LOWER BRULE SIOUX TRIBAL COURT)
LOWER BRULE SIOUX TRIBE) : SS IN TRIBAL COURT
LOWER BRULE SIOUX JURISDICTION)

****

LOWER BRULE SIOUX TRIBE, Plaintiff.	)	Civ.# 14-12-00119
vs.	)	
	)	**NOTICE OF ENTRY OF JUDGMENT AND/OR ORDER**
Kevin Wright, Sonny Ziegler, and Desiree LaRoche Defendant/s.	)	
Michael Jandreau, Orville Langdeau Jr., John McCauley Intervenors.	)	

****

TO: LOWER BRULE SIOUX TRIBE vs. Kevin Wright, Sonny Ziegler and Desiree LaRoche

PLEASE TAKE NOTICE THAT the Lower Brule Sioux Tribal Court has entered a (n **PRELIMINARY ORDERS and CONTINUED TEMPORARY RESTRAINING ORDER** in the above-entitled matter on the **13th day of February 2015,** by **B.J. Jones,** Special Judge, A copy of which is attached hereto.

Dated this 16th day of February 2015.

Clerk of Courts

Tara Adamski
Adamski Law Office
1801 East Wells Avenue
PO Box 866
Pierre, SD 57501

Matthew L. Rappold
Rappold Law Office
816 Sixth Street
PO Box 873
Rapid City, SD 57709

Robert T. Konrad
117 East Capitol
PO Box 66
Pierre, SD 57501

CERTIFICATE OF SERVICE

I, Clerk of Courts for the Lower Brule Sioux Tribal Court, do hereby certify that a true and correct copy of the Judgment and the Notice of Entry of **PRELIMINARY ORDERS and CONTINUED TREMPORARY RESTRAINING ORDER** were served upon the following persons, by first class mail with postage prepaid, on the dated shown below.

Dated this 16th day of February 2015.

Clerk of Courts

LOWER BRULE SIOUX TRIBAL COURT LOWER BRULE SIOUX TRIBE LOWER BRULE SIOUX TRIBE JURISDICTION	))SS)	IN TRIBAL COURT CIVIL DIVISION

LOWER BRULE SIOUX TRIBE,
Plaintiff,

CIV-14-12-0119

vs.
KEVIN WRIGHT, SONNY ZIEGLER,
AND DESIREE LAROCHE,
Defendants.

PRELIMINARY ORDERS AND
CONTINUED TEMPORARY
RESTRAINING ORDER

MICHAEL JANDREAU,
ORVILLE LANDEAU JR.,
JOHN MCCOLLEY,
Intervenors

Hearing on the Plaintiff's complaint and application for a temporary restraining order against the Defendants- elected leaders of the Lower Brule Sioux Tribal Council- and on the Defendants' various motions to dismiss were scheduled for the 12th day of February 2015 at 8:30 AM. The Parties and intervenors met for approximately four hours in a good faith effort to resolve their differences, but advised the Court that they had not been able to do so. The Court then went on the record at approximately 12:45 PM and indicated it intended to resolve the outstanding motions filed by the Defendants.[1] Counsel

[1] The Plaintiff has asked that the Defendants' motions and briefs in response to its reply be struck because they were not properly filed. Counsel for the Defendants apparently sent the documents to the Clerk for filing by email and the Lower Brule Sioux Tribal Court rules do not permit electronic filing. The Court will accept the pleadings this time because the Clerk graciously printed them off and filed them, but cautions the parties for future filings although an electronic copy to the Clerk and presiding Judge is suitable to give notice of the filing, the original must be filed by hard copy. When this Court reviewed the file it appears that the Clerk had printed off the electronic documents and filed them so that resulted in the hard copies being filed.

Tara Adamski appeared for the Plaintiff, Matthew Rappold for the Defendants and counsel Robert T. Conrad for the intervenors. The Plaintiff rested on its written submissions, as did the Defendants. The intervenors joined in the Tribe's arguments and also rested on those filings.

The Tribe asserts that the three Defendants are duly elected Tribal Council members for the Tribe and that on December 12, 2014 they purported to hold a Special Tribal Council meeting during which they attempted to remove the Chairman of the Plaintiff Tribe and other elected officers and replace them with other Tribal members. The complaint further alleges that a quorum of the Council, as defined at Article IV, Section 2 of the Lower Brule Sioux Tribal By-Laws, and the Tribal Treasurer were not present at said meeting thus rendering the three Defendants unable to constitutionally act at that time to take the actions they did. Lastly the application asserts that the removed elected officials were not provided due process of law in accordance with Article V, Section 2 of the Lower Brule Sioux Tribal Constitution and therefore their removal is constitutionally suspect under the Constitution of the Lower Brule Sioux Tribe. The Tribe asks for a restraining order to prevent these allegedly illegal actions.

