

**FILED**

JAN 13 2012

  
CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA  
WESTERN DIVISION

CHRIS BROOKS, FRANCIS RENCOUNTRE,  
GLORIA RED EAGLE, SHARON CONDEN,  
JACQUELINE GARNIER, JENNIFER RED OWL,  
EDWINA WESTON, MICHELLE WESTON,  
MONETTE TWO EAGLE, MARK A. MESTETH,  
STACY TWO LANCE, HARRY BROWN,  
ELEANOR WESTON, DAWN BLACK BULL,  
CLARICE MESTETH, DONOVAN L. STEELE,  
EILEEN JANIS, LEONA LITTLE HAWK, EVAN  
RENCOUNTRE, CECIL LITTLE HAWK, SR.,  
LINDA RED CLOUD, LORETTA LITTLE HAWK,  
FAITH TWO EAGLE, EDMOND MESTETH, and  
ELMER KILLS BACK, JR.

Plaintiffs,

v.

JASON GANT, in his official capacity as SOUTH  
DAKOTA SECRETARY OF STATE, SHANNON  
COUNTY, SOUTH DAKOTA, FALL RIVER  
COUNTY, SOUTH DAKOTA, SHANNON  
COUNTY BOARD OF COMMISSIONERS, FALL  
RIVER BOARD OF COMMISSIONERS, JOE  
FALKENBUERG, ANNE CASSENS, MICHAEL P.  
ORTNER, DEB RUSSELL, and JOE ALLEN in  
their official capacity as members of the County  
Board of Commissioners for Fall River County,  
South Dakota, BRYAN J. KEHN, DELORIS  
HAGMAN, EUGENIO B. WHITE HAWK,  
WENDELL YELLOW BULL, and LYLA  
HUTCHISON in their official capacity as members  
of the County Board of Commissioners for Shannon  
County, South Dakota, SUE GANJE, in her official  
capacity as the County Auditor for Shannon and Fall  
River Counties, and JAMES SWORD, in his official  
capacity as Attorney for Shannon and Fall River  
Counties,

Defendants.

Civ. No. 12-5003

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, PERMANENT  
INJUNCTION AND MEMORANDUM IN SUPPORT**

Pursuant to Fed. R. Civ. P. 65(a) and LR 65.1, Plaintiffs move this Court for a preliminary and permanent injunction ordering Defendants to establish at least one early voting<sup>1</sup> location in Shannon County for the full time period authorized by South Dakota law, for the 2012 primary and general elections, and each and every election held after 2012. In support of this motion, Plaintiffs submit the following:

1. A Brief History of the Lakota and the Pine Ridge Reservation Red Cloud Indian School (2007)
2. Statistics about Pine Ridge, Backpack Program
3. South Dakota: Pine Ridge Reservation, American Indian Relief Council
4. Testimony of the Honorable John Yellow Bird Steele, President of the Oglala Sioux Tribe, Oversight Hearing on Indian Housing
5. Affidavit of Bret Healy (November 9, 2011)
6. 2004 South Dakota Secretary of State Absentee Ballot Records
7. 2004 South Dakota Secretary of State Voter Turnout Records
8. 2006 South Dakota Secretary of State Absentee Ballot Records
9. 2006 South Dakota Secretary of State Voter Turnout Records
10. 2008 South Dakota Secretary of State Voter Records
11. 2008 South Dakota Secretary of State Absentee Records
12. In S.D., Native Americans Face Voting Roadblocks, NPR Transcript (Oct. 26, 2008).
13. 2010 South Dakota Secretary of State Absentee Records
14. 2010 South Dakota Secretary of State Voter Records
15. October 21, 2009 memorandum from Fall River States Attorney to Senator Tim Johnson
16. December 31, 2009 memorandum from Fall River States Attorney to U.S. Attorney
17. Memorandum of Agreement Between U.S. and Shannon County
18. August 18, 2010 memorandum from OST to Shannon County
19. Rapid City Journal Article Dec. 10, 2011 on Shannon Co. Early Voting
20. December 30, 2011 memorandum from SD Secretary of State to Steven D. Sandven
21. State HAVA Plan 2010
22. Rapid City Journal Article Sep. 24, 2010 on Shannon Co. Early Voting

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<sup>1</sup> South Dakota allows voters to cast absentee ballots in-person at county auditors' offices for 46 days before elections. This is commonly known as "early voting." For purposes of clarity, Plaintiffs will refer to in-person absentee balloting as "early voting" in this brief.

23. December 2, 2011 Shannon County Commission Minutes
24. FY 2012 State Budget Excerpt
25. Verified Complaint for Preliminary and Permanent Injunctive Relief.
26. Appendix Summarizing South Dakota Counties and Distances to Auditors' Offices.

