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VOTING RIGHTS PROJECT

September 9, 2013

The Honorable Eric Holder
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

Dear Attorney General Holder:

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The purpose of this letter is to request you to advise the South Dakota Board of Elections (BOE) and the South Dakota Secretary of State (SOS) of their obligation to provide satellite in person voter registration and absentee ballot locations in the American Indian communities of Wanbli on the Pine Ridge Indian Reservation, Eagle Butte on the Cheyenne River Indian Reservation, and in Fort Thompson on the Crow Creek Indian Reservation (referred to hereinafter as satellite voting offices). I understand you have received communications from others explaining the need for these locations, and rather than repeat their comments I will focus on the history of past and ongoing discrimination against American Indians in South Dakota and that the denial of the satellite voting offices would likely violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which protects the right of racial and language minorities "to participate in the political process and to elect representatives of their choice."

I. Past and Continuing Discrimination

One of the factors probative of minority vote dilution under Section 2 is a "history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process." *Thornburg v. Gingles*, 478 U.S. 30, 36-7 (1986) (citing S.Rep. No.97-417, 97th Cong.2nd Sess. 28-9 (1982)). South Dakota, as other Western states, has a long history of discriminating against American Indians.

The Dakota Territory was created by an act of Congress in 1861, which restricted suffrage in the first legislative election, as well as office holding, to free white men who were citizens of the United States. Act of Congress of March 2, 1861, 12 Stat. 239, sec. 5. The initial territorial assembly meeting in 1862 placed similar limitations on the right to vote and hold office. 1862 Dakota Terr. Laws 21. *See also*, Act of January 14, ch. 19, § 51, 1864 Dakota Terr. Laws; Civil Code § 26, 1866 Dakota Terr. Laws 1, 4 (providing that

Indians cannot vote or hold office). Indians were prohibited from entering ceded lands without a permit. Ch. 46, 1862 Dakota Terr. Laws 319. Jury service was restricted to "free white males." Ch. 52, 1862 Dakota Terr. Laws 374. The territory immediately asked Congress to extinguish title "to the country now claimed and occupied by the Brule Sioux Indians," Ch. 99, 1862 Dakota Terr. Laws 503, and to extinguish title to land occupied by the Chippewa Indians. Ch. 100, 1862 Dakota Terr. Laws 505. It praised the "indomitable spirit of the Anglo-Saxon," and described Indians as "red children" and the "poor child" of the prairie. Dakota Territory Session Laws, First Session 1862, Preface.

As white expansion into Indian Country intensified, there were numerous conflicts between the Sioux tribes and emigrants, settlers, and the U.S. Military.[1] The Territorial Legislature described Indians, no longer as the "poor child," but as the "revengeful and murderous savage." Ch. 38, 1866 Dakota Terr. Laws 551. It further passed a law making it a crime to harbor or keep on one's premises or within any village settlement of white people any reservation Indians "who have not adopted the manners and habits of civilized life." Ch. 19, 1866 Dakota Terr. Laws 482.

South Dakota became a state in 1889, and enacted laws restricting voting and office holding to free white males and citizens of the United States. Act of March 8, 1890, ch. 45, 1890 S.D. Laws 118; S. Dak. Stat. sec. 3424, Parsons 2d rev. ed., 1001. Indians who sustained tribal relations, who received support from the government, or who held untaxable land were prohibited from voting in any state election. *Id.* The establishment of precincts on Indian reservations was also forbidden. Act of March 12, 1895, ch. 84, 1895 Dakota Terr. Laws 88.

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[1]This history is discussed in many places, *e.g.*, Edward Lazarus, *Black Hills: White Justice* (New York; HarperCollins, 1991); Paul H. Carlson, *The Plains Indians* (College Station; Texas A & M U. Press, 1998); Dee Brown, *Bury My Heart at Wounded Knee* (New York; Holt, Rinehart & Winston, 1971); Jeffrey Ostler, *The Plains Sioux and U.S. Colonialism from Lewis and Clark to Wounded Knee* (Cambridge, England; Cambridge U. Press, 2004); Guy Gibbon, *The Sioux: The Dakota and Lakota Nations* (Oxford, England; Blackwell, 2003); Ralph K. Andrist, *The Long Death: The Last Days of the Plains Indian* (Norman; Oklahoma U. Press, 1964).

