

**TESTIMONY OF BRYAN L. SELLS**

for a hearing on

**Legislative Proposals to Strengthen the Voting Rights Act**

before the

**Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

of the

**House Committee on the Judiciary**

Rayburn House Office Building  
Washington, DC

October 17, 2019

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Chairman Nadler, Chairman Cohen, Ranking Member Johnson, and members of the Subcommittee, I thank you for your invitation to testify at this hearing on legislative proposals to strengthen the Voting Rights Act. My testimony this morning will focus on the need for additional protection for the right to vote in Indian Country.

I am a civil rights lawyer currently in private practice in Atlanta. Over the course of my more than 20-year legal career, I have litigated voting-rights cases on behalf of tribal members in Montana, South Dakota, and Wyoming. I was the lead attorney in *Quiver v. Nelson*, one of the largest voting-rights cases in history, and in *Bone Shirt v. Hazeltine*, a landmark case challenging South Dakota's statewide redistricting plan on behalf of Native American<sup>2</sup> voters. I also serve as an adjunct professor of law at Georgia State University College of Law, where I teach election law, and I am a member of the Native American Voting Rights Coalition, an association of national and regional grassroots organizations, academics, and attorneys advocating for the equal access of Native Americans to the political process.<sup>3</sup>

I will begin with a brief historical overview of the Native vote from our nation's founding to the present day. I will then describe some of the voting cases and controversies in Indian Country on which I have been involved over the course of my career as a litigator. Those cases, and the volumes of evidence they generated, offer a compelling demonstration of the need for a strengthened Voting Rights Act.

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<sup>1</sup> J.D., Columbia University; A.B., *magna cum laude*, Harvard University. Attorney and managing member at The Law Office of Bryan L. Sells, LLC. Adjunct professor of law, Georgia State University.

<sup>2</sup> I use the terms "Native American," "Indian," and "American Indian" interchangeably throughout this testimony because there is no consensus in the law or culture on a single term to describe the indigenous peoples of the United States. I recognize, however, that there are often very significant differences between tribal groups.

<sup>3</sup> For more information about the Native American Voting Rights Coalition, see Native American Rights Fund, About the Native American Voting Rights Coalition, available at <https://www.narf.org/native-american-voting-rights-coalition/>.

*A Brief History of Native-American Enfranchisement from 1789 to the Present*

Throughout the American West, Native Americans have faced voting discrimination ranging in form from outright vote denial to more subtle restrictions on political participation similar to those used to disenfranchise African Americans in the American South.<sup>4</sup> The original Constitution excluded “Indians not taxed” from the population basis for apportioning congressional seats among the states,<sup>5</sup> and Indians generally had neither the rights of citizenship nor of suffrage in the early days of the republic.

In 1866, when Congress adopted the Fourteenth Amendment after the Civil War, it granted citizenship to “[a]ll persons born or naturalized in the United States” except those not “subject to the jurisdiction thereof” — a provision specifically intended to exclude Native Americans from the franchise.<sup>6</sup> During debate on the amendment, Senators expressed dual concerns that Indians were an inferior race and therefore not worthy of citizenship and that, if granted citizenship and the right to vote, their numbers could overwhelm the votes of white citizens in the western territories.<sup>7</sup> For example, Senator Jacob Howard of Michigan declared: “I am not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me...”<sup>8</sup>

Notwithstanding the jurisdictional carve-out, the text of the Fourteenth Amendment appeared to leave open the question of whether Native Americans could gain citizenship, and therefore the right to vote, by voluntarily subjecting themselves to federal jurisdiction in some way. But the Supreme Court answered that question in 1884.<sup>9</sup> John Elk, a Winnebago Indian, was born on a reservation but later moved to non-reservation land in Omaha, Nebraska, where he renounced his tribal allegiance and claimed U.S. citizenship by virtue of the citizenship clause of the Fourteenth Amendment.<sup>10</sup> He then sought to register and vote but was refused. In *Elk v. Wilkins*, the Supreme Court held that the citizenship clause did not apply to Elk because he was not subject to the jurisdiction of the United States when he was born.<sup>11</sup> He could only obtain citizenship, and therefore the right to vote, through some affirmative act of Congress.<sup>12</sup>

Congress had begun selectively naturalizing certain Indians, often conditioned on renouncing tribal affiliation and culture, in the middle of the 1800s.<sup>13</sup> That effort accelerated with

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<sup>4</sup> See generally Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 Am. Indian L. Rev. 167 (1990); Orlan Svingen, *Jim Crow, Indian Style*, 11 Am. Indian Quarterly 275 (1987); Daniel McCool, *Indian Voting, in American Indian Policy in the Twentieth Century* (Vine Deloria, Jr. ed. 1985).

<sup>5</sup> U.S. Const. art. I, § 2, cl. 3.

<sup>6</sup> U.S. Const. amend. XIV, § 1.

<sup>7</sup> See Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, *Native Vote*, at 3 (2007).

<sup>8</sup> Cong. Globe, 39th Cong., 1st Sess. 2895 (1866).

<sup>9</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>10</sup> *Id.* at 98-99.

<sup>11</sup> *Id.* at 102.

<sup>12</sup> *Id.* at 103.

<sup>13</sup> See, e.g., Act of Mar. 3, 1843, ch. 101, § 7, 5 Stat. 645, 647 (offering conditional citizenship to the Stockbridge-Munsee tribe).

the Treaty of Fort Laramie in 1868, which offered citizenship to the Lakota Sioux and the Arapahoe,<sup>14</sup> and it continued through the early 1900s. By the early 1920s, about two-thirds of the Indian people in the United States were citizens,<sup>15</sup> and Congress conferred citizenship on the remainder when it passed the Indian Citizenship Act of 1924.<sup>16</sup>

Unfortunately, citizenship did not automatically confer suffrage. The right to vote in both federal and state (or territorial) elections is determined by state (or territorial law).<sup>17</sup> And even though the Fifteenth Amendment provides that states may not deny a citizen's right to vote on the basis of "race, color, or previous condition of servitude,"<sup>18</sup> states found other ways to continue denying the right to vote to Native American citizens. In 1936, for example, the attorney general of Colorado opined that Indians had no right to vote because they were not citizens of the state.<sup>19</sup> Other grounds used by states to deny Native American citizens the right to vote included residency on Indian reservations, continued tribal enrollment, taxation, and guardianship status.<sup>20</sup> Gradually, all of the formal restrictions denying Native American citizens the right to vote were either struck down by the courts or repealed by state legislatures. But Native Americans were not fully eligible to vote in every state until 1957, when Utah finally repealed its residency statute.<sup>21</sup>

Indian suffrage, however, did not immediately translate into full political participation. State and local officials in Indian Country used a variety of facially neutral tactics, such as onerous registration requirements, poll taxes, literacy tests, and a host of other election rules, to make it difficult for Native Americans to participate in the political process and to elect candidates of their choice.<sup>22</sup> These tactics had been used in the South to prevent African Americans from exerting electoral power, and they could be used against Native Americans to the same effect.