### **PRELIMINARY STATEMENT**

Plaintiffs bring this action to protect their voting rights and obtain fair and equal participation for Native American voters in the upcoming election, pursuant to Sections 2, 5 and 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. §§ 1973 and 1973j(d); the Indian Citizenship Act, 8 U.S.C. § 1401(a)(2)(1924); the Fourteenth Amendment to the United States Constitution; and Article II, Section 1 and Article VI, Section 19 of the Constitution of the State of South Dakota.

In 64 of South Dakota's 66 counties, residents may vote early at their local county auditor's office during regular business hours starting 46 days before Election Day. See Appendix A. In 2012, Shannon County residents will have just six days of early voting in the primary and general elections. See Ex. 19, Andrea J. Cook, Shannon Commission approves limited early voting in 2012, Rapid City Journal, Dec. 10, 2011. In recent elections, Shannon County voters have had fewer days of early voting and for shorter hours than voters in South Dakota's 64 incorporated counties. Because of Defendants' early voting practices, Native American voters in Shannon County have less opportunity to participate in the political process and elect representatives of their choice.

### **STATEMENT OF FACTS**

The relevant facts are set forth in detail in Plaintiffs' Verified Complaint for Preliminary and Permanent Injunctive Relief, the attached affidavits and other materials submitted in support of this motion. They are summarized below.

Plaintiffs are enrolled members of the Oglala Sioux Tribe who live in Shannon County, South Dakota and are registered to vote. Plaintiffs want to vote early in the 2012 election in Shannon County during regular business hours within the 46-day period before Election Day authorized by South Dakota law. Most of the Pine Ridge Indian Reservation is located in Shannon County, with a portion in Jackson County.

The Defendant Secretary of State is the chief state election official for South Dakota. SDCL § 12-4-33.<sup>2</sup> The Secretary of State oversees elections in the State of South Dakota. See SDCL §§ 1-8-1, 1-8-1.1(2), 12-1-5 (2010). Defendant county commissioners are responsible for administering elections in Shannon County. County commissioners designate polling places and provide for election precincts. SDCL §12-14-1 (2010). Sue Ganje is the Fall River County Auditor and James Sword is the Fall River County State's Attorney. County Auditors administer elections in South Dakota counties. Ex. 21, HAVA State Plan for South Dakota at 4 (March 2010).

Under South Dakota law, a registered voter may vote by absentee ballot for any reason. SDCL §12-19-1. Absentee voting begins "no earlier and no later than forty- six days prior to the election." SDCL § 12-16-1.

If a county contracts for the services of a county auditor from another county, that county auditor shall make absentee ballots available in the contracting county if the contracting county requests that absentee ballots be provided. The contracting county shall reimburse the county auditor for the costs incurred pursuant to this section.

SDCL §12-19-53. With the exception of Shannon and Todd County residents, South Dakota voters may cast early votes at their local county auditors' offices during regular

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<sup>2</sup> The website for the Secretary of State also states that he is the Chief Elections Officer for South Dakota and that "[a]ll statewide elections are directed from this office, with election results filed here. Available at [http://sdsos.gov/content/viewcontent.aspx?cat=secretary&pg=/secretary/officeduties\\_chiefelectionsofficer.ssh](http://sdsos.gov/content/viewcontent.aspx?cat=secretary&pg=/secretary/officeduties_chiefelectionsofficer.ssh) (accessed on January 9, 2011).

business hours starting 46 days before a primary or general election. County auditors' offices also allow voters to fill out absentee ballots at their offices until 3 p.m. on Election Day. The deadline to register to vote in South Dakota is 15 days before any election. S.D. Admin. R. 5:02:03:13

Early voting allows people to vote at a time most convenient to them, and lets them avoid the risk of missing their chance to vote on Election Day. A voter could miss Election Day due to bad weather, a family emergency, a busy work schedule or unexpected illness, a mechanical problem or any number of reasons. The early vote period also begins long before the two-week registration deadline, allowing voters the chance to clear up any registration problems that would keep them from voting on Election Day and allows people who are unregistered to conveniently register and vote at the same time.

Shannon County is an unincorporated county, and contracts for county auditor services from Fall River County. Accordingly, if Shannon County requests absentee balloting (early voting) services from Fall River County, Fall River County must provide it. See SDCL §12-19-53. If Fall River County provides early voting for Shannon County, Shannon County must reimburse Fall River County for staff costs, travel and other costs associated with early voting. Id. ("The contracting county shall reimburse the county auditor for the costs incurred pursuant to this section.")

In each election since 2004, Shannon County voters have had fewer days of early voting and shorter hours of early voting than residents of almost all South Dakota counties. In 2004, Shannon County voters had access to early voting for four hours per weekday for the three weeks prior to Election Day. Private donors paid \$15,000 to

reimburse Shannon County, which had contracted with Fall River County for early vote services. Despite the limited early vote access for the 2004 general election, 36.78% of the votes cast in Shannon County were absentee ballots, compared to a 23.96% statewide average. Turnout in Shannon County was 56.98% compared to 78.63% statewide.

