

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA**

Archie Fool Bear,)
)
 Plaintiff,)
)
 vs.)
)
 Standing Rock Sioux Tribe, Tribal Council;)
 Standing Rock Sioux Tribe, Tribal Council)
 Election Commission; Dave Archambault,)
 II, Chairman of Standing Rock Sioux Tribe,)
 Tribal Council; and Linda Comeau, Chair,)
 Standing Rock Sioux Tribe, Tribal Council)
 Election Commission,)
)
 Defendants.)

**ORDER DENYING PLAINTIFF’S
MOTION FOR TEMPORARY
RESTRAINING ORDER**

Case No.: 1:17-cv-146

Before the Court is the Plaintiff’s “Motion for Temporary Restraining Order/Motion for Preliminary Injunction” filed on July 14, 2017. See Docket No. 3. The Plaintiff seeks a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure, specifically requesting an order enjoining the Defendants from conducting the tribal primary election scheduled for July 19, 2017.

I. BACKGROUND

On July 14, 2017, the Plaintiff, Archie Fool Bear, filed a complaint, asserting claims of declaratory judgment and injunctive relief, and a motion for a temporary restraining order/preliminary injunction. See Docket Nos. 1 and 3. Fool Bear is seeking election to the office of Chairman of the Tribal Council of the Standing Rock Sioux Tribe, and he was found ineligible to run based on an alleged delinquency of a debt to the Tribe. Fool Bear disputes that he is ineligible to run for election and asserts the Defendants failed to comply with the Tribe’s election

procedures. Fool Bear brought suit in federal court based on an alleged violation of his equal protection and due process rights under 25 U.S.C. § 1302(8). Fool Bear seeks to restrain and enjoin the Defendants from conducting the tribal primary election that is scheduled for July 19, 2017. Fool Bear notes he made a good faith effort to notify the named Defendants by faxing to the Defendants' office a copy of the verified complaint, the motion for temporary restraining order/motion for preliminary injunction, and the proposed order granting the motion. See Docket No. 4.

II. STANDARD OF REVIEW

Fool Bear seeks a temporary restraining order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, which provides in relevant part as follows:

(b) Temporary Restraining Order.

(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

The United States Supreme Court has recognized that in some limited situations, a court may properly issue *ex parte* orders of brief duration and limited scope to preserve the status quo pending a hearing. Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974); Carroll v. Princess Anne, 393 U.S. 175, 180 (1968). The limited nature of *ex parte* remedies:

reflect[s] the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt

necessary in certain circumstances, cf. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 180 . . . (1968), but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.

Granny Goose Foods, 415 U.S. at 438-39 (emphasis in original).

Rule 65(b) directs the court to look to the specific facts shown by an affidavit to determine whether immediate and irreparable injury, loss, or damage will result to the applicant. In addition, it is well-established the court is required to consider the factors set forth in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981), in determining whether a temporary restraining order should be granted. The *Dataphase* factors include “(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” Id.

III. LEGAL DISCUSSION

It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction.” Id. at 1472.

The Plaintiff alleges that his equal protection and due process rights, under the Indian Civil Rights Act, 25 U.S.C. § 1302(8), were violated when the Defendants declared he was not an eligible candidate for the primary election for the office of Chairman of the Tribal Council for the Standing Rock Sioux Tribe. In cases arising under the Indian Civil Rights Act, the Eighth Circuit Court of Appeals has generally imposed an exhaustion of tribal remedies requirement. See

Rosebud Sioux Tribe of South Dakota v. Driving Hawk, 534 F.2d 98, 100 (8th Cir. 1976). The exhaustion requirement's purpose is to foster tribal self-government and cultural identity; "the federal courts should infringe as little as possible upon the authority of an Indian tribe to govern itself." See id. The Eighth Circuit Court of Appeals has stated:

[I]t is incumbent upon each Indian tribe to establish a system whereby election contests can be fairly tried and fairly resolved in compliance with the guarantees of equal protection and due process of law established by the Indian Civil Rights Act. The federal courts should not be called upon to supervise and decide a multitude of issues raised in tribal elections.

Id. at 100-101.

No allegation has been made that the Plaintiff has exhausted his available tribal remedies or that exhaustion would be futile. See Pomani v. Crow Creek Sioux Tribe, 418 F.Supp. 166, 170 (D.S.D. 1976); compare Rosebud, 534 F.2d at 101. Exhaustion is the rule rather than the exception, and no unusual circumstances have been shown to exist here. Pomani, 418 F.Supp. at 170.

Exhaustion is particularly appropriate in this case because of the fact that the issues raised by the 25 U.S.C. § 1302(8) allegations involve questions of the allocation of decision-making power among the various entities involved in the Standing Rock Sioux Tribal government. Indeed, the questions presented may well fall within the area of non-justiciable political questions. Under these circumstances, this Court feels compelled to defer, at least initially, to the judgment of Tribal authorities.

Further, the Court has deep-seeded concerns regarding whether this Court even has jurisdiction over this case. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) (finding that 25 U.S.C. § 1302 does not impliedly authorize actions for declaratory or injunctive relief

against either the tribe or its officers). Therefore, the Plaintiff's motion for temporary restraining order is denied.

IV. CONCLUSION

It is well-established that a temporary restraining order is considered to be an extraordinary remedy, and the need for such a remedy must be clearly established by the movant. The evidence in the record before the Court does not support the issuance of such a drastic remedy. For the reasons set forth above, the Court **DENIES** Fool Bear's "Motion for Temporary Restraining Order/Motion for Preliminary Injunction" (Docket No. 3) with respect to the temporary injunction.

IT IS SO ORDERED.

Dated this 18th day of July, 2017.

/s/ Daniel L. Hovland
Daniel L. Hovland, Chief Judge
United States District Court