IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

CIV NO. _____

CV 12-135-BLG

MARK WANDERING MEDICINE, HUGH CLUB FOOT, LENARD ELK SHOULDER, CHARLES BEAR COMES OUT, WINFIELD RUSSELL, JAMES DAY CHILD, WOODROW BRIEN, SARAH STRAY CALF, MARTY OTHER BULL, NEWLYN LITTLE OWL, DONOVAN ARCHAMBAULT, ED MOORE, PATTY QUISNO, MICHAEL D. FOX and PHYLLIS POND CULBERTSON,

Plaintiffs,

v.

LINDA McCULLOCH in her official capacity as MONTANA SECRETARY OF STATE, GERALDINE CUSTER, in her official capacity of ROSEBUD COUNTY CLERK AND RECORDER, ROSEBUD COUNTY, ROBERT E. LEE, DOUGLAS D. MARTENS, and DANIEL M. SIOUX, in their official capacity as members of the County Board of Commissioners for Rosebud County, Montana, SANDRA L.BOARDMAN, in her official capacity of BLAINE COUNTY CLERK AND RECORDER, BLAINE COUNTY, CHARLIE KULBECK, M. DELORES PLUMMAGE and FRANK DEPRIEST in their official capacity as members of the County Board of Commissioners for Blaine County, Montana, DULCE BEAR DON'T WALK, in her official capacity of BIG HORN COUNTY ELECTION ADMINISTRATOR, BIG HORN COUNTY, SIDNEY FITZPATRICK, JR., CHAD FENNER, JOHN PRETTY ON TOP, in their official capacity as members of the County Board of Commissioners for Big Horn

**MEMORANDUM IN SUPPORT O
MOTION FOR
PRELIMINARY INJUNCTION**

County, Montana and KIMBERLY YARLOTT, in her official capacity of BIG HORN COUNTY CLERK AND RECORDER BIG HORN COUNTY,

Defendants.

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PLAINTIFFS' MEMORANDUM IN SUPPORT OF PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF

Pursuant to Fed. R. Civ. P. 65(a) and D. Mont. R. 7.1, Plaintiffs move this Court for a preliminary and permanent injunction ordering Defendants

to locate satellite county offices with in-person absentee voting and late voter registration in Fort Belknap, Lame Deer, and Crow Agency for the full time period (30 days) as authorized by Montana law for the 2012 general election, and each and every election held after 2012.

PRELIMINARY STATEMENT

Plaintiffs bring this action to protect their voting rights and obtain fair and equal participation for Indian voters in the upcoming general election, pursuant to Sections 2, 5 and 12(d) of the Voting Rights Act of 1965, as amended, (hereinafter the "VRA"), 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 4 and Article II, Section 13 of Montana's Constitution.

Registered voters in Montana's largest cities – which are predominantly non-Indian - may vote early at their local county clerk and recorder's office during regular business hours starting 30 days before Election Day. Ex. 1. In stark contrast, Tribal members of the Fort Belknap, Crow and Northern Cheyenne Reservations must travel long distances to exercise their Constitutional right to vote. Ex. 1.

Recognizing that the County Clerk's office should be easily accessible for absentee voters, the Election Administrator of Missoula County authorized the opening of an alternative location in 2009. Currently, five counties utilize satellite locations to provide services to residents who live a great distance from the county seat.[1] Ex. 5 and 19. Despite this precedent, the Secretary of State's office has stated in the past that county officials in a majority-minority county would be violating Montana law if they acted similarly. Ex. 3. Allowing a non-Indian majority county to establish in-person absentee locations at County courthouses but denying the same level of voter access to Indian-majority communities is evidence of invidious discrimination by state and county officials.

Montana law allows the Secretary of State and County election administrators to work in uniformity to increase the number of satellite county offices for in-person absentee voting. Indeed, the U.S. Constitution, the VRA, and the Montana Constitution demand it. Because of Defendants' decisions to delay the establishment of satellite offices on Montana reservations, Indian voters have less opportunity to participate in the political process and elect representatives of their choice.