In 2006 there was no early voting location in Shannon County. In the general election, only 69 of the 2,459 registered voters in Shannon County voted by absentee ballot in 2006, or 2.8%. In Shannon County turnout dropped to 31.34% for the 2006 general election, compared to 67.26% turnout for all of South Dakota.

In the 2008 general election, Shannon County had just two days of early voting. See Ex. 12, Charles Michael Ray, In S.D., Native Americans Face Voting Roadblocks, NPR transcript at 1 (October 26, 2008) available at <http://www.npr.org/templates/story/story.php?storyId=96154277>. The early voting days were shorter than normal business hours to allow time for Fall River County staff to travel between Hot Springs and Pine Ridge for one day and Hot Springs and Kyle for another. In Shannon County, 13.8% of the votes were by absentee ballot while the statewide average was 26.02%. Turnout was 42.59% in Shannon County compared to 73.02% statewide.

On August 3, 2010, voting rights advocates OJ Semans and Brett Healy attended a meeting with Fall River County State's Attorney Jim Sword to discuss his views about establishing early voting locations in Shannon County for the six weeks before the November Election Day. Ex. 5, Healy Aff. 5. Semans and Healy offered to have Four Directions, a voting rights organization, reimburse Fall River County for the expenses related to Shannon County early voting. Id. Sword informed them that he would advise

Fall River County against establishing early voting locations in Shannon County because Fall River County had been sued by the United States Department of Justice and the American Civil Liberties Union for other violations of the Voting Rights Act.<sup>3</sup> Ex. 5 Healy Aff. 5-6. Sword informed Semans and Healy that if Shannon County requested early voting, he would terminate the county auditor service contract with Fall River County, leaving Shannon County without anyone to conduct the 2010 election. *Id.* In 2009, Sword also had threatened to resign over a possible DOJ voting rights lawsuit, and threatened that “DOJ, the State of South Dakota and the tribe can argue about who is going to run the 2010 elections.” See Ex. 16, Letter from James G. Sword to United States Attorney Brendan Johnson at 2 (December 31, 2009).

After a lengthy and contentious debate, much of which was complicated by county personnel issues unrelated to elections, Fall River County and Shannon County agreed to provide approximately 22 days of early voting in Pine Ridge. See Ex. 22, Andrea J. Cook, Shannon officials and commissioners reach accord; early voting starts Tuesday, Rapid City Journal, September 24, 2010. Four Directions paid \$5,000 for early vote site expenses. Ex. 5, Healy Aff. 6. The Oglala Sioux Tribe had written to Shannon County requesting early voting. See Ex. 18, Letter from President Theresa Two Bulls to Shannon County Commissioners (August 18, 2010). In the 2010 general election, 18.57% of the Shannon County votes were absentee ballots, compared to the South Dakota average of 19.71%. Turnout in Shannon County was 34.9% and 62.27% statewide. See Ex. 13 and Ex. 14.

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<sup>3</sup> On April 23, 2010, Shannon County and the United States Department of Justice had entered into a Memorandum of Agreement to resolve other voting rights issues. See Ex. 17, Memorandum of Agreement (April 23, 2010). See also Ex. 15, Letter from James G. Sword to Senator Tim Johnson (October 21, 2009).

In 2012, Shannon County voters will only have access to early voting for six days before the primary election and six days prior to the general election. See Ex. 23, Shannon Co. Comm. Minutes at 6 (December 2, 2011). See also Ex. 19, Andrea J. Cook, Shannon Commission approves limited early voting in 2012, Rapid City Journal, Dec. 10, 2011. Because the Pine Ridge Indian Reservation makes up most of the county, only 15% of the property in Shannon County generates any property tax revenue for county services, including elections. See id. Shannon County eliminated line items from their budget to cover 2012 election expenses, including early vote expenses. Id.

South Dakota has received millions of dollars in federal funding to assist with elections through the Help America Vote Act. Ex. 21, HAVA State Plan for South Dakota at 4 (March 2010). The Secretary of State for South Dakota has allotted HAVA funds to each county, regardless of financial need. Id. Under a policy adopted by the Secretary of State, counties make requests to the Secretary of State's Office for reimbursement for election expenses, which are approved if they fit the HAVA state plan. See Ex. 20, Letter from Secretary of State Gant to Steven D. Sandven (December 30, 2011). The Secretary of State's Office issues reimbursements twice per year. Shannon County was reimbursed from HAVA funds for early vote expenses in 2008.

In the past two months, counsel for Plaintiffs made four written requests to the Secretary of State to inquire about the use of HAVA funds for early voting in Shannon County in 2012. On December 30, 2011, the Secretary of State responded and stated Shannon County had approximately \$68,000 in its state HAVA account that it could use for the 2012 elections. See Ex. 20, Letter from Secretary of State Gant to Steven D. Sandven (December 30, 2011). In the letter, the Secretary of State said that he had not

received any requests for reimbursement for 2012 elections, and that his office's policy is to make HAVA expenditures by reimbursement. Id. Unless the Court grants the Plaintiffs' motion for a preliminary and permanent injunction ordering the Defendants to provide a Shannon County early voting location open during regular business hours within the full 46 day time period authorized by South Dakota law, Plaintiffs will only receive six days of early voting for the 2012 primary and general elections.