Despite passage of the Indian Citizenship Act of 1924, 8 U.S.C. § 1401(a)(2), which granted full rights of citizenship to Indians, South Dakota officially excluded Indians from voting and holding office until the 1940s. *Buckanaga v. Sisseton Independent School District*, 804 F.2d 469, 474 (8th Cir. 1986). Even after the repeal of state law denying Indians the right to vote, as late as 1975 the state prohibited Indians from voting in elections in counties that were "unorganized" under state law. *Little Thunder v. South Dakota*, 518 F.2d 1253, 1255-57 (8th Cir. 1975). The three unorganized counties were Shannon, Todd, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of the unorganized counties from holding county office until as late as 1980. *United States v. South Dakota*, 636 F.2d 241, 244-45 (8th Cir. 1980).

Fall River County also imposed restrictions on voter registration in Shannon County. Joe American Horse, a tribal member and resident of Shannon County, attempted to register to vote prior to the November 1984 general election. His application was rejected by the Fall River County auditor, however, as untimely despite the fact that it was received by the county auditor prior to the deadline that had been agreed upon and publically announced. In an lawsuit filed by American Horse, the court ordered his application, as well as others that had been similarly rejected, to be accepted and the applicants be allowed to vote in the upcoming elections. *American Horse v. Kundert*, Civ. No. 84-5159 (D. S.Dak. Nov. 5, 1984). For a discussion of the case, *see Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1024 (D. S.Dak. 2004).

For most of the 20th century, voters were required to register in person at the office of the county auditor. S.D.C. §§ 16.0701-.0706 (1939). Getting to the county seat was a hardship for many Indians who lacked transportation, and particularly for those in unorganized counties who were required to travel to another county to register. State law, moreover, did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities. Registration of Voters, Op. S.D. Att'y Gen., 1963-1964 Rep. S.D. Att'y Gen. 341 (May 28, 1964). There was one exception, however. State law required the tax assessor to register property owners in the course of assessing the value of their land. Thus, taxpayers were automatically registered to vote, while non-taxpayers, many of whom were Indian, were required to make the trip to the courthouse to register in person. *Bone Shirt*, 336 F.Supp.2d at 1024. Mail in registration was not fully implemented in South Dakota until 1973. Ch. 70, 1973 S.D. Laws 111.

Shannon and Todd Counties became covered by Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, in 1975. Federal Register 41 (Jan. 5 1976): 784. Section 5 requires covered jurisdictions to submit voting changes for federal approval, or preclearance, before they may be implemented and show that they have neither a discriminatory purpose or effect. *Beer v. United States,* 425 U.S. 130, 141 (1976). The attorney general of South Dakota derided the 1975 law as a "facial absurdity," and advised the secretary of state not to comply with the preclearance requirement. "I see no reason," he said," to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General." William Janklow, 1977 South Dakota Opinions of the Attorney General 175; 1977 Westlaw 36011 (S. Dak. Attorney General). Accordingly, from 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in the covered counties but submitted fewer than ten for preclearance. Two of the submissions were made only after suits were filed by the United States. *United States v. Tripp County, South Dakota*, Civ. No. 78-3045 (D. S.Dak. Feb. 6, 1979) (ordering state to submit reapportionment plan for preclearance); *United States v. South Dakota*, Civ. No. 79-3039 (D. S.Dak. May 20, 1980) (enjoining implementation of a revision of organized and unorganized counties absent preclearance). Following a suit by tribal members in Shannon and Todd Counties in 2002, the court entered a consent order requiring the submission of the remaining unprecleared voting changes. *Quick Bear Quiver v. Hazeltine*, Civ. No. 02-5069 (D. S.Dak. Dec. 27, 2002).

