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Written Statement of Sara Frankenstein

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Hearing on "Voting in America: A National Perspective on the Right to Vote, Methods of Election, Jurisdictional Boundaries, and Redistricting."

The Committee on House Administration Subcommittee on Elections
U.S. House of Representatives

Chairman Butterfield, Ranking Member Steil, and members of the Subcommittee:

My name is Sara Frankenstein and I am a private practice attorney and partner in the law firm of Gunderson, Palmer, Nelson & Ashmore, in Rapid City, South Dakota. I practice voting rights and election law. I advise and defend cities, counties, and school boards when they are sued, and frequently advise election administrators in the Midwest in all aspects of elections and voting rights. I was lead counsel in numerous federal Voting Rights Act cases and other election disputes, including redistricting and felon voting issues. These matters often involve issues unique to American Indian voting as well as tribal and county governmental concerns. I have included information on two areas of Voting Rights Act litigation relevant to American Indian populations within states and counties.

I. VRA Preclearance for Reservation Counties.

Previously, under Section 5 of the Voting Rights Act (VRA), "covered" jurisdictions were required to obtain preclearance from the Attorney General or a three-judge panel of the District of Columbia before all new county ordinances, city ordinances, and state laws that changed voting procedure could take effect. 42 U.S.C. §1973c. "Section 5 initially covered southern states and areas in the north where literacy tests and other discriminatory devices had been used to disenfranchise qualified African-American voters." *South Carolina v. Katzenbach*, 383 U.S. 301, 334-33, 86 S.Ct. 803, 15 L.Ed. 2d 76 (1966).

In South Dakota and elsewhere, however, counties were added as covered jurisdictions based on a different test, one which did not rely upon a finding of discriminatory conduct against minorities. This additional test, found in 52 U.S.C.A. § 10303(b), extended coverage over those political subdivisions which 1) maintained a "test or device" (including holding elections in

English), and 2) had less than 50% of voting-age citizens registered on November 1, 1972, or less than 50% of such persons voted in the November 1972 Presidential election. In 1975, two counties in my state of South Dakota -- Shannon County (since renamed Oglala Lakota County) and Todd County -- were added as covered jurisdictions. 41 Fed.Reg. 784 (Jan. 5, 1976); *See* C.F.R. pt. 51 app (list of covered jurisdictions).

As found by the court in *Quick Bear Quiver v. Nelson*, Civ. 02-5069, Doc. 118, Opinion and Order:

> On August 23, 1977, then South Dakota Attorney General William Janklow voiced his opposition to the VRA, calling it an "absurdity" that created an "unworkable solution to a nonexistent problem." 77-73 Opinion of the Attorney General 176 (1977). Janklow advised the secretary of state that he intended to pursue litigation to exempt South Dakota from the VRA and meanwhile to ignore its preclearance mandates. *Id.* at 184. This practice continued virtually unabated even after Janklow's term as Attorney General ended, and as a result, a significant preclearance backlog existed when [*Quick Bear Quiver v. Nelson*] was filed in 2002.

The *Quick Bear Quiver* case was settled by consent decree. Pursuant thereto, and in a negotiated and orderly fashion, 3,048 South Dakota laws were submitted for preclearance. Significantly, of those 3,048 statutes, ordinances, and constitutional changes, not one was denied preclearance. The South Dakota Secretary of State during the *Quick Bear Quiver* case, Chris Nelson, wrote as follows:

> "These submissions contained 3,048 changes to election statutes, administrative rules, and the state constitution. **Every one of these changes were precleared by the Department of Justice.**[8] None were denied preclearance. Not a single change was found to retrogress the voting rights of Native Americans. This fact destroyed the ACLU's claims in the Quiver suit that South Dakota election statutes discriminated against Native American voters."

Realistic Expectations – South Dakota's Experience with the Temporary Provisions of the Voting Rights Act, by Chris Nelson, South Dakota Secretary of State, March 2007. Such facts are a strong indicator that preclearance is not needed in South Dakota counties.

South Dakota's two counties previously under preclearance, one of which I have represented on multiple occasions, are majority American Indian and contain the Pine Ridge and Rosebud Reservations. In my experience, those counties, often run by majority-American Indian leaders, do not pass local ordinances that deny or abridge their own people's ability to vote. Requiring those counties, or others similar, to seek and obtain preclearance before their majority-minority leadership can change, for instance, where their polling places should be on the reservation, is unneeded.

I have represented reservation counties in helping them seek preclearance for local election changes needed, such as moving a polling place. Preclearance requires very low-revenue counties to pay lawyers to seek preclearance for them, which is a financial burden. County governments often work with tribal leaders to secure Election Day polling places on the reservation. Counties will utilize the tribal buildings their respective tribes offer to them, working together locally to find buildings and rooms not otherwise needed for tribal matters on Election Day, which offer the accessibility and other resources needed to serve as a polling place. If a week before Election Day, a tribal government indicates to the county election official that the county may no longer use one tribal building but offers another one the tribe believes is better suited, preclearance requirements should not thwart or second-guess that decision by the tribe. In my experience, even expedited preclearance requests for these situations result in an election occurring out of necessity at the new polling facility, with the Department of Justice granting preclearance after the election has been held. Such federal bureaucracy is not needed and causes uncertainty in elections.

II. VRA "vote denial" satellite office claims.

In and around reservations, American Indian plaintiffs have brought VRA "vote denial" claims stemming from the location of county courthouses. In states such as South Dakota, Montana, and elsewhere, county courthouses are located in the county seat. Such county buildings are not on reservation land, which is land held in trust by the U.S. government. While there are often segments of land held in trust outside the primary boundaries of what is considered reservation land, the largest portions of reservation land often encompass a large portion of a county, the entirety of a county, or span more than one county. If, for instance, a county's southern half is reservation land, the county seat is located in the northern half of the county. This creates a situation where, on average, white voters live closer to the county seat than the average American Indian in that county.

Many states offer in-person absentee voting prior to Election Day at the office of the election administrator. The election administrator's office is usually in the county courthouse or another county administration building in the county seat. Because voters living on the reservation may have to drive off reservation and farther than voters that live on non-reservation land, some advocates look to open satellite election administration offices on the reservation.

While the idea may seem attractive at first, the logistical requirements to open a satellite election administration office on the reservation create roadblocks. First, the county must find a building on the reservation both available and suitable for the purpose. It is difficult to find a building that meets ADA requirements, has hardwire internet capabilities, can safely store ballots and election machines, and is available during the voting time period. Second, the county must be able to afford not only the building, but the staff and equipment to operate the facility.

Counties are primarily funded through property taxes paid by the property owners within the county. Land held in trust, such as reservation land, does not generate property taxes. Therefore,

the more reservation land in a county, the less revenue base the county has to operate. Many services county government provides are mandated by state statute.

VRA lawsuits demanding satellite offices on reservations place the county at risk of either offering its residents statutorily-required services, such as a county sheriff or basic road maintenance, or fund a second election administration office on reservation land. Such lawsuits put counties in untenable positions. Counties with reservation land, out of financial necessity, already offer fewer services due to the funding shortfall. Such counties simply cannot afford to offer additional election services such as satellite offices.

My clients and I have found a solution when counties can utilize Help America Vote Act (HAVA) funds to pay for the hiring and training of election workers and fund building rent and equipment to create satellite election administration offices on the reservation. *See* Memorandum Opinion and Order Granting Motion to Dismiss (Doc. 92), *Poor Bear v. County of Jackson;* 5:14-cv-05059*;* Settlement Agreement (Doc. 143), *Janis v. Nelson; 5*:09-cv-05019. Without HAVA funding, however, counties with reservation land cannot realistically offer such services. In my experience, county officials, regardless of race, fully understand these financial issues, and do not deny requests for satellite offices due to any reason other than the financial and logistical ones described above. My county clients have consisted of majority or entirely American Indian county leaders who have the very same attitude and approach to these lawsuits as counties with primarily white county leaders. Satellite office requests on reservation land are often initially denied, by both minority and white county leaders, not in an effort to deny minority voting, but rather due to serious financial concerns and other logistical problems. Efforts to require preclearance in these counties do not ameliorate or address the underlying funding problem in reservation counties.

I have worked numerous other election matters, particularly federal litigation regarding reservations, and am happy to answer questions regarding any such issues.