### ARGUMENT

On a motion for preliminary injunction, this Court must consider: "(1) the threat of irreparable harm to the moving party; (2) the weight of this harm as compared to any injury an injunction would inflict on other interested parties; (3) the probability that the moving party will succeed on the merits; and (4) the public interest." Gen. Motors Corp. v. Harry Brown's, LLC, 563 F.3d 312, 316 (8th Cir. 2009)(quoting Dataphase Sys., Inc. v. C.L. Sys., Inc., 640 F.2d 109, 113 (8th Cir.1981). In order to obtain a preliminary injunction, the plaintiffs must show that they are likely to prevail on the merits. Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds, 530 F.3d 724, 732 (8th Cir. 2008). Plaintiffs will address the third Dataphase factor first.

**1. Plaintiffs are likely to succeed on the merits because early voting is limited in Shannon County.**

Plaintiffs assert three claims based on the Defendants' failure to provide access to early voting for the same amount of time that incorporated South Dakota counties receive pursuant to the following: (1) Section 2 of the Voting Rights Act; (2) the 14th Amendment to the United States Constitution; and (3) the Constitution of the State of South Dakota. Plaintiffs are likely to succeed on the merits of each claim.

**A. Voting Rights Act**

Under Section 2 of the Voting Rights Act, no state or political subdivision may apply any “standard, practice or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 42 U.S.C.A. § 1973(a)(West).

A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. . .

42 U.S.C.A. § 1973(b)(emphasis added). “Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election.” Chisom v. Roemer, 501 U.S. 380, 397, 111 S. Ct. 2354, 2365, 115 L. Ed. 2d 348 (1991). The Voting Rights Act protects the rights of Native American voters. See e.g. Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006). The Voting Rights Act was aimed at subtle and obvious state actions which have the effect of denying citizens their right to vote because of their race, and gives a broad interpretation of the right to vote. Allen v. State Bd. of Elections, 393 U.S. 544, 565-66, 89 S. Ct. 817, 831-32, 22 L. Ed. 2d 1 (1969). “The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law.” 42 U.S.C.A. § 1971 (West)

Congress amended the Voting Rights Act in 1982 to make it clear that plaintiffs seeking relief under Section 2 must show that a policy or practice has a discriminatory result, but do not have to show discriminatory intent. Thornburg v. Gingles, 478 U.S. 30,

43-44, 106 S. Ct. 2752, 2762-63, 92 L. Ed. 2d 25 (1986). The Senate Report that accompanied the 1982 Voting Rights Act amendments emphasizes that the issue is whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”<sup>9</sup> Id. at 44 (citing 28, U.S.Code Cong. & Admin.News 1982, p. 206. See also id., at 2, 27, 29, n. 118, 36.)

In the Senate Report, Congress specified factors that may be relevant to a Section 2 claim, including:

the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group . . . the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process . . .

Gingles, 478 U.S. at 44-45. The Report stresses that this list of typical factors is neither comprehensive nor exclusive. Id. at 45. Congress determined that “the question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality . . . and on a functional view of the political process.”

Id. (internal citations and quotations omitted).

In Bone Shirt v. Hazeltine, the Eighth Circuit Court of Appeals noted that

The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred candidates.” Cottier v. City of Martin, 445 F.3d 1113, 1116 (8th Cir.2006) (quoting Gingles, 478 U.S. at 47, 106 S.Ct. 2752). A denial of the right to vote under Section 2 occurs when:

based on the totality of circumstances, it is shown that the political processes leading to nomination or election ... are not equally open to

participation by members of a [a racial group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

League of United Latin Am. Citizens, 126 S.Ct. at 2613-14 (quoting 42 U.S.C. § 1973(b)).

Bone Shirt, 461 F.3d at 1017-18 (8th Cir. 2006). Although most reported Section 2 cases involve districting decisions that diminish the voting power of racial minorities, or “vote dilution” claims, Section 2 also applies to cases where state or other political subdivisions deny a protected class equal access to voting. Under the plain language of the statute, it applies to any standard, practice or procedure that results in a denial or abridgement of the right to vote on account of race or color. See 42 U.S.C.A. § 1973(a). “In a report describing the reach of the amended Section 2, the Senate Judiciary Committee made clear that ‘Section 2 remains the major statutory prohibition of all voting rights discrimination.’” Mot. for Prelim. Inj. at 8, N.A.A.C.P., Inc. ex rel. Volusia County Branch v. Lowe, No. 6:04-CV-1469, 340 F. Supp. 2d 1329 (M.D. Fla. 2004)(dismissed as moot) (quoting S. Rep. No. 97-416 at 30 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 179). Because this case does not involve dilution or voting districts, racially polarized voting and block voting are not relevant issues. The Court should consider whether the lack of early voting violates Section 2 under the totality of the circumstances. Cf. Bone Shirt, 461 F.3d at 1017.