With the passage of the Voting Rights Act of 1965, Native Americans gained a new tool in the struggle for full political participation. All of Indian Country was covered by the nationwide and permanent provisions of the Act. Among other things, those provisions prohibit voting discrimination on the basis of "race or color" and the use of any "test or device," such as a literacy test, as a prerequisite for registering or voting in any federal, state or local election.<sup>23</sup> The permanent provisions of the Act were aimed primarily at voting discrimination against African

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<sup>14</sup> 1868 Fort Laramie Treaty, 15 Stat. 635, *reprinted in* II Charles J. Kappler, *Indian Affairs: Laws and Treaties* 998 (1904). Article VI of the treaty offered citizenship to any member of a signatory tribe who could occupy a plot of land for three years and make at least two hundred dollars' worth of improvements.

<sup>15</sup> McCool *et al.*, *supra* note 7, at 7.

<sup>16</sup> 43 Stat. 253 (1924).

<sup>17</sup> See U.S. Const. art I, § 2, cl. 1; U.S. Const. amend. XVII, § 1.

<sup>18</sup> U.S. Const. amend. XV.

<sup>19</sup> McCool *et al.*, *supra* note 7, at 9.

<sup>20</sup> *Id.* at 11-19.

<sup>21</sup> Act of Feb. 14, 1957, ch. 38, 1957 Utah Laws 89-90; see *Rothfels v. Southworth*, 356 P.2d 612, 613 (Utah 1960).

<sup>22</sup> McCool *et al.*, *supra* note 7, at 20.

<sup>23</sup> 52 U.S.C. §§ 10301, 10303.

Americans in the South, but Native Americans were also covered as a cognizable racial group.<sup>24</sup> Native Americans were also expressly covered when Congress amended the Act in 1975 to address discrimination against members of language minorities, and to require certain jurisdictions to provide language assistance to voters with limited English proficiency.<sup>25</sup>

Enforcement of the Act's permanent provisions was somewhat lacking in the early years. The extensive voting-rights litigation campaign that swept through the South in the 1970s, '80s, and '90s largely bypassed Indian Country. At least one scholar has attributed this lack of enforcement to a combination of factors, including a lack of resources and access to legal assistance among Native Americans, lax enforcement of the Voting Rights Act by the Department of Justice, the geographic isolation of Indian reservations, and the debilitating legacy of discrimination by the state and federal government.<sup>26</sup>

Over time, however, litigation activity increased. In the seven years between 1999 and 2006, for example, there were eight voting-rights cases brought by or on behalf of Native Americans in South Dakota alone. Recent years have also seen a number of Indian voting cases in Alaska, Arizona, Montana, Nevada, North Dakota, South Dakota, Utah, and Wyoming. I had the privilege of working on some of those cases, and it is to those matters that I turn next.

### *Cases Involving At-Large Elections or Multi-Member Districts*

#### *Emery v. Hunt*

In 1991, the South Dakota legislature adopted a new legislative redistricting plan using data from the 1990 Census.<sup>27</sup> The plan divided the state into 35 districts and provided, with one exception, that each district would be entitled to one senate member and two house members elected at-large from within the district.

The exception was the new District 28. The 1991 legislation provided that "in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts."<sup>28</sup> House District 28A consisted of Dewey and Ziebach counties and portions of Corson County, and included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. House District 28B consisted of Harding and Perkins Counties and portions of Corson and Butte Counties. According to 1990 census data, Indians were 60% of the voting-age population of House District 28A, and less than 4% of the voting age population of House District 28B.

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<sup>24</sup> See *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 76 (1955) (acknowledging that Native Americans are protected by laws that prohibit discrimination on the basis of race or color)

<sup>25</sup> See An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (1975).

<sup>26</sup> Laughlin McDonald, *Voting Rights Act in Indian Country: A Case Study*, 29 Am. Indian L. Rev. 43, 53 (2004-2005).

<sup>27</sup> An Act to Redistrict the Legislature, ch. 1, 1991 S.D. Laws 1st Spec. Sess. 1.

<sup>28</sup> *Id.* at 5.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the house to run at large in District 28.<sup>29</sup> The repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of the repealing legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.<sup>30</sup> The reconstituted House District 28 had an Indian voting-age population of only 29%. Given the prevailing patterns of racially polarized voting, of which members of the legislature were surely aware, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

Steven Emery, Rocky Le Compte, and James Picotte—all residents of the Cheyenne River Sioux Reservation—challenged the repeal in early 2000. They claimed that the changes in District 28 violated Section 2 of the Voting Rights Act, as well as Article III, Section 5 of the South Dakota constitution, which mandated reapportionment once every tenth year, but prohibited all reapportionment at other times. The South Dakota Supreme Court had expressly held “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration.”<sup>31</sup>

The plaintiffs’ experts analyzed the six legislative contests between 1992-1994 involving Indian and non-Indian candidates in District 28 held under the 1991 plan to determine the existence, and the extent, of any racial bloc voting. Indian voters favored the Indian candidates at an average rate of 81%, while whites voted for the white candidates at an average rate of 93%. In all six of the contests the candidate preferred by Indians was defeated.<sup>32</sup>

White cohesion also fluctuated widely depending on whether an Indian was a candidate. In the four head-to-head white-white legislative contests, where there was no possibility of electing an Indian candidate, the average level of white cohesion was 68%. In the Indian-white legislative contests, the average level of white cohesion jumped to 94%.<sup>33</sup> This phenomenon of increased white cohesion to defeat minority candidates has been called “targeting.”<sup>34</sup>

Before deciding the plaintiffs’ Section 2 claim, the district court certified the state law question to the South Dakota Supreme Court. That court accepted certification and held that, in enacting the 1996 redistricting plan, “the Legislature acted beyond its constitutional limits.”<sup>35</sup> It declared the 1996 plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A,

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<sup>29</sup> An Act to Eliminate the Single-member House Districts in District 28, ch. 21, 1996 S.D. Laws 45.

<sup>30</sup> Minutes of House State Affairs Committee, January 29, 1996, p. 5.

<sup>31</sup> *In re Legislative Reapportionment*, 246 N.W. 295, 297 (S.D. 1933).

<sup>32</sup> *Emery v. Hunt*, Civ. No. 00-3008 (D.S.D.), Report of Steven P. Cole, Tables 1 & 2.

<sup>33</sup> *Id.*, Tables 1 & 3.

<sup>34</sup> See *Clarke v. City of Cincinnati*, 40 F.3d 807, 457 (6th Cir. 1994) (“[w]hen white bloc voting is ‘targeted’ against black candidates, black voters are denied an opportunity enjoyed by white voters, namely, the opportunity to elect a candidate of their own race”).