There has been other voting rights litigation in South Dakota brought by tribal members challenging a variety of vote dilution measures, *e.g.*, *Buckanaga v. Sisseton Independent School District*, 804 F.2d at 474 (a successful vote dilution challenge to at-large elections for a school board); *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D. S.Dak. May 14, 1986) (successful challenge to failure to provide sufficient polling places for school district elections);[2] *Fiddler v. Sieker*, No. 85-3050 (D. S.Dak. Oct. 24 1986) (successful challenge to the county auditor limiting the number of voter application forms provided to Indians);[3] *United States v. Day County, South Dakota*, No. CV 99-1024 D. S.Dak. June 16, 2000) (holding that Indians had

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[2]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.

[3]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024-25.

been unlawfully denied the right to vote in elections for a sanitary district);[4] *Emery v. Hunt*, 615 N.W.2d 590, 597 (S. Dak. 2000) (successful challenge to an interim 1996 legislative redistricting plan as violating state constitutional law); *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D. S.Dak. Mar. 18, 2003) (successful challenge to at-large elections for school board);[5] *Bone Shirt v. Hazeltine*, 200 F.Supp.2d 1150 (D. S.Dak. 2002) (three-judge court) (requiring state to submit its 2001 legislative redistricting plan for preclerance under Section 5); *Bone Shirt*, 336 F.Supp.2d at 1053 (order of single-judge court invalidating the state's 2001 legislative plan as diluting Indian voting strength); *Kirkie v. Buffalo County, South Dakota*, Civ. No. 03-3011 (D. S.Dak. Feb. 12, 2004) (invalidating a redistricting plan that packed Indian voters);[6] *Quick Bear Quiver v. Nelson*, 387 F.Supp.2d 1027 (D. S.Dak. 2005) (three-judge court) (enjoining county redistricting plan from being implemented absent preclearance); *Blackmoon v. Charles Mix County*, 2005 WL 2738954 (D. S. Dak. 2005) (enjoining a county redistricting plan as violating one person, one vote).

In invalidating the 2001 legislative plan, the district court in *Bone Shirt* found: there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office;" Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile;" Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and although the accusations have proved to be unfounded they have "intimidated Indian voters;" "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice;" "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process;" turnout rates for Indian voters were generally lower (usually 20%) than for whites; in 2000, there was a 20% disparity rate in registration between Indians and non-Indians; there was "a

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[4]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1023-24.

[5]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.

[6]For a discussion of the case, *see Bone Shirt*, 336 F.Supp.2d at1024.

significant lack of responsiveness on the part of elected officials to Indian concerns." *Bone Shirt*, 336 F.Supp.2d at 1019, 1025-26, 1030, 1046.

In response to the decision in *Blackmoon v. Charles Mix County*, the county adopted a new plan that increased the size of the commission from three to five members and submitted it to the Department of Justice for preclearance under Section 5. DOJ objected to the plan concluding "that the county has not sustained its burden of showing that the proposed change does not have a discriminatory purpose." Letter from Grace Chung Becker, Acting Assistant Attorney General, to Sara Frankenstein, Feb. 11, 2008.

The long and continuing history of official discrimination in South Dakota that has touched the right of tribal members to register, to vote, or otherwise to participate in the democratic process strongly supports a finding that the failure of the BOE and SOS to provide satellite voting offices will have a discriminatory effect upon Indian voters in violation of Section 2 of the Voting Rights Act.

II. Depressed Socio-Economic Status and Reduced Political Participation

One of the many legacies of discrimination against Indians is a severely depressed socio-economic status. Based on the 2010 census, the unemployment rate for Indians in South Dakota was 16.4%, compared to 2.7% for whites. U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates. The unemployment rates on the reservations were even higher. South Dakota Advisory Committee to the U.S. Commission on Civil Rights, Native Americans in South Dakota: An Erosion of Confidence in the Justice System 6 (2000). Life expectancy for Indians is shorter than for other Americans. According to a report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, "Indian men in South Dakota . . . usually live only into their mid-50s." *Id.* Infant mortality in Indian Country "is double the national average." *Id.* at 6-7.