The location of polling places are a “standard, practice, or procedure with respect to voting” under Section 2. Jacksonville Coal. For Voter Prot. v. Hood, 351 F. Supp. 2d 1326, 1334 (M.D. Fla. 2004)(citing Perkins v. Matthews, 400 U.S. 379, 387, 91 S.Ct. 431, 27 L.Ed.2d 476 (1971)). See also Brown v. Dean, 555 F. Supp. 502, 505 (D.R.I. 1982) (plaintiff established likelihood of succeeding on the merits of claim that locating

polling location at a place that was difficult for minority voters to access violated the Voting Rights Act). The accessibility of a polling place's location has an effect on a person's ability to exercise their right to vote. Perkins, 400 U.S. at 387. Locating polling locations far from minority communities may result in denial of the right to vote on account of race or color. See id.

Once it is established that the case involves a “standard, practice or procedure” as defined in Section 2 of the Voting Rights Act, the plaintiffs only have to show that “based on the totality of circumstances . . . the political processes leading to nomination or election in the State or political subdivision are not equally open” to the group to which plaintiffs belong, in this case, Native American voters. See 42 U.S.C.A. §§ 1973(a), 1973(b). See also Chisom, 501 U.S. at 397-398 (“The plaintiffs' burden is to produce evidence ... that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”)

In this case, the location of the early voting polling place for Shannon County voters is a “standard, practice, or procedure with respect to voting” under Section 2 of the voting rights act. See Jacksonville, 351 F. Supp. 2d at 1334. Plaintiffs will have to travel long distances from Shannon County to Hot Springs to vote early, for all but six of the 46 days of South Dakota's 2012 early vote period. In 2006, Plaintiffs would not have been able to participate in in-person early voting in Shannon County at all. Without a court order, there is no guarantee that they will have access to early voting in any future election. Voters or voting rights advocates would have to lobby county officials to establish early voting in Shannon County and hope that officials provide it, like they did

in recent elections. Voters in 64 of South Dakota's 66 counties do not have this burden on their right to vote.

Voters in most South Dakota counties can conveniently register and vote on the same day during regular business hours starting 46 days before Election Day. The voting registration deadline is 15 days before Election Day. S.D. Admin. R. 5:02:03:13.

Outside Shannon County, a first-time voter or a voter who has moved recently can register in their new precinct and early vote, avoiding any problem that may cause them to miss voting on Election Day. Voters must vote in the precinct in which they are registered. S.D. Const. art. VII, § 2. This year, a resident of Shannon County who is registered in another county, or not registered, would be unable to register and vote early during the six days of early vote because the registration deadline will have passed. See S.D. Admin. R. 5:02:03:13. Because of the limited access to early voting in Shannon County, Shannon County voters have less opportunity to participate in the political processes and elect candidates of their choice.

Early voting in a primary election also makes it easier for residents of most South Dakota counties to change party registration in time to participate in the primary. "No person may vote a party ballot at any primary election unless the person is registered as a member of that political party in the precinct in which the person seeks to vote." S.D. Codified Laws § 12-6-26. The 2012 primary will have Republican Presidential candidates and Democratic Congressional candidates on the ballot, and Shannon County residents who need to change parties or register to vote for the primary will find that it is too late to make such a change during the six day early vote period provided in Shannon County. See id. See also S.D. Admin. R. 5:02:03:13. Or they have the option to drive

from Shannon County to the Fall River County Auditor's Office, which is an expensive and time-consuming obstacle to voting for Shannon County residents.

The availability of early voting in Shannon County correlates with higher turnout. For example, when voters had access to early vote in Shannon County for three weeks in 2004, turnout was 56.98% compared to a statewide average of 78.63%, or about 22 percentage points lower than the rest of the state. See Ex 7. In 2006, when there was no early vote in Shannon County, turnout dropped to 31.34% while the statewide average was 67.26%. See Ex. 9. Without early voting, Shannon County turnout was almost 36 points lower than the statewide average in 2006. Statewide turnout only dropped about 11 points between 2004 and 2006. With no early voting location in Shannon County, only 2.81% of the votes cast in Shannon County in 2006 were absentee ballots, compared to 27.35% statewide. See Ex. 8.

The correlation between the lack of availability of early vote and declining participation by Shannon County voters shows that the lack of early voting in Shannon County results in an unequal opportunity to elect their preferred candidates, as required to show a violation of § 2 of the Voting Rights Act. See e.g. Cottier, 445 F.3d at 1116 (citing Gingles, 478 U.S. at 47.)