[1] Defendant Rosebud County has a satellite office location at Human Services Building, 415 Willow Ave., Colstrip, MT 59323.

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. For the Court's convenience, they are summarized below.

Plaintiffs are registered voters and enrolled members of the Fort Belknap Reservation in Blaine County, Crow Indian Reservation in Big Horn County, and Northern Cheyenne Indian Reservation in Rosebud County. Plaintiffs are seeking an opportunity to vote at satellite offices in Fort Belknap, Crow Agency, and Lame Deer. Plaintiffs do not want to endure undue hardship (i.e. 113.8 mile round trip from Lame Deer to the Rosebud County seat) to exercise their fundamental right to vote for the candidates of their choosing.

Defendant Secretary of State is the chief state election official for Montana who oversees elections in the State of Montana and is responsible "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws other than those in Title 13, Chapter 35, 36, or 37." MONT. CODE ANN. § 13-1-201 (2011). The Secretary of State is required to advise and assist election administrators in the "application,

operation, and interpretation of Title 13, except for chapter 35, 36, or 37." MONT. CODE. ANN. § 13-1-203 (2011).

Defendant Sandra L. Boardman is the Blaine County Clerk and Recorder. Defendant Kimberly Yarlott is the Big Horn County Clerk and Recorder. Defendant Geraldine Custer is the Rosebud County Clerk and Recorder. As clerk and recorders, the defendants and their staff are the election administrators for their respective counties. MONT. CODE ANN. § 13-1-301(1) (2011). "The election administrator is responsible for the administration of all procedures relating to registration of electors and conduct of elections, [...] and is the primary point of contact for the county with respect to [...] implementation of other provisions of applicable federal law governing elections." MONT. CODE ANN. § 13-1-301(2) (2011). *See also* 38 Op. Mont. Att'y Gen. 105 (1980) (citing MONT. CODE ANN. § 13-1-101 that gives the Clerk responsibility "for *all* election administration duties") (emphasis in original). These election powers are to be liberally construed in favor of local government; "every reasonable doubt as to the existence of a local government power or authority shall be resolved in favor of the existence of that power or authority." Mont. Ann. Code § 7-1-106 (2011).

As an election administrator, the Clerk and Recorder is mandated to "comply with the directives and instructions" of the Secretary of State. MONT. CODE ANN. 13-1-202 (2011). Election administrators are also required to "assist the Secretary of State in making recommendations to improve voter confidence in the integrity of the election process." Id.

The County Clerk and Recorder must permit eligible voters to cast in-person absentee ballots at the County Clerk's office at least 30 days prior to a federal election. MONT. CODE ANN. § 13-13-205 (2011); MONT. CODE ANN. § 13-13-222 (2011). A voter may mail an application for absentee voting "directly to the election administrator or deliver the application in person to the election administrator. An agent designated pursuant to 13-1-116 or a third party may collect the elector's application and forward it to the election administrator." Mont. Code Ann. 13-13-213 (2011). A voter may also return an absentee ballot by delivering it to "a polling place within the elector's county." Mont. Code. Ann. § 13-13-201 (2011).

The recognized authority to make the decision to establish satellite offices is exceptionally important in counties with large minority populations concentrated in a location far from the Clerk's primary office. Currently, Indian voters in Montana must drive significant distances to

absentee vote or late register in-person. Crow Reservation residents drive 27.2 miles round trip to exercise the same fundamental right as those in Hardin. Fort Belknap residents drive 43 miles round trip to have the same access to the ballot as Chinook residents. Members of the Northern Cheyenne Reservation drive a startling 113.8 miles round trip to Forsyth to exercise their constitutional right to vote. Ex. 1.

In 2009, the Missoula County Clerk concluded that the main Clerk office, located at the Missoula Courthouse, did not meet the needs of Missoula County residents. She used her discretion as the county election administrator to open an "Elections Office" for early voting. The Clerk concluded that "[t]he space required to run elections has grown and requires more room to ensure security and provide quality customer service. The [new office location] finally gives voters and staff the room they need to participate in the electoral process."[2]

On May 2, 2012, the Blackfeet Nation requested assistance from Defendant Secretary of State in administering a satellite office in Browning in part because of the success of a similar location in Missoula County. Ex.