Native Americans experience a poverty rate that is substantially greater that the poverty rate for whites. The 2010 census reported that 48.5% of Indians in South Dakota were living below the poverty line, compared to 10.3% of whites. The per capita income of Indians was $7,774 compared to $25,052 for whites. U.S. Census Bureau, 2010 American Community Survey 1-Year Estimates.

Of Native Americans 25 years of age and over, 21.2% have not finished high school, while 9% of whites are without a high school diploma. 15.7% of Indian households live in crowded conditions, compared to 1.0% for whites. Native American households are much more likely than white households to be without access to vehicles – 24.9% of Native American households are without access to vehicles versus 4.8% of white households. *Id.*

The link between a depressed socio-economic status and reduced political participation is direct. One of the seven primary factors identified in the legislative history of the 1982 amendment to Section 2 as probative of minority vote dilution is "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process." S.Rep. No.97-417, at 28-9, cited in *Gingles*, 478 U.S. at 37. As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Gingles*, 478 U.S. at 69. Numerous appellate and trial court decisions, including those from Indian country, are to the same effect. In *Buckanaga v. Sisseton Independent School District*, 804 F.2d at 475, the court concluded that "[l]ow political participation is one of the effects of past discrimination."

In a recent and related Section 2 case, *Spirit Lake Tribe v. Benson County, North Dakota*, 2010 WL 4226614 *3 (D. N.Dak. 2010), the court enjoined the closing of polling places on the Spirt Lake Reservation in North Dakota on the grounds, *inter alia*, that it "will have a discriminatory impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to the voting places in Minnewauken [the county seat] to vote." Failing to provide satellite voting offices will have a similar discriminatory impact on Indian residents in South Dakota. *See also Perkins v. Matthews*, 400 U.S. 379, 388 (1971) (acknowledging that the location of polling places "at distances remote from black communities" has an obvious potential from abridging the right to vote); *Brown v. Dean*, 555 F.Supp. 502, 505 (D. R.I. 1982) (enjoining the relocation of a polling place under Section 2 because it "may well abridge" minorities' free exercise of the right to vote).

The court in *Spirit Lake Tribe* further rejected the argument that the use of mail balloting justified the closing of precincts on the reservation. It held

"poverty and transience on the Reservation makes mail balloting more difficult for tribal members," it was "a burden that would fall inordinately on the poorly educated," and "many members of the tribe do not trust that their votes will be counted under the mailin ballot procedure." *Id.* at 3, 6, 8. Failing to provide satellite voting offices in South Dakota will have a similar discriminatory effect upon Indian voters in violation of Section 2.

Given the socio-economic status of Indians in South Dakota, it is not surprising that their voter registration and political participation have been severely depressed. As late as 1985, only 9.9% of Indians in the state were registered to vote. *Buakanaga v. Sisseton Independent School District*, 804 F.2d at 474. The South Dakota Advisory Committee to the U.S. Commission on Civil Rights concluded in a 2000 report that:

> For the most part, Native Americans are very much separate and unequal members of society. . . . [who] do not fully participate in local, State, and Federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality.

South Dakota Advisory Committee 38-9 (2000).

In view of their depressed socio-economic status, the failure to provide satellite voting offices would have a discriminatory effect upon Indians in South Dakota in violation of Section 2 of the Voting Rights Act.

III. The Right to Vote Is Fundamental and Entitled to Special Protection

The right to vote is one of the most fundamental rights in our system of government. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964); *Harman v. Forssenius*, 380 U.S. 528, 537 (1965); *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Illinois Board of Election v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (the right to vote and have one's vote counted "is of the most fundamental significance under our constitutional structure"). The right to vote is entitled to special constitutional protection because:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . [T]he

> right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights.