In the 2008 general election, Shannon County turnout was 42.59%, around 31 percentage points lower than the 73.02% statewide average. See Ex. 10. Shannon County had two days of early voting while most of the rest of the state had 46. This 42.59% turnout was lower than the 56.98% turnout in the previous Presidential election year, when Shannon County had early voting for three weeks compared to the two days in 2008.

In the 2010 midterm general election, with approximately 22 days of early voting, Shannon County turnout was 34.9% compared to 62.27% statewide. See Ex. 14. Turnout was about 27 percentage points less than the statewide average in 2010. This is higher than 2006, the previous nonpresidential election, when there was no early vote in Shannon County. In 2006, Shannon County turnout was 31.34% and 36 points lower than the statewide average of 67.26%.

A lack of access to early vote in Shannon County results in less opportunity for Native American voters in Shannon County to participate in the political process and elect preferred candidates, in violation of the Voting Rights Act. Without access to early voting in Shannon County, Plaintiffs would have to vote by mail, drive long distances to Hot Springs to vote early, or vote on Election Day. For example, Kyle, South Dakota in Shannon County is 113 miles from Hot Springs, which means a roundtrip to vote early would require more than four hours of driving. Shannon County is one of the poorest counties in the nation, which means many residents would not be able to afford the drive, if they even have a car.

The availability of absentee voting by mail is not enough to make up for the lack of in-person absentee voting (early voting), as shown by the pitifully low use of absentee voting in 2006, the last election in which there was no early voting in Shannon County. Many Native American voters in Shannon County do not trust that their ballot will be counted if they vote mail. Moreover, as a low-income county, many Shannon County residents lack fixed addresses and move frequently.

The inability to take the time or spend the money necessary for a four hour drive to vote early is an example of how the effects of past discrimination in employment and

education can interfere with participation in the electoral process. See Gingles, 478 U.S. at 44-45. In a previous legislative redistricting Voting Rights Case, this Court noted that “the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process.” Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1022 (D.S.D. 2004). The lack of equal access to early voting is another barrier to Native American involvement in the political process. As noted above, the essence of a Section claim is an electoral practice interacting with social conditions to cause inequality in voting. See Bone Shirt, 461 F.3d at 1017-18. The lack of sufficient early voting in Shannon County is a violation of the Voting Rights Act, because many Shannon County voters do not have the time or money to drive to Hot Springs to vote early, may be unable to participate in the six-day early vote period and may miss their chance to vote on Election Day.

The case at bar involves a more egregious limitation on early voting than a Florida early voting case in which the court ruled for the defendants. Jacksonville, 351 F. Supp. 2d at 1335 (holding that an inconvenient location for an early voting site was not a denial of meaningful access to the political process). Unlike the Plaintiffs in Jacksonville, who had the same amount of time but had to travel long distances to the early vote site, the Shannon County Plaintiffs have a much shorter time period to early vote than residents of most other counties. See 351 F. Supp. 2d at 1335. A Shannon County Plaintiff would also have to travel much further to the Fall River County Auditor’s Office to early vote than the plaintiffs in Jacksonville. For example, one plaintiff in the Florida case testified that she had to drive 25 minutes to the early vote site,

compared to a two hour drive or longer for some of the Shannon County plaintiffs. See Jacksonville, 351 F. Supp. 2d at 1335.

Unlike the plaintiffs in this case, the Jacksonville plaintiffs had five early voting sites in their county, and did not allege that they had fewer early voting days than other Florida residents. See id. While residents of 64 of South Dakota's 66 counties have 46 days to early vote, and early voting until 3pm on Election Day, Shannon County residents have had 0, 2, approximately 15, and 22 early vote days for the 2004-2010 general elections. Unless the Court issues an order compelling Defendants to provide Shannon County the full early vote period required by South Dakota law and the Voting Rights Act, Plaintiffs will only have 6 days of early voting in Shannon County. Defendants have a duty to provide Native American voters in Shannon County the same opportunity for early voting that residents of other counties have. Cf. Brown v. Post, 279 F. Supp. 60, 64 (W.D. La. 1968) (election officials have a duty to refrain from any conduct that results in allowing white voters opportunities to absentee vote without giving the same opportunities to African-American voters).

Any limitation on the opportunity of members of a protected class to participate in an election impairs their ability to influence the outcome of the election. Chisom, 501 U.S. at 397. It is no defense that Plaintiffs can still vote on Election Day, can still vote absentee by mail, can still drive to Fall River County to vote starting 46 days before the election, or can still vote early for six days before Election Day in Shannon County. The test under Section 2 of the Voting Rights Act is whether the plaintiffs have less opportunity to participate in the political processes and to elect legislators of their choice. Chisom, 501 U.S. at 397-398. Because the current early vote system provides for less

opportunity for Native American voters to participate in the political process and elect their preferred candidates, this Court should find that they are likely to succeed on the merits of their claim that the current early vote system violates the Voting Rights Act.