[2] Press Release, Missoula County Clerk and Recorder, The Elections Office Moved its Later Voter Registration Services and Counting Center from the Missoula County Courthouse to the Missoula County Fairgrounds (2009).

12. Two months later, the Secretary of State refused to offer assistance, concluding that such an office would be illegal. Ex. 3. An ensuing legal disagreement between interested parties culminated with an Attorney General Letter of Advice supporting the Blackfeet Nation's legal position. Ex. 3, Ex. 4, Ex. 5. Subsequently, the Secretary of State and Glacier County officials agreed to offer a satellite office for in-person late registration and absentee voting in Browning, and indeed, the Secretary of State issued an Election Advisory to all county clerk and recorders notifying them of the requirements to establish satellite office locations. Ex. 9. So far, five counties use satellite offices to provide county services. Ex. 5 and 19.

When Fort Belknap leaders heard about this opportunity, they wanted to establish such an office at their tribal headquarters, Fort Belknap, for several reasons. First, the Blaine County Seat, Chinook, is a 43 mile round trip from Fort Belknap. Ex. 1. This is a daunting trip especially in consideration of the Tribe's high poverty rate, which is higher than the average of all Montana Indian reservations.[3] Second, they believe it will increase the electoral participation of Indians, a protected class under the VRA. Moore Aff.; Archambault Aff. Finally, tribal members dislike visiting

[3] MONTANA'S POVERTY REPORT CARD, FORT BELKNAP INDIAN RESERVATION (December 2011), available at http://www.montana.edu/extensionecon/countydata/FortBelknap.pdf.

Chinook because of the townspeople's racist sentiment towards Indians. Moore Aff.; Archambault Aff.

On September 11, Fort Ft. Belknap President William Main contacted Blaine County officials to schedule a meeting to discuss a satellite office in Fort Belknap. On September 12, the Blaine County Commission voted to deny the Tribe's request. Ex. 37.

Blaine County officials, tribal leaders and representatives from Four Directions met via teleconference on September 13. Ex. 11. During the meeting, Four Directions Consultant Bret Healy offered to donate funds for the establishment of one satellite office in Fort Belknap. Healy Aff. Blaine County officials refused the offer. Additionally, they claimed that such a satellite office could not be provided during the 2012 general election. Healy Aff. When asked if the 2012 general election was completely out of the question, Blaine County officials did not say no. Healy Aff. The Tribe was never informed during the meeting that the Blaine County Commission had already voted to deny the request.

The parties reconvened on September 17. This was a tense meeting for several reasons. First, the County Sheriff was present but only sat silently without participating. Semans Aff. Moreover, County Attorney

Ranstrom made a disparaging remark about Fort Belknap Councilman Edward Moore's facial features; Councilman Moore suffers from facial paralysis. Moore Aff. Again, the Blaine County Commission never bothered to inform the Tribe that they had already decided to deny the request.

The success in Glacier County and the struggle in Blaine County inspired other Montana tribes to demand their equal rights under the law. On September 18, 2012, the Crow Nation Chairman Cederic Black Eagle and the Northern Cheyenne President Leroy Sprang both sent letters to county officials requesting satellite offices at their respective tribal headquarters. Ex. 15; Ex. 16.

Unfortunately, efforts of these Tribes mirrored the struggles in Blaine County. Two days after Northern Cheyenne President Spang sent his request, Rosebud County Clerk and Recorder Custer denied the request due to staffing concerns and her belief that the voting system was too complex for a satellite office. Semans Aff. However, Rosebud County Commissioner Robert E. Lee informed Four Directions that Custer did not have the authority to make this decision and the Rosebud County Commission was going to vote on the request on September 28, 2012. Semans Aff.