<sup>35</sup> *In re Certification of a Question of Law*, 615 N.W.2d 590, 597 (S.D. 2000).

the first Native American in history to be elected to the state house from the Cheyenne River Sioux Indian Reservation.

*Weddell v. Wagner Community School District*

The City of Wagner is a border town in Charles Mix County, South Dakota. The county, in the southeastern part of the state along the Missouri River, is home to the disestablished Yankton Sioux Reservation.

The local school district in Wagner was run by a seven-member school board elected at large to staggered three-year terms. Although Indians were 42% of the district's total population and 36% of the district's voting-age population, Indian voters had not been able to elect a candidate of their choice to the school board for many years.

In March 2002, three members of the Yankton Sioux Tribe filed suit against the school district, alleging that its at-large elections diluted Indian voting strength in violation of Section 2 of the Voting Rights Act.<sup>36</sup> The plaintiffs demonstrated that Native American voters could control at least two seats if the seven board members were elected from single-member districts.

The parties eventually agreed to settle the case by replacing the at-large elections with cumulative voting. The district court approved a consent decree containing the settlement agreement on March 18, 2003.<sup>37</sup>

The very first election under the new system resulted in a tie between an Indian candidate and a non-Indian candidate. Under South Dakota law, the tie was to be settled with a deck of cards, and the Indian candidate prevailed by drawing a queen.

*Large v. Fremont County*

In 2005, members of the Eastern Shoshone and Northern Arapaho Tribes residing on the Wind River Indian Reservation filed suit against Fremont County, Wyoming. The plaintiffs alleged that at-large elections for the county's Board of Commissioners diluted Native American voting strength in violation of the Constitution and Section 2 of the Voting Rights Act. At the time the suit was filed no Native American had ever been elected to the county commission despite the fact that Native Americans were 20 percent of the county's population and had frequently run for office with the overwhelming support of Native American voters.

Following extensive discovery and a lengthy trial, the district court issued a detailed, 102-page opinion on April 29, 2010, holding the at-large system diluted Indian voting strength. the court made extensive findings about past and continuing discrimination against

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<sup>36</sup> *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D.S.D. March 22, 2002).

<sup>37</sup> *Weddell v. Wagner Community School District*, Civ. No. 02-4056 (D.S.D. March 18, 2003).

Indians, racially polarized voting, the isolation of the Indian community, and the lack of responsiveness by the County Commission to the special needs of Indians. The court concluded: “The evidence presented to this Court reveals that discrimination is ongoing, and that the effects of historical discrimination remain palpable.”<sup>38</sup>

As a remedy, the court adopted a plan containing five single-member districts, one of which was majority-Indian, giving Native Americans the opportunity to elect candidates of their choice. The county did not appeal the decision on the merits but did appeal the remedy provided by the district court. The court of appeals, however, affirmed the decision of the district court in 2012.<sup>39</sup>

### *Cases Involving Redistricting*

#### *Bone Shirt v. Hazeltine*

The State of South Dakota enacted a new redistricting plan for its 105-member state legislature in November 2001.<sup>40</sup> The plan divided the state into thirty-five districts, each of which elected one member of the state senate and two members of the state house of representatives. Voters elected their two house members at large in each district except District 28, which the plan subdivided into two single-member house districts, Districts 28A and 28B. The plan contained two majority-Indian districts: District 27 and District 28A. District 27 encompassed part of the Pine Ridge Indian Reservation and all of the Rosebud Indian Reservation in the southern part of the state. Native Americans comprised approximately 90% of District 27’s total population and 86% of its voting-age population. In majority-white District 26, which bordered District 27 to the north and east and encompassed the remainder of the Pine Ridge Indian Reservation, Native Americans comprised approximately 30% of the total population and 23% of its voting-age population. In the state as a whole, Native Americans were approximately 9% of the total population and 7% of the voting-age population.

Shortly after the 2001 plan became law, Alfred Bone Shirt and three other Native American voters sued in federal court, alleging that the plan violated Sections 2 of the Voting Rights Act.<sup>41</sup> Among other things, the plaintiffs contended that the plan diluted Native American voting strength in violation of Section 2 by “packing” Native Americans into District 27 with the result that Indian voters in the neighboring District 26 were unable to elect representatives of their choice.

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<sup>38</sup> *Large v. Fremont County, Wyo.*, 709 F. Supp. 2d 1176, 1184 (D. Wyo. 2010).

<sup>39</sup> *Large v. Fremont County, Wyo.*, 670 F.3d 1133 (10th Cir. 2012).

<sup>40</sup> 2001 S.D. Laws ch. 2.

<sup>41</sup> *Bone Shirt v. Hazeltine*, Civ. No. 01-3032 (D.S.D. Dec. 26, 2001).

After extensive discovery and a bench trial held over nine days in April 2004, the district court ruled in a 144-page opinion that the State's plan violated Section 2.<sup>42</sup> The court first considered whether the evidence established the three factors that the Supreme Court identified in *Thornburg v. Gingles*<sup>43</sup> as generally necessary to prove a violation of Section 2. The court then analyzed whether the totality of the evidence had also shown that Indian voters had less opportunity than white voters to participate in the political process and to elect candidates of their choice. In conducting this analysis, the district court examined twelve additional factors, and the district court made extensive findings of fact on each factor.

With respect to the first *Gingles* factor, the district court found that Native Americans in South Dakota are sufficiently numerous and geographically compact that they could constitute a majority in at least one more legislative district than existed in the state's plan.<sup>44</sup> The court based its finding on the report and testimony of William S. Cooper, the plaintiffs' expert demographer, as well as several redistricting plans drafted by state legislative staffers during the 2001 redistricting process.

The district court rejected the defendants' argument that the required threshold for the first *Gingles* factor should be well above 65% of the voting-age population. The court noted that the defendants had failed to identify any cases in which a court had ever required such an elevated threshold. The district court also rejected the defendants' contention that the plaintiffs' illustrative plans were based on racial considerations above all else. To the contrary, the court found that the plans did not subordinate traditional race-neutral districting principles to racial considerations and did not consider race any more than reasonably necessary to determine whether an additional majority-Indian district was possible. After considering all of the evidence, the district court concluded that the plaintiffs had satisfied the first *Gingles* factor "as a matter of law."<sup>45</sup>

With respect to the second *Gingles* factor, the district court found that Native Americans in Districts 26 and 27 were politically cohesive. Turning first to the parties' statistical evidence, the court found that, despite a difference in methodology, experts for both parties produced reliable results which "demonstrate[d] significant cohesion among Indian voters."<sup>46</sup> The district court also surveyed the parties' nonstatistical evidence of cohesion at some length. Relying on the testimony of numerous witnesses, both expert and lay, and literally dozens of documentary exhibits, the court concluded that the nonstatistical evidence, like the statistical evidence, established Indian cohesion.<sup>47</sup>

The district court rejected the defendants' contention that Democratic partisanship, not race, was the reason that Native Americans tended to vote the same way at the polls.<sup>48</sup> Relying on

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<sup>42</sup> See *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1053 (D.S.D. 2004).