In the event that the Secretary of State argues that his office has no jurisdiction over the Shannon County Commissioners because of tribal sovereignty, this Court should reject that argument. The Shannon County and Fall River County governments are political subdivisions of the State of South Dakota, not a tribal government. A county is a public corporation which exists for public purposes connected with the administration of the state government. Tripp County v. State, 264 N.W.2d 213, 218 (S.D. 1978). As the chief election officer for the State of South Dakota, the Secretary of State is responsible for ensuring fair and equal elections for all South Dakota residents. The Shannon County Commission also holds its meetings in Fall River County.

In the event that the Secretary of State argues that the State of South Dakota cannot afford to fund early voting in Shannon County, this Court should reject that argument too. In 2002, Congress passed and President George W. Bush signed into law the Help America Vote Act, which was designed to assist states with federal elections. Ex. 21, HAVA State Plan for South Dakota at 1 (March 2010). In 2005, the federal government awarded South Dakota a grant of \$11,596,803 to assist with voting in federal elections in South Dakota. Id. at 4. The federal government gave South Dakota an additional \$575,000 in HAVA funds in 2008 and \$350,000 in 2010 Id. at 1. As of September 30, 2009, the state had a total of \$6,373,680.68 in HAVA funds remaining available. Id. at 6. The approximately 15 days of early voting in Shannon County in 2004 only cost \$15,000. See Ex. 5, Healy Aff. 4. In fiscal year 2011, the State of South

Dakota had a total budget of over \$4,000,000. Ex. 24, FY2012 Governor's Budget Book at 22. available at [http://bfm.sd.gov/budget/rec12/SD\\_Total\\_Recommended\\_2012.pdf](http://bfm.sd.gov/budget/rec12/SD_Total_Recommended_2012.pdf) (last visited January 11, 2012). Because of the low cost of early voting compared to South Dakota's HAVA funds and total state budget, South Dakota has funds available to meet its obligations to provide fair and equal elections under the state and federal constitution and the Voting Rights Act.

The promise of six days of early vote access granted to Plaintiffs for the 2012 elections only came in response to a letter from counsel. The previous limited early voting in past years was funded by private donations or from HAVA funds for a few days following a request from citizens and voting rights advocates to the Shannon County Commissioners. A Shannon County resident should have equal voting rights every year, and should not have to argue in front of the County Commission every two years for early voting. Shannon County is one of the poorest counties in the nation, with a very limited private property tax base, and had to forego other county priorities to fund the six days of early voting for 2012. See Ex. 19. The Secretary of State's policy of reimbursing election expenditures from HAVA funds rather than providing the funding when needed has the discriminatory effect of making it impossible for Shannon County to provide for the full six weeks of early voting in Shannon County.

As they are currently applied, the statutes on early voting in unincorporated counties that contract with other counties for auditor's services violate the Plaintiffs' voting rights. See SDCL §12-19-53. The Secretary of State, Shannon County and Fall River County have not provided Shannon County residents with equal access to early voting in Shannon County. This Court should order the Defendants to fund and operate

at least one early voting location in Pine Ridge for the full time period required by South Dakota law, from HAVA funds or other state funds, in order to comply with the Voting Rights Act, the 14th Amendment to the United States Constitution, and the South Dakota Constitution.

**B. Section 1983 Claim**

Plaintiffs are also likely to succeed on the merits of their claim that limited access to early voting in Shannon County violates their rights under the 14th Amendment to the United States Constitution. Defendants' decision to provide fewer days of early voting with shorter hours is an action taken under color of state law. As the state's chief elections officer and administrator of the state's allotment of HAVA funds, Secretary of State Gant has the responsibility to ensure fair and equal elections in South Dakota,.

"It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters whenever the State has adopted an electoral process for determining who will represent any segment of the State's population." Lubin v. Panish, 415 U.S. 709, 713, 94 S. Ct. 1315, 1318, 39 L. Ed. 2d 702 (1974)(internal quotations omitted). "The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." Bush v. Gore, 531 U.S. 98, 104-05, 121 S. Ct. 525, 530, 148 L. Ed. 2d 388 (2000). Although Plaintiffs can still vote on Election Day, the current voting system in Shannon County violates the Equal Protection Clause because Shannon County voters do not have equal access to early voting. Limited early voting has a discriminatory impact on the Plaintiffs because they have fewer opportunities to vote than residents of other South Dakota counties.

“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.” Washington v. Davis, 426 U.S. 229, 242, 96 S. Ct. 2040, 2048-49, 48 L. Ed. 2d 597 (1976). In this case, the Secretary of State’s policy requires impoverished, unincorporated counties to request reimbursement for early voting, instead of being able to use HAVA funds to pay for voting expenses up front, as needed. This burden falls more heavily on Native American voters than voters of other ethnic backgrounds because the only two unincorporated counties have a Native American majority, including Shannon County.

