



U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

June 19, 1995

The Honorable Joyce Hazeltine  
Secretary of State for the State  
of South Dakota  
State Capitol, Suite 204  
500 East Capitol Avenue  
Pierre, South Dakota 57501-5070

Dear Ms. Hazeltine:

This refers to the submission to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, of Chapter 107, S.B. No. 17 (1994) of the State of South Dakota, and Article 5:02 of the administrative rules and regulations of the South Dakota State Board of Elections, which adopt changes (listed in Attachment A) to voter registration and related procedures to, inter alia, implement the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. 1973gg to 1973gg-10, for Shannon and Todd Counties in South Dakota. We received your response to our February 21, 1995, request for additional information on April 20, 1995; supplemental information was received on June 9, 1995.

This also refers to the procedures for implementing voter registration at "voter registration agencies" and driver's license locations, inter alia, to implement the NVRA for Todd and Shannon Counties in South Dakota.

We have given careful consideration to the information you have provided, as well as to information from other interested persons. Except as set forth below, the Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41). In this regard, the granting of Section 5 preclearance does not preclude the Attorney General or private individuals from filing a civil action pursuant to Section 11 of the NVRA, 42 U.S.C. 1973gg-9.

We cannot reach the same conclusion regarding the procedures for removing registered voters from the registration list, insofar as the procedures provide for sending a registration confirmation notice to persons who have not voted during a four-year period or updated their voter registration information. In this regard, we note that the NVRA specifically provides with respect to such vote removal procedures that the procedures "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote." Section 8(b)(2), 42 U.S.C. 1973gg-6(b)(2).

According to 1990 Census data, Shannon and Todd Counties are 93 and 81 percent Native American in population, respectively, while the State of South Dakota is 7 percent Native American in population. Under the proposed procedure, registered voters in Shannon and Todd Counties, South Dakota, who fail to vote within a four-year period or update their voter registration information would be specifically targeted to be included in the state's voter removal program, which can lead to a voter's purge or removal from the voter registration list. This result is directly contrary to the language and purpose of the NVRA, and is likely to have a disproportionately adverse effect on Native American voters in the Section 5 covered counties. The proposed procedures thus appear to eliminate certain of the gains to minority voters mandated by Congress in enacting the NVRA and, accordingly, "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

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 the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the voter removal procedures proposed by Chapter 107 insofar as they incorporate the failure to vote within a four-year period as a trigger for mailing a registration confirmation notice.

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 change has neither 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 of Columbia Court is obtained, the objected-to change continues to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. In addition, our review of the state's submission suggests several areas of concern regarding compliance with the NVRA. First, as you are aware, Section 5 of the NVRA, 42 U.S.C. 1973gg-3, mandates that the state include a voter registration application form for elections in Federal office as a part of an application for a state motor vehicle driver's license, and that the voter registration application not request duplicate information requested on the driver's license application. We understand that the state is considering steps to bring its procedures into greater compliance with these requirements, specifically by joining the driver's license and voter registration forms to one another.

Second, Sections 5 and 9 of the NVRA, 42 U.S.C. 1973gg-3 and 42 U.S.C. 1973gg-7, specify that the voter registration forms used at driver's license locations and voter registration agencies include statements that "if an applicant declines to register to vote, the fact that the applicant had declined to register will remain confidential and will be used only for voter registration purposes," and that "if an applicant does register to vote, the office at which the applicant submits a voter registration application will remain confidential and will be used only for voter registration purposes." We understand that the state is considering amending its voter registration form to include these statements. When the amendments are finalized, Section 5 review will be required prior to implementation in Shannon and Todd Counties.

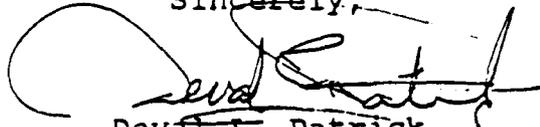
Third, Chapter 107 requires that certain registered voters respond to a confirmation mailing within 30 days and the failure to respond will result in the registrant being placed on an inactive registration list. However, Section 8(d)(2) of the NVRA, 42 U.S.C. 1973gg-6(d)(2), provides that such persons have until the deadline for mail registration to respond to such notices.

Finally, we note that the preclearance of those provisions of Chapter 107 that enable or permit the state or its political subdivisions to adopt future voting changes does not constitute preclearance of those future changes and, accordingly, Section 5 review will separately be required when those changes are adopted or finalized. See 28 C.F.R. 51.15. The matters for which Section 5 review will be required include, but are not limited to, the following: the designation of additional locations where voter registration may occur or changes in existing locations; any forms or notices developed to implement the NVRA; and any

rules or regulations, or procedures promulgated to implement the NVRA for Shannon and Todd Counties, South Dakota.

To enable us to meet our responsibility to enforce the Voting Rights Act, please inform us of the action the State of South Dakota plans to take concerning this matter. If you have any questions, you should call Zita Johnson-Betts (202-514-8690), an attorney in the Voting Section.

Sincerely,

A handwritten signature in black ink, appearing to read "Deval Patrick", written over a horizontal line.

Deval L. Patrick  
Assistant Attorney General  
Civil Rights Division

Attachment A

Chapter 107 (1994) includes the following changes:

1. assigns responsibility to the South Dakota Secretary of State to coordinate the state's implementation of the NVRA;
2. designates offices that provide or administer driver's licenses, food stamps, aid to families with dependent children, nutrition programs for women, infants, and children, medicaid, assistance to the disabled, and military recruitment as mandatory voter registration locations, and the county auditor's office and municipal finance officer's office as discretionary voter registration locations;
3. amends voter registration procedures to require the provision of mail registration cards, with instructions on how to properly register (such cards and instructions are to be provided to private entities and individuals);
4. provides standards governing the transmittal and receipt of voter registration applications and the acceptance of voter registration applications, and the preparation of voter registration lists;
5. amends procedures when insufficient information is provided on a voter registration application;
6. authorizes the State Board of Elections to adopt rules and regulations necessary to implement the NVRA, including the development of registration records and forms, such as an acknowledgement notice, confirmation mailing, and an affirmation;
7. provides standards governing the inspection of voter registration records and procedures for obtaining duplicates;
8. amends procedures concerning registrants who move or whose registration record reflects that they have moved;
9. amends procedures for voter registration list maintenance, including the placement of registrants on and the use of an inactive registration list, and the removal of names from the list of eligible registered voters;
10. amends procedures governing changes of address, name changes, and party affiliation changes;
11. adopts Sections 4 to 8 of the NVRA for all elections in South Dakota for which voter registration is required; and
12. adopts procedures that require an applicant for registration at a driver's license station to sign a signature card prescribed by the Department of Commerce and Regulation, and that the signature be digitized and used to prepare the

registration card as provided in Section 12-4-5.

Article 5:02 of the administrative rules and regulations of the South Dakota State Board of Elections includes the following changes:

1. the requirements for a new voter registration form;
2. a statement regarding the prohibited reasons for denying voter registration;
3. agency voter registration instructions (excluding driver's license locations), and the agency voter registration declination form;
4. voter registration instructions for the completion of voter registration forms at locations other than the county auditor's office and agencies;
5. procedures regarding the acknowledgement notice and requirements for the form of the notice, including the acknowledgement notices for valid and invalid or incomplete voter registrations;
6. procedures regarding the confirmation mailing, including record keeping requirements, and the requirements for the form of the confirmation mailing notice;
7. requirements for the form of the affirmation of an inactive voter's address;
8. requirements for the form of the notice regarding the deadline for voter registration; and
9. record keeping specifications regarding voter registration statistics.