The Tribe goes further in its complaint however to seek a court order declaring that the Defendants have no authority to act as Tribal councilpersons and an injunction preventing them from doing so.

The Defendants have filed a motion to dismiss alleging numerous defenses. First, they claim that the Court lacks subject matter jurisdiction over the complaint because it involves matters left to the legislative and executive branches of government. The Defendants also assert that the Plaintiff lacks standing to bring this action, both because it

cannot demonstrate that it will suffer a concrete injury if the Court does not act and secondly that the Tribe, through its governing body, has not authorized the suit and the Tribe is essentially taking sides in a dispute between its elected leadership, something which they claim is not countenanced under the law and is inappropriate.

The Defendants also assert that even if the Court has subject matter jurisdiction over the lawsuit, it is barred by sovereign immunity because the Defendants are elected officials and that they took the actions they did in their official capacities. The Defendants also raise other procedural irregularities in the filing and granting of the temporary restraining order. At hearing on February 12, 2015 they also asked that the temporary restraining order be vacated because a hearing on extending it was not held in time.

The Plaintiff and intervenors have responded by alleging that the Tribe has standing to bring this suit, that the Ex Parte Young doctrine permits suits against tribal officials who allegedly are acting in excess of their authorities, and that the restraining order should remain in effect pending further hearing.

As the Court indicated at hearing on February 12, 2015 the Court finds that this Court lacks subject matter jurisdiction over certain aspects of the complaint filed by the Tribe in this case. In its first prayer of relief the Tribe asks that the Court enter an order preventing "each of the Defendants from participating in any official business of the Lower Brule Sioux Tribal Council..." This Court lacks the jurisdiction to enter such an order. Article V, Section 2 of the Lower Brule Sioux Tribal Constitution appears to be the sole method of removing elected officials at Lower Brule. That provision of the Constitution provides no role for the Court to play in such removals. For this Court to

purport to have any such authority would be violative of the separation of powers between the Tribal Court and the Tribal legislative and executive branches of government.[2] To the extent that the complaint asks for such relief it shall be dismissed for want of jurisdiction.

The other issue raised by the Defendants is that the Tribe lacks standing to bring this lawsuit and has no permission from a quorum of the Council to do so. These are actually separate issues because standing relates to whether the party would suffer a concrete injury if the Court were not to intervene. The United States Supreme Court has held that to satisfy Article III's standing requirements, a plaintiff must show "injury in fact," causation, and redressability. *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555, 560-561, 119 L. Ed. 2d 351, 112 S. Ct. 2130. An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434.

The Lower Brule Sioux Tribe is actually an association of its members and actions taken by the Tribe itself must be executed on behalf of the welfare of its members. This Court finds that the Tribe certainly has standing to bring a lawsuit to

---

[2] This does not mean that the Court would have no authority to intervene if, for example, an elected leader were taking actions that are threatening or harassing to other individuals such as threatening harm to other tribal officials or is so disruptive to a Tribal Council meeting that meetings could not take place. In that case the Court could possibly restrain the disruptive conduct, although it still could not prevent the official from performing his duties if done without harassment. The Court has reviewed the pleadings and does not find that the complaint rises to this level.

resolve an impasse over its governance because its members certainly have an interest in seeing that its government functions. The membership cannot tolerate a situation where the Council is not meeting as required by the Constitution because this harms the membership who needs the government to function on their behalf. The Court therefore finds that under the Lujan standard the Tribe has demonstrated injury in fact, causation and redressabiiity.

However, this Court is not confident that the Tribe can file a lawsuit apparently on behalf of some of its elected leadership against other members of its leadership without a quorum of the Council approving of the lawsuit. The Court understands that the Tribe was put into a very difficult situation after the actions taken on December 12, 2014 by the Defendants because those actions called into question who the lawful leaders of the Tribe were. Neither party has pointed the Court to any resolution nor ordinance passed by the Tribe regarding the filing of lawsuits by the Tribe on behalf of the membership to permit the Court to determine if the lawsuit herein was filed in accordance with tribal law. Of course, this issue has been rendered somewhat moot because the three officials who object to the actions taken on December 12, 2014 have now intervened into this lawsuit as Plaintiffs and the Court finds that they certainly have standing to participate in the lawsuit under the Lujan standard. Dismissal of the Tribe as a proper Plaintiff would not therefore impact the ability of this Court to go forward with this suit. However, the Court finds that even in emergency situations the Tribe should attempt to the extent it can to adhere to its resolutions and ordinances so the Court will reserve ruling on whether the original complaint filed by the Tribe should be dismissed outright and allow each side to file any relevant resolutions, motions or ordinances governing this

situation.

