) provides, "To adopt resolutions regulating the procedure of the Community Council itself and of the other Community Agencies and Community officials."

> The sovereign immunity from suit of the Tribe and every 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 court, federal, state or tribal is hereby affirmed; nothing in this Code, with the exception of subsection (d) of this section, shall constitute a waiver of the Tribe's sovereign immunity. The Tribal Court shall have no jurisdiction over any suit brought against the Tribe in the absence of an unequivocally expressed waiver of that immunity by the Lower Sioux Community Council.

IV. CONCLUSION

Based on the foregoing, the Court concludes that Plaintiffs lack standing to bring this cause of action and that sovereign immunity bars the Plaintiffs' claims against the Community Council in this action. Therefore, the Court lacks subject matter jurisdiction and this matter is dismissed.[6]

IT IS SO ORDERED this 24th day of January, 2007.

BY THE COURT:

Rochelle Ducheneaux

ROCHELLE DUCHENEAUX
ASSOCIATE JUDGE

ATTEST:

Rita Tellinghuisen

CLERK OF COURT

[6] Because the Court has found that it lacks subject matter jurisdiction to hear this matter on standing and immunity grounds, it is unnecessary for the court to decide the political question issue or the merits of Plaintiffs' constitutional and due process claims.

CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2007, I mailed a true and correct copy of the **MEMORANDUM OPINION & ORDER** by sending that copy via United States Mail to:

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