<sup>43</sup> 478 U.S. 30, 50-51 (1986)

<sup>44</sup> *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d at 995.

<sup>45</sup> *Id.* at 995.

<sup>46</sup> *Id.* at 1004.

<sup>47</sup> *Id.* at 1004-08.

<sup>48</sup> *Id.* at 1008-10.

statistical and nonstatistical evidence, including two of the defendants' own lay witnesses, the court found that the balance of the evidence did not support the defendants' claim. The district court also rejected the defendants' partisanship claim as a matter of law, reasoning that Section 2 protects a minority voter's right to elect candidates of choice even if the voter chooses candidates solely because they belong to a particular political party. After considering all of the evidence, the district court found that the plaintiffs had satisfied the second *Gingles* factor.<sup>49</sup>

With respect to the third *Gingles* factor, the court found that both parties' experts had produced results that "show[ed] that non-Indian voters in District 26 vote sufficiently as a bloc to enable them, particularly in the most probative elections and in the absence of special circumstances, usually to defeat the Indian-preferred candidate."<sup>50</sup> Across all of the many elections on which the district court relied, the plaintiffs' expert had shown that white voters in District 26 voted sufficiently as a bloc to defeat 21 out of 21 (100%) Indian-preferred candidates. And the defendants' expert had shown that white voters defeated 17 out of 25 (68%) Indian-preferred candidates. Considering all of this evidence in the aggregate, the district court concluded that the plaintiffs had satisfied the third *Gingles* factor.<sup>51</sup>

Turning to the "totality of the circumstances," the court found that eleven of the twelve totality factors weighed in the plaintiffs' favor, and it rejected the defendants' claim on the twelfth factor that Indian voter apathy alone accounted for the difficulty Indian voters had experienced in electing candidates of their choice in District 26.<sup>52</sup>

According to the Supreme Court, the two "most important" totality factors are: (1) the extent to which minorities have been elected under the challenged plan; and (2) the extent to which voting is racially polarized.<sup>53</sup> The district court found that both factors weighed in the plaintiffs' favor. The defendants admitted, and the district court found, that not a single Native American candidate was elected to the state legislature from the area in District 26 between 1982 and 2002.<sup>54</sup> The district court also found that "substantial evidence, both statistical and lay, demonstrates that voting in South Dakota is racially polarized among whites and Indians in Districts 26 and 27."<sup>55</sup> It described that polarization as "extensive" and at a "high level."<sup>56</sup> It also found that white crossover voting dropped precipitously when the Indian-preferred candidate was an Indian.<sup>57</sup>

The district court's analysis of the totality factors is also noteworthy because of its extensive findings on South Dakota's history of discrimination against Native Americans. The

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<sup>49</sup> *Id.* at 1010.

<sup>50</sup> *Id.* at 1016.

<sup>51</sup> *Id.* at 1017.

<sup>52</sup> *Id.* at 1017-52.

<sup>53</sup> *Gingles*, 478 U.S. at 48-49 n.15; accord *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc).

<sup>54</sup> *Bone Shirt*, 336 F. Supp. 2d at 1043.

<sup>55</sup> *Id.* at 1036.

<sup>56</sup> *Id.* at 1035.

<sup>57</sup> *Id.* at 1035.

court's review of that history of discrimination covers more than forty pages in its slip opinion.<sup>58</sup> The review synthesizes innumerable documents, many of which were pulled directly from the state's own session laws.

The review also highlights the testimony of Native American witnesses who offered their own experiences of discrimination at trial. For example, Elsie Meeks, a tribal member at Pine Ridge and the first Indian to serve on the U.S. Commission on Civil Rights, told about her first exposure to the non-Indian world and the fact "that there might be some people who didn't think well of people from the reservation."<sup>59</sup> When she and her sister enrolled in a predominantly white school in Fall River County and were riding the bus, "somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it . . . it was just sort of a shock to me."<sup>60</sup> Meeks said that there is a "disconnect between Indians and non-Indians" in the state.<sup>61</sup> "[W]hat most people don't realize is that many Indians, they experience this racism in some form from non-Indians nearly every time they go into a border town community. . . . [T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel that the non-Indians don't like them and don't trust them."<sup>62</sup>

Lyla Young, a Rosebud tribal member, said that the first contact she had with whites was when she went to high school in Todd County.<sup>63</sup> The Indian students lived in a segregated dorm at the Rosebud boarding school, and were bussed to the high school, then bussed back to the dorm for lunch, then bused again to the high school for the afternoon session.<sup>64</sup> The white students referred to the Indians as "GI's," which stood for "government issue."<sup>65</sup> Young said that "I just withdrew. I had no friends at school. Most of the girls that I dormed with didn't finish high school . . . I didn't associate with anybody."<sup>66</sup> Even as an adult, Young has had little contact with the white community. "I don't want to. I have no desire to open up my life or my children's life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more."<sup>67</sup> Testifying in court was particularly difficult for her. "This was a big job for me to come here today. . . . I'm the only Indian woman in here, and I'm nervous. I'm very uncomfortable."<sup>68</sup>

Arlene Brandis, a Rosebud tribal member, recalled walking to and from school in Tripp County: "[C]ars would drive by and they would holler at us an call us names. . . like dirty Indian, drunken Indian, and say why don't you go back to the reservation."<sup>69</sup> Although that was years

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<sup>58</sup> *Id.* at 1018-34.

<sup>59</sup> *Id.* at 1032.

<sup>60</sup> *Id.* at 1032.

<sup>61</sup> *Id.* at 1032.

<sup>62</sup> *Id.* at 1032.

<sup>63</sup> *Id.* at 1032.

<sup>64</sup> *Id.* at 1032.

<sup>65</sup> *Id.* at 1033.

<sup>66</sup> *Id.* at 1033.

<sup>67</sup> *Id.* at 1033.

<sup>68</sup> *Id.* at 1033.

<sup>69</sup> *Id.* at 1033.

ago, Brandis does not see much difference between then and now. White families in Winner, where she lives now, do not sit near her family at high school football and basketball games. She believes that this is because she and her husband are Native American.

Almost without exception, the tribal members who testified at trial could recount incidents of being mistreated, embarrassed, or humiliated by whites. Based on “the wealth of evidence and testimony” before it, the court concluded that “there is a long and extensive history of discrimination against Indians in South Dakota that touches upon the right to register and to vote, and affects their ability to participate in the political process on an equal basis with other citizens.”<sup>70</sup>

Lastly, the district court returned to the defendants’ attempt to attribute the lack of Indian electoral success to voter apathy and low voter turnout. In particular, the defendants claimed that the lack of success was due to a lack of Indian interest in state politics, internal divisions among the tribes, and a fear among Indian voters that voting in state and county elections would erode tribal sovereignty.

The district court found, however, that the record refuted those claims.<sup>71</sup> “Throughout South Dakota’s history, Native Americans have made repeated and persistent efforts to participate in the political process at all levels of government despite facing outright discrimination and informal barriers in exercising their right to vote.”<sup>72</sup> The court based its conclusion in part on more than two dozen documentary exhibits and the testimony of several Native American lay witnesses who underscored the value of participating in state and federal elections. Even the defendants’ own expert historian, Dr. Michael Lawson, conceded that Native Americans in South Dakota are not disinterested in state politics. He added: “I think there’s a growing number of tribal members who see the importance of political participation at every level.”<sup>73</sup>

After reviewing each of the factors in its analysis, the district court found, based on the totality of circumstances, that South Dakota’s 2001 legislative redistricting plan “results in unequal electoral opportunity for Indian voters.”<sup>74</sup> Accordingly, the court concluded that the plan “impermissibly dilutes the Indian vote and violates § 2 of the Voting Rights Act.”<sup>75</sup>

After finding a violation of Section 2, the district court gave the defendants two separate opportunities to propose a remedy. Each time they declined to do so. The court then issued an order adopting one of the plaintiffs’ proposed remedial plans and enjoining the defendants from using the unlawful plan in future elections.<sup>76</sup>

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<sup>70</sup> *Id.* at 1034.

<sup>71</sup> *Id.* at 1050-52.

<sup>72</sup> *Id.* at 1052.

<sup>73</sup> *Id.* at 1052.

<sup>74</sup> *Id.* at 1052.

<sup>75</sup> *Id.* at 1052.

<sup>76</sup> *Bone Shirt v. Hazeltine*, 387 F. Supp. 2d 1035, 1044 (D.S.D. 2005).

The state appealed, but the Eight Circuit affirmed the decision of the district court.<sup>77</sup> The State did not ask the Supreme Court to hear the case, and the redrawn districts were used for the remainder of the decade, resulting in Indian-voter control over one additional seat in the South Dakota House of Representatives.

### *Kirkie v. Buffalo County*

In March 2003, three members of the Crow Creek Sioux Tribe filed suit challenging to the county commission districts in Buffalo County, South Dakota.<sup>78</sup> The plaintiffs alleged that the districts were malapportioned in violation of the one-person-one-vote principle and were adopted or maintained for the purpose of discriminating against Native American voters.

Buffalo County, which according to the 2000 Census was the poorest county in the United States, had a population of approximately 2000 people. Approximately 85% of the county's population was Native American.

The county was governed by a three-member county commission elected from three single-member districts. Those districts, which had been in use for decades, contained populations of approximately 1,550, 350, and 100 people, respectively. Virtually all of the 1,550 people in commissioner district 1 were Native American, while not a single Indian lived in the underpopulated district 3. The system not only violated the "one person, one vote" standard of the Equal Protection Clause but had also been clearly implemented and maintained to dilute the Indian vote and ensure white control of county government.

The malapportionment persisted, moreover, despite a state-law made for decennial redistricting. South Dakota law required a board of county commissioners to redistrict "at its regular meeting in February of each year ending in the numeral 2 . . . if such change is necessary in order that each district shall be as regular and compact in form as practicable and it shall so divide and redistrict its county that each district may contain as near as possible an equal number of residents, as determined by the last preceding federal decennial census."<sup>79</sup> Minutes of the county commission meeting held in February 2002 reveal that the commissioners considered the issue and decided—despite the overwhelming inequality among the districts—that the existing districts "required no change."<sup>80</sup> The commissioners were, in effect, thumbing their noses at state and federal redistricting requirements in order to prevent Native Americans from having a full voice on the commission.

The parties settled the case in early 2004. In a consent decree approved by the court, the county was required to redraw its commissioner districts and to hold a special election for two of

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<sup>77</sup> *Bone Shirt v. Hazeltine*, 461 F.3d 1011 (8th Cir. 2006).

<sup>78</sup> Complaint, *Kirkie v. Buffalo County*, Civ. No. 03-5024 (D.S.D. Mar. 20, 2003).

<sup>79</sup> S.D.C.L. § 7-8-10.

<sup>80</sup> See Answer, *Kirkie v. Buffalo County*, Civ. No. 03-5025 (D.S.D. Apr. 28, 2003), at 10.

the three seats.<sup>81</sup> The county also admitted that its plan was discriminatory and agreed to relief under Section 3 of the Voting Rights Act. That relief included the authorization of federal observers to monitor elections and the activation of the “pocket-trigger” in Section 3(c), which effectively made Buffalo County subject to the preclearance requirements of Section 5 of the Voting Rights Act through 2013.

*Blackmoon v. Charles Mix County*

The litigation against Charles Mix County may be the best example of the continuing need for further protections under the Voting Rights Act. Charles Mix has historically been a county divided. Members of the Yankton Sioux Tribe, who make up approximately 30 percent of the county’s population, live mainly in the southern part of the county, along the banks of the Missouri River, and in the small towns of Lake Andes, Marty, and Wagner. Farmers make up the bulk of the county’s non-Indian population, and they are concentrated in the northern and eastern parts of the county. Social life remains largely, though informally, segregated. There is a plaque in the main hall of the county courthouse recognizing county residents who served in the Vietnam War, and it lists not a single Indian name even though many served.

The county is governed by a three-member county commission, with each commissioner elected from a single-member district. Before the litigation, no Native American had ever been elected to the commission.

The county’s commissioner districts were decades old and badly malapportioned. The total deviation of the districts from equality was greater than 19 percent, and white voters were a majority in all three districts.

In anticipation of redistricting following the 2000 Census, the Yankton Sioux Tribe sent a letter to the commission in November 2001 pointing out the malapportionment and proposing a new plan with one majority-Indian district. State law required the commission to redraw its districts at its regular meeting in February 2002 and then prohibited further redistricting for the rest of the decade.<sup>82</sup> The February meeting came and went, however, and the commission decided to leave its existing districts intact.

Four tribal members then sued the county, alleging that the three commissioner districts were malapportioned in violation of the one-person-one-vote standard of the Fourteenth Amendment and had been drawn or maintained to dilute Indian voting strength in violation of Section 2 of the Voting Rights Act.<sup>83</sup> In response to the suit, the county commission took the position that its districts were not unlawful, but it also asked the state legislature to pass legislation establishing a process for emergency redistricting. The purpose of the bill, according to its proponents, was to allow the defendants in the *Blackmoon* case to render the plaintiffs’

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<sup>81</sup> Consent Decree, *Kirkie v. Buffalo County*, Civ. No. 03-5024 (D.S.D. Feb. 12, 2004).

<sup>82</sup> S.D.C.L. § 7-8-10.