As this Court is aware, there is also a long history of discrimination against Native American voters in South Dakota that has led to voting rights litigation. See e.g. Bone Shirt, 461 F.3d 1011, Cottier, 445 F.3d 1113. When the early voting issue was raised in 2010, the Fall River County State’s Attorney threatened to cancel their contract with Shannon County to provide auditor’s services if Shannon County requested early voting. Ex. 5, Healy Aff 5-6. Given the history of racial tension between residents of border communities and Indian Reservations, a discriminatory intent can be inferred by Defendants’ failure to provide equal access to early voting. Because of the discriminatory impact and evidence of discriminatory intent, Plaintiffs are likely to succeed on the merits of their claim that the lack of early voting in Shannon County violates the Equal Protection Clause of the 14th Amendment.

**C. State Constitution Claim**

South Dakota’s Constitution provides that elections “shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the

right of suffrage.” S.D. Const. art. VI, § 19. Elections in South Dakota are not equal because Plaintiffs do not have equal access to early voting. In Shannon County, early voting is available for fewer days, for shorter hours, and in the case of the 2006 election, not available at all. Accordingly, Plaintiffs are likely to succeed on the merits of their claim that unequal access to early voting violates the South Dakota Constitution.

**2. Plaintiffs will be irreparably harmed without equal access to early voting.**

The Plaintiffs will only have six days of early voting in the 2012 primary and general elections unless this Court grants their motion for a preliminary and permanent injunction. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.”

Wesberry v. Sanders, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L. Ed. 2d 481 (1964). See also Spencer v. Blackwell, 347 F. Supp. 2d 528, 537 (S.D. Ohio 2004)(application of Ohio statute would impair right to vote and cause irreparable injury if temporary restraining order would not issue.) Unequal access to voting cannot be addressed with monetary damages for the plaintiffs. Accordingly, this factor weighs in favor of granting the preliminary injunction.

**3. The balance of harms weighs in favor of granting plaintiffs’ motion.**

The court must consider the balance between the harm to the Plaintiffs and the injury that granting the injunction will inflict on Defendants. Dataphase, 640 F.2d at 114. If the court grants the motion, Defendants will only be minimally inconvenienced. Defendants Shannon County and Fall River County have shown willingness to provide at least some early voting in previous elections. An order to provide for the full early vote time period would merely clarify their responsibilities as mandated by state and federal

law. Defendant Secretary of State Gant has received appropriations from Congress specifically to improve elections in the State of South Dakota through HAVA and would not suffer harm if he was ordered to provide for equal early voting in Shannon County. In any event, mere inconvenience to the state is no justification for allowing citizens to be burdened in the exercise of their voting rights. Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1266 (N.D. Miss. 1987) aff'd sub nom. Mississippi State Chapter, Operation Push, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991). Plaintiffs would suffer significant, irreparable harm if their right to participate equally in early voting continues to be denied. Accordingly, this factor weighs in favor of granting the Plaintiffs' motion for preliminary injunction.

**4. The public interest weighs in favor of granting plaintiffs' motion.**

The public interest would be served by an order that would grant citizens of Shannon County the same access to early voting that the rest of South Dakota has to make it easier for them to vote. The public has an interest in fair and equal elections for all South Dakotans.

**CONCLUSION**

For the foregoing reasons, Plaintiffs request that the Court:

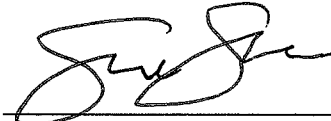
1. Schedule a hearing on this motion for Monday, January 23 at 9 a.m., or as soon thereafter as possible;
2. Following the hearing, enter a preliminary injunction directing Defendants to designate at least one early voting sight in Shannon County, to be open during regular business hours starting 46 days before the primary and general elections; and

3. Grant such other relief as this Court deems appropriate.

January 13, 2012

STEVEN D. SANDVEN, Law Office

By:



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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Steven D. Sandven, certify that on the 13th day of January 2013, a true and correct copy of the foregoing Plaintiff's Motion for Preliminary, Permanent Injunction and Memorandum in Support, was served via U.S. Mail, postage prepaid, upon the following parties:

South Dakota Secretary Of State Jason Gant  
State Capitol  
500 East Capitol Avenue  
Pierre SD 57501-5070

Fall River County, South Dakota and Fall River County Board Of Commissioners, Joe Falkenberg, Anne Cassens, Michael P. Ortner, Deb Russell, and Joe Allen  
906 N. River St.  
Hot Springs, SD 57747

Shannon County, South Dakota, Shannon County Board Of Commissioners, Bryan J. Kehn, Deloris Hagman, Eugenio B. White Hawk, Wendell Yellow Bull, And Lyla Hutchison  
906 N. River St.  
Hot Springs, SD 57747

Fall River County Auditor Sue Ganje  
Fall River County Auditor's Office  
906 N. River St.  
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Fall River County State's Attorney James Sword

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