The next issue is whether the Defendants are immune from suit under the doctrine of sovereign immunity. The Court starts with the premise that Indian Tribes and tribal officials who are sued in their official capacities enjoy common-law immunity from suit. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). The Tribe may waive that immunity, either for itself or its officials, but that waiver must be clear and unequivocal and cannot be implied. See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, 523 US 751 (1998)(tribal sovereign immunity is interpreted under federal law and is not subject to diminution by state or tribal law). Sovereign immunity is a jurisdictional bar to suit and thus precludes a Court from hearing a case. See Hagen v. Sisseton-Wahpeton Community College, 205 F.3d 1040 (8th Cir. 2000)

The Supreme Court has acknowledged that "tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 760 (1998). There are only two recognized instances in which a tribe might be subject to suit. These instances include occasions where 1) Congress has authorized the suit or 2) the tribe has waived its immunity. Kiowa Tribe of Okla. v. Manufacturing Technologies, 523 U.S. 751, 754 (1998). For a tribe to waive sovereign immunity, such a waiver must be "clear." Oklahoma Tax Comm'n v. Citizen Band Potawatoni Tribe of Okla., 498 U.S. 505, 509 (1991). A waiver "cannot be implied but must be unequivocally expressed." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

In Santa Clara, the Supreme Court, in holding that habeas corpus was the only

remedy available in federal court to challenge violations of the Indian Civil Rights Act, strongly suggested in dicta that under the Ex Parte Young doctrine remedies may be available in tribal forums for violations of the ICRA that did not result in detention. Tribal Courts were split on this issue after Santa Clara, but the United States Supreme Court's most recent pronouncement on sovereign immunity has clarified this issue somewhat. In Michigan v. Bay Mills Indian Community, ____ U.S. ____, May 27, 2014 the Supreme Court in a 5-4 decision upheld the defense of sovereign immunity for an Indian tribe that was allegedly involved in Class III gaming off "Indian lands" in violation of the Indian Gaming Regulatory Act. The Court ruled that IGRA only permitted states to sue Indian Tribes for "Indian lands" gaming and thus the suit against the Tribe could not be countenanced. However, the Court discussed numerous other manners in which the State could have sued the Tribe including suits against tribal officials utilizing the Ex Parte Young exception.

> "As this Court has stated before, analogizing to Ex parte Young, 209 U. S. 123 (1908), tribal immunity does not bar such a suit for injunctive relief against individuals, including tribal officers, responsible for unlawful conduct. See Santa Clara Pueblo, 436 U. S., at 59."
>
> Slip opinion at 13

Because Santa Clara Pueblo held that such suits against tribal officials cannot be brought in federal courts because the exclusive remedy in federal court for a violation of the Indian Civil Rights Act is habeas corpus under 25 U.S.C. §1303, the Bay Mills Court must be holding that these suits can be brought in tribal courts. The Court therefore finds that the complaint filed by the Plaintiff, insofar as it alleges a claim of unlawful removal of an elected leader, alleges a suit for injunctive relief against tribal officers and thus the Plaintiff has jumped through this initial hurdle surmounting the sovereign immunity

defense.

However, because the Bay Mills Court cites to Santa Clara Pueblo this Court finds that the unlawful conduct referenced in Bay Mills must be conduct that contravenes the Indian Civil Rights Act. That is the statute Congress was discussing in Santa Clara Pueblo. The Plaintiff must therefore establish that the Defendants have violated the Indian Civil Rights Act in attempting to remove the Chairman from office and taking other actions allegedly in violation of the other elected leaders' rights.

The Indian Civil Rights Act prohibits the Defendants from depriving the Intervenor Chairman of a "property right" without due process of law. 25 U.S.C. §1302. The question thus becomes whether the right to "elective office" and the rights arising from that status qualify as a property right.

The right to continue to hold elective office is a property right that cannot be taken without due process of law. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). (The process due in removal proceedings includes, at a minimum "oral or written notice, an explanation of the ....evidence, and an opportunity for an (elected official to present his side of the story." Loudermill, at 546, 548. This includes the requirement that the allegations contained in a removal notice be specific enough to allow an elected official to respond. As one commentator has noted:

> "The law has tended toward the requirement that, even where no particular procedure is prescribed whereby the power to expel an officer may be exercised, such proceedings should be had as will give the person charged an opportunity to be heard. See Am Jur 2d, Public Officers and Employees (lst ed ß 215). The power to remove a public officer, considered by itself alone, has been characterized as executive in nature, when it is associated with the discretionary prerogatives of high executive office, at least. However, when, as essential prerequisites to the exercise of that power, there must be a formulation of charges, notice thereof, a hearing, and a decision. See Am Jur 2d, Public Officers and Employees (lst ed ß 216). 115 ALR 3, 159 ALR 627.