<sup>83</sup> Complaint, *Blackmoon v. Charles Mix County*, Civ. No. 05-4017 (D.S.D. Jan. 27, 2005).

claims moot by modifying the challenged redistricting plan and thereby to avoid liability in the suit. Because of the urgency of that goal, the bill's sponsors brought the bill directly to the House floor, where the House suspended its rules, dispensed with a hearing, and passed the bill on the same day without the usual public notice. In the South Dakota Senate, the defendants' attorneys lobbied aggressively in favor of the bill and testified in support of it. Although many Native Americans, including several from Charles Mix County, testified in opposition to the bill, the Senate passed it shortly thereafter. Because it contained an emergency clause, the law went into effect immediately upon the governor's signature. The new law allowed a county to redistrict any time it became aware of facts that called into question whether its districts complied with state or federal law, and the county commission immediately began the process of redrawing its districts to avoid court-ordered redistricting.<sup>84</sup>

Before the county could complete the redistricting process, however, the Native American plaintiffs in the *Quiver* litigation obtained a temporary restraining order and preliminary injunction prohibiting the State from enforcing the new law unless and until it obtained preclearance under Section 5 of the Voting Rights Act.<sup>85</sup> In a strongly worded opinion granting the injunction, the three-judge district court noted that State officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the emergency clause in the new law "gives the appearance of a rushed attempt to circumvent the VRA."<sup>86</sup> The injunction effectively put the new law on hold while the litigation against Charles Mix County proceeded.

While the new law was on hold, the district court in *Blackmoon* granted the plaintiffs' motion for partial summary judgment on their malapportionment claim and ordered the defendants to submit a remedial proposal for court approval.<sup>87</sup> The county commission then tried to push through a redistricting plan that would have continued to dilute Native American voting strength. Using noncontiguous districts, the plan included recently developed land along the Missouri River in the district that, according to the 2000 Census, contained mostly Native Americans. Because the developments didn't exist at the time of the 2000 Census, the impact of those voters was not apparent on the county's proposed plan. Residents of the county knew full well, however, that most of the voters in the newly developed area were non-Indian. The county commission held a hearing on its dilutive plan, and Native Americans strongly opposed it. In light of that opposition, the county adopted the plan that had been proposed by the Yankton Sioux Tribe in 2001, and that remedied both the malapportionment and the dilution of Indian voting strength.

Reaction to new districts was swift. Less than a month after the county adopted a redistricting plan with a majority Indian district, a white resident of the northeast part of the county began circulating a petition to split Charles Mix into two counties, one part of which

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<sup>84</sup> 2005 S.D. Laws., ch. 43.

<sup>85</sup> *Quiver v. Nelson*, 387 F. Supp. 2d 1027 (D.S.D. 2005) (three-judge district court).

<sup>86</sup> *Id.* at 1034.

<sup>87</sup> *Blackmoon v. Charles Mix County*, 2005 WL 2738954 (D.S.D. 2005).

would be almost all white. The petition received significant news coverage, and it was widely seen as directly related to the Indian victory in the *Blackmoon* case.<sup>88</sup>

The secession movement fizzled after the media coverage, and the petitions to divide the county were never turned in. Instead, a new petitioning effort sprung up—this time seeking to increase the number of county commissioners from three to five. In a thinly veiled reference to an Indian candidate who was running for commissioner in the new majority-Indian district, the circulator of the petition told the media that the purpose of increasing the size of the county commission was to “take[] power away from one strong commissioner.”<sup>89</sup>

Native Americans opposed the increase, but it passed in November 2006 with strong white support. In an effort to stop the increase from being implemented, tribal members successfully circulated a petition to refer the county’s five-member plan to the voters. In a special election on the referendum, however, the matter failed, and the increase was scheduled to take effect in 2008.

In early 2007, the district court ruled that the plaintiffs’ remaining claims could go forward and set them for trial in March 2008.<sup>90</sup> The primary issue was the plaintiffs’ request for relief under the “pocket trigger” provisions in Section 3 of the Voting Rights Act, which would require the county to comply with the preclearance provisions of Section 5.

Rather than go to trial, the county requested mediation. In December 2007, the parties negotiated a consent decree that, among other things, activated the “pocket trigger” in Section 3(c) of the Voting Rights Act and requires the county to preclear its voting changes until 2024. The county subsequently submitted for preclearance its plan to increase the size of the county commission from three to five. The Department of Justice objected to the change on the ground that the county had not met its burden of proving that the increase was not motivated by a discriminatory purpose. As a result of the objection, the three-member plan with one majority-Indian district remained in place.

The first election under the new districts was held in November 2006, and Sharon Drapeau was elected to be the first woman and the first Native American to serve on the commission.

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<sup>88</sup> See Kimberly Kolden, Residents in Charles Mix consider plan to split county, *Mitchell Daily Republic* (Feb. 14, 2006).

<sup>89</sup> Monica Wepking, Petition to Change County Commission Numbers, *Lake Andes Wave* (June 14, 2006).

<sup>90</sup> *Blackmoon v. Charles Mix County*, 505 F. Supp. 2d 585 (D.S.D. 2007).

## *Cases Involving Documentation or Qualifications to Vote*

### *Janis v. Nelson*

Eileen Janis and Kim Colhoff, both residents of Pine Ridge, South Dakota, were registered voters until early 2008, after they were each convicted of a felony offense and sentenced to five years of probation but no jail time. Despite the fact that South Dakota law expressly provided that the right to vote is denied only while persons convicted of felonies are imprisoned in the state penitentiary, Colhoff and Janis were removed from the voter rolls without any notice and denied the right to vote at their polling places when they attempted to vote in the 2008 presidential election. In front of several other voters, election officials refused to allow Janis to cast either a regular or provisional ballot.

In 2009, Janis and Colhoff filed a class-action lawsuit against state and local election officials, alleging that the illegal disfranchisement of individuals with felony convictions has had a disproportionate and negative impact on American Indian voters who are overly represented in South Dakota's criminal justice system. The lawsuit also contended that the removal of individuals' names from the state and county voter registration lists based on felony convictions for which they were sentenced only to probation violates their rights to equal protection and due process under the federal and state constitutions, the Help America Vote Act, the National Voter Registration Act and Sections 2 and 5 of the Voting Rights Act.

The defendants moved to dismiss the case on various grounds, but the district court allowed the suit to proceed.<sup>91</sup> Following a period of discovery and mediation, the parties reach a settlement. The agreement restored Janis and Colhoff to the rolls and established procedures to prevent unlawful disfranchisement from happening in the future, including increased training for election officials and public education.

### *Drivers' Licensing Offices in Todd and Charles Mix Counties*

In September 2009, South Dakota announced plans to close 17 of its drivers' licensing offices around the state. Among the offices to be closed were those in Todd and Charles Mix counties, both of which were covered jurisdictions subject to the Act's preclearance mandates. (Todd by Section 5 and Charles Mix by Section 3(c)). Residents of those counties would in many instances have to drive long distances to get a driver's license or photo ID. Several residents of those counties complained, and the ACLU began an investigation.

The closure would affect both voter registration and voting. Under the National Voter Registration Act, drivers' license offices in South Dakota conduct voter registration, and the closure of drivers' licensing offices would mean that residents of Todd and Charles Mix counties would have less access to motor-voter registration. Access to drivers' licenses would also affect

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<sup>91</sup> *Janis v. Nelson*, Civ. No. 09-cv-05019 (D.S.D. Dec. 30, 2009).

voting because South Dakota is one of several states that require each voter to show identification before voting in person or by absentee ballot.<sup>92</sup> The closure would likely mean that some voters would not be able to meet the identification requirements because they would not have an up-to-date driver's license or state-issued photo identification card. Census data showed that Native Americans in Todd and Charles Mix counties had a lower socioeconomic status and less access to cars than their white counterparts, which would mean less access to gas money and the ability to travel long distances to obtain or renew the necessary identification.

The ACLU asked the Department of Justice to send the state a "please submit" letter asking the state to submit its closure plan to the Attorney General for preclearance. It is unclear whether the Department did, in fact, send such a letter or make an oral request for a submission, but the state announced three weeks later that it was reversing the decision to close the offices in Todd and Charles Mix counties. The state's Department of Public Safety, which oversees the licensing program, issued a statement specifically citing the preclearance provisions of the Voting Rights Act and the state's desire to avoid potential litigation as a reason for its decision.

### *Cases Involving Voting Locations*

#### *Polling Places in Mellette County*

In September 2008, officials in sparsely-populated Mellette County, South Dakota, voted to close all but one of the county's four polling places. The move was touted as a cost-saving measure designed to save the cash-strapped county about \$1,000. But it meant that some voters would have to drive as many as 40 miles each way to the county seat in order to cast a vote. And, to make matters worse, South Dakota had one of the most restrictive absentee ballot laws in the country, requiring voters to have their absentee ballot applications notarized or witnessed by county officials.

Soon after the county's decision to close the polls, the Rosebud Sioux Tribe contacted the ACLU's Voting Rights Project for help. Mellette County is within the historical boundaries of the Rosebud Indian Reservation, and Native Americans still make up about half of the county's population.

The ACLU analyzed the impact of the county's decision and concluded that the poll closure would have a severe and disparate impact on Native American voters. Not only would a higher percentage of Indians than non-Indians have to travel significant distances to vote or cast an absentee ballot, but Native Americans were also much less likely than whites to have access to a vehicle or the money to pay for gas. And, to add insult to injury, the all-white county commission moved the county's only remaining polling place next door to the sheriff's office, a place that would further deter Indians from voting because of a history of friction between Native Americans and law enforcement in the county. The ACLU prepared a lawsuit alleging violations

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<sup>92</sup> See S.D.C.L. §§ 12-18-6.1, 12-19-2.

of Section 2 of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the United States Constitution.

One of the largest television stations in the state ran a story on the poll closure, and word of the ACLU's investigation got out. Less than 24 hours before the ACLU was prepared to file suit against the county on behalf of Native American voters, county officials called a hastily arranged meeting and rescinded the poll closing ordinance to avoid the possibility of litigation.

*Spirit Lake Tribe v. Benson County*

Shortly before the November 2010 election, Benson County, North Dakota, announced that it was closing all but one of the county's polling places, including the two that were located on the Spirit Lake Indian Reservation. The Spirit Lake Tribe filed suit in federal district court that closing the precincts on the Reservation would make it difficult or impossible for many Indians to vote in violation of the federal and state constitutions and Section 2 of the Voting Rights Act.

The tribe moved for a preliminary injunction, and, following an expedited hearing, the district granted the motion on October 21, 2010.<sup>93</sup> The order required the county to maintain the two polling places on the Reservation, concluding that closing the precincts would have a disparate impact on Indian voters who lacked access to transportation or to voting by mail.

In 2012, the parties settled the case, with the county agreeing to keep the reservation polling places open in future general elections. The settlement also called for a series of meetings between county and tribal officials to foster communication between the two entities.

*Wandering Medicine v. McCulloch*

In 2012, tribal members living on the Crow, Northern Cheyenne, and Fort Belknap reservations in Montana filed suit against state and local election officials seeking equal access to in-person late registration and absentee voting opportunities.<sup>94</sup> Montana law permits late registration and early voting at the county seat, but also permits counties to create satellite locations for these purposes. The plaintiffs moved for a preliminary injunction ordering the counties to open satellite offices accessible to voters on the reservations.

The Department of Justice filed a Statement of Interest in the case, arguing that the plaintiffs were likely to succeed on their claim that the location of the late-registration and early voting sites violated Section 2.<sup>95</sup> The Department's brief also contained expert analysis showing

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<sup>93</sup> *Spirit Lake Tribe v. Benson Cnty.*, No. 2:10-cv-095, 2010 WL 4226614 (D.N.D. Oct. 21, 2010)

<sup>94</sup> *Wandering Medicine v. McCulloch*, No. 1:12-cv-0135 (D. Mont.).

<sup>95</sup> Statement of Interest of the United States, *Wandering Medicine v. McCulloch*, No. 1:12-CV-135-RFC (D. Mont. Oct. 23, 2012), <https://www.justice.gov/crt/case-document/si-wandering-medicine-v-mcculloch-2012>.

that, in order to access the lone site in the county seat, Native Americans were forced to travel 189 percent further than white voters in Big Horn County, 322 percent further in Blaine County, and 267 percent further in Rosebud County.

The district court denied the motion, but the plaintiffs appealed. In 2014, following the Ninth Circuit's dismissal of the plaintiffs' appeal as moot,<sup>96</sup> the parties conducted further discovery and filed cross motions for summary judgment. The defendants argued that the plaintiffs' claims were not cognizable under Section of the Voting Rights Act, and the Department of Justice again filed a Statement of Interest supporting the plaintiffs' claims.<sup>97</sup>

In June 2014, the parties agreed to settle the case by establishing satellite offices on the reservations twice a week through Election Day.<sup>98</sup>

### *Poor Bear v. Jackson County*

In September 2014, four members of the Oglala Sioux Tribe filed suit against Jackson County, South Dakota, alleging that the county's refusal to open a satellite office for in-person absentee voting and registration on the Pine Ridge Reservation violates Section 2 of the Voting Rights Act of 1965 and the Fourteenth Amendment of the United States Constitution.

Under South Dakota law, residents can register and vote in one stop starting 46 days before an election at locations designated by each county.<sup>99</sup> Nothing in South Dakota law prohibits a county from creating satellite election offices so that one-stop in-person voter registration and in-person absentee voting can take place in more than one location. Nor does South Dakota law require that there be a one-stop site in the county seat. Yet the only location for one-stop in-person voter registration and in-person absentee voting in Jackson County was the election office in Kadoka, the county seat—a town that is more than 90% white.