Reynolds v. Sims, 377 U.S. at 555, 562. *Accord*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined").

Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *Accord*, *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) ("denial of the right to vote" constitutes irreparable injury); *Cook v. Luckett*, 575 F. Supp. 479, 484 (S.D. Miss. 1983) ("perpetuating voter dilution" constitutes "irreparable injury"); *Foster v. Kusper*, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (denial of the right to vote for candidate of choice constitutes "irreparable harm"). *See also Elrod v. Burns*, 427 U.S. at 373 (the loss of constitutionally protected freedoms "for even minimal periods of time, constitutes irreparable injury"). Once the right to vote is denied or suppressed, there is usually no way to remedy the wrong. As the court held in *Spirit Lake Tribe,* ,2010 WL 4226614 *4, in enjoining the closing of polling places on the reservation, "there is simply no remedy at law for such harm other than an injunction." Indian voters will suffer irreparable injury if they are denied an adequate opportunity to vote in the 2013 and future elections.

Providing satellite voting offices would also be in the public interest. The Voting Rights Act is a congressional directive for the immediate removal of all barriers to equal political participation by racial and language minorities. When it adopted the remedial provisions of the Act in 1965, Congress cited the "insidious and pervasive evil" of discrimination in voting and acted "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." *South Carolina v. Katzenbach*, 383 U.S. 301, 309, 328 (1966). In the legislative history of the 1965 Act, as well as the 1970, 1975, 1982, and 2006 amendments and extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" *NAACP v. New York*, 413 U.S. 345, 354 (1973) (quoting H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965)). *See also* S.Rep. No. 417, at 5, reprinted in 1982 USCCAN 182 ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for

dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Public Law 109-246, 120 Stat. 577, Section 2(b)(3) ("[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965").[7] As the Court held in *Briscoe v. Bell*, 432 U.S. 404, 410 (1977), the Voting Rights Act "implements Congress' intention to eradicate the blight of voting discrimination with all possible speed." Given the clear and unambiguous intent of Congress that the door to minority political participation be opened as quickly as possible, providing satellite voting offices would be in the public interest. *See Harris v. Graddick*, 593 F.Supp. at 136 ("when section 2 is violated the public as a whole suffers irreparable injury"); *Johnson v. Halifax County*, 549 F.Supp. 161, 171 (E.D. N.C. 1984) (the "public interest" is served by enjoining discriminatory election procedures).

The public also has a broad interest in the integrity of elected government which is compromised by a system that fails to weigh the votes of all citizens equally. *See Cook v. Luckett*, 575 F. Supp. at 485 ("[t]he public interest must be concerned with the integrity of our representative form of government"). Subjecting Indian voters to an "inequitable" system that is different from the one implemented in other counties in the state would be adverse to the public interest. *Watson v. Commissioners of Harrison County*, 616 F.2d 105, 107 (5th Cir. 1980).

We strongly urge you to advise the South Dakota Board of Elections and the South Dakota Secretary of State of their obligation to provide satellite in-person voter registration and absentee ballot locations in the American Indian communities of Wanbli on the Pine Ridge Indian Reservation, Eagle Butte on the Cheyenne River Indian Reservation, and in Fort Thompson on the Crow

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[7]In Shelby County, Alabama v. Holder, 133 S.Ct. 2612, 2627 (2013), the Court held the Section 5 coverage formula unconstitutional because it was "based on decades-old data and eradicated practices." However, the Court issued "no holding on 5 itself, only on the coverage formual" and acknowledged "Congress may draft another formula based on current conditions." Id. at 2631.

Creek Indian Reservation. Their failure to do so would likely violate Section 2 of the Voting Rights Act.

Sincerely,

Laughlin McDonald
Director Emeritus
ACLU Voting Rights Project

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Andrew Knecht
ACLU of South Dakota