See also Suro v. Padilla, 441 F. Supp. 14 (D.P.R. 1976)(in action by chief of selective service section of Puerto Rico national guard to prevent his removal from office, district court had jurisdiction to enjoin such removal, notwithstanding fact that military officers serve at pleasure of President of United States, where, inter alia, chief's property interest in office, although not identical with those of civil service employees, was so significant

Courts should exercise caution in attempting to micro-manage the legislative removal process because such a proceeding is a "political" proceeding that does not implicate the same liberty and property interests as a courtroom proceeding. See Indian Political Action Committee v. Tribal Executive Committee of the Minnesota Chippewa Tribe, 416 F. Supp. 655 (D.Minn. 1976). A Tribal Council need not have formal procedures, contained in an ordinance, governing the introduction of testimony, cross-examination, a written record, and written reasons for decision, in order to conform to the due process requirements of the Indian Civil Rights Act. As one Court has ruled in assessing what type of procedure must be utilized in a removal proceeding, the Chairman "was entitled to the even-handed application of tribal customs, traditions and any formalized rules relative to the impeachment proceeding itself." Stands Over Bull v. BIA, 442 F. Supp. 360, 376 (D. Mont. 1977). [3]

Therefore the Plaintiff has demonstrated that sovereign immunity does not bar parts of the suit brought by the Tribe in this case and the motion to dismiss on that ground

---

[3] It should be noted that the Stands Over Bull decision was issued prior to the United States Supreme Court decision in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978),which severely proscribed the authority of the federal courts to review Indian Civil Rights Act cases.

shall be denied.

The other objections brought by the Defendant to the entry of the temporary restraining order are not sufficient to vacate the order. It is true that the Tribal Code requires that a temporary restraining order issue ex parte only remain in effect for a certain period of time before a hearing must be held or the order must be vacated. There were two separate attempts to conduct a hearing prior to February 12, 2015. The first, on January 12, 2015, was waylaid when the presiding Judge became ill. The second, on January 26, 2015, needed to be delayed because the Defendants retained counsel and filed numerous dispositive motions that needed to be addressed by the Plaintiff. Counsel therefore agreed to continue the matter until February 12, 2015 at which time the parties attempted to resolve the matter and were unable to do so.

The Court finds that a restraining order needs to remain in effect to protect the interests of all parties and the membership of the Tribe. The Defendants shall take no action that violates the Lower Brule Sioux Tribal Constitution to remove the Chairman and the Tribe and intervenors shall not attempt to prevent the Defendants from exercising their authorities as elected leaders.

WHEREFORE it is hereby

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendants to dismiss this lawsuit for lack of subject matter jurisdiction is GRANTED insofar as the suit seeks an order enjoining the Defendants from exercising their rights as elected leaders of the Tribe and it is further

ORDERED, ADJUDGED, AND DECREED that the motion to dismiss the Plaintiff for lack of standing is DENIED. The motion to dismiss for failure to follow

tribal law is reserved until the Parties are permitted to file any motions, resolutions or ordinances of the Tribe on or before February 27, 2015 that govern how the Tribe is authorized to bring suits, and it is further

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendants to dismiss on sovereign immunity grounds is DENIED and it is further

ORDERED, ADJUDGED, AND DECREED that the above-named Defendants shall continue to be temporarily restrained from attempting to take any actions that interfere with the rights of the intervenors duly elected by the tribal membership and serving in office prior to December 12, 2014 except in accordance with the Lower Brule Sioux Tribal Constitution. Similarly, the intervenors shall not interfere with the rights of the Defendants and it is further

ORDERED, ADJUDGED AND DECREED that the Court continues to enjoin the Defendants and any other party from recognizing the actions purportedly taken at a Special Council meeting on December 12, 2014 and restrains the Defendants from taking any actions to carry out the motions passed at that meeting because they do not appear to have comported with the Lower Brule Sioux Tribe's Constitution, and it is further

ORDERED, ADJUDGED, AND DECREED that the Defendants and intervenors as well as their agents and assigns are further temporarily restrained from taking any actions to hold Special or General meetings of the Council without a quorum or remove any elected official of the Tribe without complying with Article IV, Section 2 of the Tribe's By-Laws and Article V, Section 2 of the Tribe's Constitution, and it is further

ORDERED, ADJUDGED, AND DECREED that all parties to this case shall conduct a Tribal Council meeting in March of 2015 in accordance with the Lower Brule

Sioux Tribal Constitution and shall make every attempt to resolve their differences at official meetings and it is further

ORDERED, ADJUDGED, AND DECREED that further hearing will be held, if necessary, after the March Tribal Council meeting or upon request of any party.

So ordered this 13th day of February 2015.

B.J. Jones
Lower Brule Sioux Tribe
Special Judge

ATTEST: