U.S. Department of Justice

Civil Rights Division

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Voting Section - NWB
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

February 11, 2008

Ms. Sara Frankenstein
Gunderson, Palmer, Goodsell & Nelson
P.O. Box 8045
Rapid City, South Dakota 57709-8045

Dear Ms. Frankenstein:

This refers to the increase in the number of county commissioners from three to five, and the 2007 redistricting plan for Charles Mix County, South Dakota, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your submission on December 12, 2007; supplemental information was received through January 28, 2008.

According to the 2000 Census, the County has 9,350 residents, of whom 2,644 (28.3%) are Native American, 177 (1.9%) are Hispanic, 9 (0.1%) are Asian, and 12 (0.1%) are African-American. The County currently elects its commission from three single-member districts. Under the proposed plan, the number of commissioners would increase to five and be elected from single-member districts. An increase in the number of commissioners on the board is a voting change under Section 5. *See City of Lockhart v. United States*, 460 U.S. 125, 131 (1983) (change in system where county commission increased from a three-member commission to a five-member commission is a voting change). The county also has adopted a redistricting plan for the five single-member districts.

We have carefully considered the information you have provided, as well as information and materials from other interested parties. Under Section 5 of the 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 (2006) ("Voting Rights Act"), the Attorney General must determine whether the submitting authority has met its burden of showing that the proposed change "neither has the purpose nor will have the effect" of denying or abridging the right to vote on account of race. As discussed further below, I cannot conclude that the County has sustained its burden of showing that the proposed change does not have a discriminatory purpose. Therefore, based on the information available to us, I object to the voting changes on behalf of the Attorney General.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of

showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. *Georgia v. United States*, 411 U.S. 526 (1973). See also Procedures for the Administration of Section 5 of the Voting Rights Act (28 C.F.R. 51.52). In satisfying its burden, the submitting authority must demonstrate that the proposed changes are not tainted, even in part, by an invidious racial purpose; it is insufficient simply to establish that there are some legitimate, nondiscriminatory reasons for the voting changes. See *City of Rome v. United State*s, 422 U.S. 156, 172 (1980); *Busbee v. Smith*, 549 F. Supp. 494, 516-17 (D.D.C. 1982), aff'd 459 U.S. 1166 (1983).

The Supreme Court identified a non-exhaustive list of factors that may serve as indicia of a discriminatory purpose in *Village of Arlington Heights v. Metropolitan Housing Authority*, 429 U.S. 252, 256-57 (1977) . Those factors include the following: (1) the impact of the official action and whether it bears more heavily on one race than another; (2) the historical background of the action; (3) the sequence of events leading up to the action; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporary statements and viewpoints held by the decision-makers.

Here, an analysis of these factors confirms that the County has not sustained its burden of showing that the proposed change does not have a discriminatory purpose. In the first place, the voting changes appear to have a greater impact on Native Americans because, under the proposed plan, Native American voters can elect their candidate of choice in only one of five districts, as opposed to one in three districts under the current plan. Our election analysis demonstrates that there is no reasonable probability that Native American voters could elect their candidate of choice in District 2 of the proposed plan.

In addition, Charles Mix County and the State of South Dakota have a history of voting discrimination against Native Americans. Native Americans could not vote in the county until 1951. Even when Native Americans received the right to vote, they were discriminated against in registration and other parts of the voting process.

Moreover, the historical background and the sequence of events leading to these voting changes also support an inference of intentional retrogression of Native American voting strength by the county. In January 2005, the county was sued for violations of the Fourteenth Amendment and Section 2 of the Voting Rights Act in *Blackmoon v. Charles Mix County*. At the time *Blackmoon* was filed, no Native American had ever been elected to the County Commission in Charles Mix County, despite the significant Yankton Sioux population in the County. Depositions in the case revealed that after the 2000 Census, the County Commissioners decided not to redistrict despite the fact that commissioners knew that the districts did not provide Native Americans the voting strength to elect a candidate of choice.

On March 24, 2005, the court in *Blackmoon* found that there had been violations of the Fourteenth Amendment because Charles Mix County failed to redistrict after the 2000 Census. Despite the court's finding, the first remedial plan suggested by the county again failed to

provide Native Americans with an opportunity to elect a candidate of their choice. Finally, in 2006, the County agreed to a redistricting plan that included a majority Native American district which could elect a candidate of choice, and this plan was implemented for the 2006 county elections. Under this new plan, the voters elected the first Native American to the county commission in Charles Mix County.

The timing of the adoption of the proposed change to a five member commission raises concerns of a discriminatory purpose. The first petitioner signed the referendum petition to increase the size of the commission on April 3, 2006. Only 46 people signed the initial circulation prior to June 2006. At the June 2006 Democratic Primary election, Ms. Drapeau won, and she would become the first Native American County Commissioner in Charles Mix County because there was no opponent in the general election. Immediately after the primary election, an article about changing the number of county commissioners appeared in *The Lake Andes Wave*. Momentum for the petition then built, and one thousand signatures were obtained to put the referendum on the ballot. The referendum was held in November 2006, and the measure passed.

Elected officials supported the increase in the number of county commissioners. In particular, the Sheriff and his deputies, actively circulated the petition. According to our contacts in the county, the Sheriff and deputies collected signatures in uniform.

Depositions in *Blackmoon* reveal that one commissioner admitted that the commissioners decided not to redistrict in 2000 despite the fact that they knew that the districts did not provide Native Americans the voting strength to elect a candidate of choice. Various community members, including Native Americans and non-Native Americans, also have informed the Section that county commissioners have made comments that evidence a racially discriminatory intent.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes neither have the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District Court for the District of Columbia is obtained, the increase in the number of county commissioners and the redistricting plan will continue to be legally unenforceable. *Clark v. Roemer*, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action Charles Mix County plans to take concerning this matter. If you have any questions, you should call Tim Mellett (202-307-6262), Acting Deputy Chief of the Voting Section.

Sincerely,

Grace Chung Becker
Acting Assistant Attorney General
Civil Rights Division