Jackson County is geographically large and sparsely populated. It also has a substantial Native American population, most of which lives on or near the Pine Ridge Indian Reservation at a great distance from Kadoka. On average, Indian citizens in Jackson County have to travel almost two hours round-trip to reach Kadoka, and that is twice as long as the average round-trip travel time required for white citizens. The time and resources required for a trip to Kadoka, combined with the depressed socioeconomic status of Indians in Jackson County, made in-person absentee voting and therefore one-stop voting effectively unavailable for many Indians in Jackson County.

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<sup>96</sup> *Wandering Medicine v. McCulloch*, 544 Fed. App'x 699 (9th Cir. 2013).

<sup>97</sup> Statement of Interest of the United States, *Wandering Medicine v. McCulloch*, No. 1:12-CV-135-RFC (D. Mont. Apr. 25, 2014), <https://www.justice.gov/crt/case-document/si-wandering-medicine-v-mccullough>

<sup>98</sup> John S. Adams, *Montana Indian Voting Lawsuit Settled*, Great Falls Tribune, June 12, 2014, *available at* <https://www.greatfallstribune.com/story/news/politics/2014/06/12/montana-indian-voting-lawsuit-settled/10389781/>.

<sup>99</sup> See generally S.D.C.L. chs. 12-4, 12-19

The plaintiffs filed a motion for a preliminary injunction in October 2014, but that became moot after the county reversed course and agreed to open a satellite office that would be more accessible to Native American voters. That office provided in-person absentee voting from October 20 until the November 4 election.

The defendants then filed a motion to dismiss, arguing that the plaintiffs' claims are not cognizable under Section 2 of the Voting Rights Act. The Department of Justice filed a Statement of Interest supporting the plaintiffs' claims,<sup>100</sup> and the district court denied the motion.<sup>101</sup>

Jackson County thereafter entered into an agreement with the State of South Dakota under which the County committed to opening a satellite office accessible to Indian voters during all federal primary and general elections through January 1, 2023.<sup>102</sup>

### *Cases Involving the Denial of Attorneys' Fees*

The *Poor Bear* case, discussed immediately above, is also noteworthy because it illustrates the need to strengthen the attorneys' fees provisions of the Voting Rights Act.

Most voting-rights litigation is brought on behalf of private plaintiffs who generally lack the means to pay for their own attorneys. Like most civil-rights statutes, the Voting Rights Act contains a fee-provision that changes the so-called "American rule" for attorney fees by allowing victorious citizen plaintiffs to recover their attorney fees from the losing party.<sup>103</sup>

It is well established that plaintiffs who win a judgment in their favor qualify for the benefits of fee-shifting. What used to be less clear, however, was whether those parties whose successes come outside the courtroom could also recover fees. In the past, the so-called "catalyst theory" answered this question affirmatively. Parties were entitled to fees by demonstrating that their litigation was the catalyst for obtaining the relief sought, even though the relief was obtained through the defendant's voluntary change in conduct or through a private, non-judicial settlement agreement.

In 2001, however, the Supreme Court rejected the "catalyst theory" in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*.<sup>104</sup> In *Buckhannon*, the Supreme Court construed the term "prevailing party" in the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act. The

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<sup>100</sup> Statement of Interest of the United States, *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. Dec. 23, 2014), <https://www.justice.gov/crt/case-document/si-poor-bear-v-jackson>.

<sup>101</sup> *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. May 1, 2015).

<sup>102</sup> *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. June 17, 2016).

<sup>103</sup> 52 U.S.C. § 10310(e).

<sup>104</sup> 532 U.S. 598 (2001)

*Buckhannon* majority adopted a narrow view of the term “prevailing party,” ruling that, for those two statutes at least, “the ‘catalyst theory’ is not a permissible basis for the award of attorney’s fees.”<sup>105</sup> The Court required some “judicially sanctioned” victory as a prerequisite to a fee award.<sup>106</sup>

The Supreme Court’s rejection of the catalyst theory has had “a profoundly negative impact on civil rights litigation.”<sup>107</sup> *Buckhannon* reduces plaintiffs’ leverage in settlement negotiations because defendants are aware that they can often avoid a fee award by capitulating, and it also makes settlement more difficult by taking away the potential for face-saving out-of-court settlements in which the defendants do not admit liability.<sup>108</sup>

So it was in *Poor Bear*. The parties litigated the case for more than two years. The district court had rejected the counties primary defenses, and the plaintiffs had filed a motion for summary judgment on the merits. Rather than defend their position on the merits or engage in settlement discussions with the plaintiffs, the County entered into a temporary agreement with the State to offer a satellite voting location for four election cycles. The County then immediately sought to dismiss the case on ripeness grounds, and the district court granted the motion.<sup>109</sup>

The plaintiffs still moved for an award of fees, but the district court rejected the motion under *Buckhannon*.<sup>110</sup> There was no dispute that the plaintiffs had been the catalyst for the defendants’ capitulation, that was no longer enough to qualify for fees as a prevailing party.

The plaintiffs in *Poor Bear* were represented by a non-profit civil rights organization and private counsel that had undoubtedly devoted hundreds of hours to the case. Although they obtained excellent results for their clients, they recovered nothing. The district court’s decision denying fees risks creating a chilling effect on future voting-rights litigation in Indian Country, with attorneys less likely to take a risk on uncompensated cases.

Congress should therefore fix the Voting Rights Act to restore a plaintiff’s ability to recover fees under the catalyst theory as it existed prior to *Buckhannon*.

## *Conclusion*

The cases that I have discussed today are just the tip of the proverbial iceberg. They are only some of the cases in Indian Country that one attorney has participated in over the course of a twenty-year career. There are many more such cases brought in Indian Country by other

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<sup>105</sup> *Id.* at 610.

<sup>106</sup> *Id.*

<sup>107</sup> Rebecca Glenberg, *Attorney’s Fees and Buckhannon*, J. Va. Tr. Lawyers’ Assoc., Vol. 20, No. 4, at 13 (2009).

<sup>108</sup> See Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 UCLA L. Rev. 1087 (2007).

<sup>109</sup> *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. June 17, 2016).

<sup>110</sup> *Poor Bear v. Jackson County*, 5:14-CV-5059-KES (D.S.D. Jan. 4, 2017).

attorneys, including my colleagues in the Native American Voting Rights Coalition. But these cases and the volumes of evidence they generated show that voting discrimination continues to be a significant problem in Indian Country. This problem justifies strong congressional action to ensure that Native Americans, like all Americans, can be free to participate fully in our democracy.

I thank you for the opportunity to testify here today, and I look forward to answering any questions that you might have.