On September 28, 2012, Custer reiterated her staffing concerns. Semans Aff. She further stated that she did not believe there was enough time to secure office space equipped with high-speed Internet. Semans Aff. She suggested that Tribal members could vote by mail or the Tribe could "bus people to Forsyth" to vote. Semans Aff. On this day, the Rosebud County Commission failed to take action. Healy Aff. Ex.39. The meeting was rescheduled for October 2, 2012.

On October 2, 2012, Custer had another excuse to deny the request: fraud. Semans Aff. Custer noted her objectivity, stating she would not grant this request if "it was Negroes, Chinese, Asians, whatever, we could not do it." Semans Aff.

The Rosebud County Commission voted 2-1 to deny the Tribe's request for a satellite location in Lame Deer. The Commission approved the creation of an "Election Information Office" in Lame Deer but no in-person late registration or in-person absentee voting could occur at the newly established office. Healy Aff. Ex. 14. The Commission concluded, "although not precisely as requested, the essence of the voter participation measures requested by the Northern Cheyenne Tribe and Four Directions are able to be implemented for the November 2012 election." Healy Aff. Ex. 14.

In taking its action, the Rosebud County Commission failed to take into consideration the Northern Cheyenne's poverty. The Northern Cheyenne Reservation has one of the highest dependency ratios (88.6%) in Montana; it is well above the state average dependency ratio[4] which is not surprising considering that over half (52.3%) of the Reservation's residents make less than $25,000 a year. Id. In fact, the median per-capita income is a startling $7,736. Id. These numbers are consistent with the 59.8% unemployment rate and 34.8% of the population living below the poverty line.[5]

The Crow Nation also faced resistance from Big Horn officials. Despite an offer from Four Directions to cover any expenses for a satellite county office for in-person absentee voting, the Big Horn County Commission denied the Tribe's request. At the October 1, 2012 Big Horn County Commission meeting, the Election Administrator Dulce Air Don't Walk used many of the same excuses made by Rosebud County officials:

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[4] MONTANA'S POVERTY REPORT CARD, NORTHERN CHEYENNE RESERVATION (December 2011), available at http://www.montana.edu/extensionecon/countydata/NorthernCheyenne.pdf.

[5] STATE TRIBAL ECONOMIC DEVELOPMENT COMMISSION, Demographic & Economic Information for Northern Cheyenne Reservation, (no date given), available at http://www.ourfactsyourfuture.org/admin/uploadedPublications/2695_N_Cheyenne_RF08_Web.pdf.

lack of time, staff, and office space. She was also concerned about the "integrity of the ballot." Semans Aff.

The Crow Indian Reservation is also poverty-stricken. It has a dependency ratio of 79.6%. 18.4% of families live below the poverty line; a startling 77.4% of families with children live under five years of age are below the poverty line.[6] The Bureau of Indian Affairs calculated a 46.5% unemployment rate for tribal Members.[7]

Perhaps the most telling revelation from this meeting is not how the Commission voted but why. Big Horn County Commissioner John Tree on Top, a Crow Nation Tribal Member, stated he was voting to deny the request because "white people will get mad." Semans Aff.

ARGUMENT

On a motion for preliminary injunction, this Court "must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public

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[6] "American Fact Finder." United States Census Bureau. http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_10_5YR_DP02.

[7] Census and Economic Information Center, Demographic and Economic Information for Crow Reservation (no date given), http://www.ourfactsyourfuture.org/admin/uploadedPublications/2685_Crow_RF08_Web.pdf.

consequences. Winter v. NRDC, Inc., 126 S. Ct. 365, 367 (2008) (citing Weinberg v. Romero-Carcelo, 456 U.S. 305, 312 (1982)). The Court must grant a preliminary injunction when serious questions go to the merits of the case. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). In order for a preliminary injunction to be granted, Plaintiffs must establish: (1) Plaintiff is likely to succeed on the merits, (2) Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in the Plaintiffs' favor, and (4) an injunction is in the public interest. Id. (citing Munaf v. Geren, 553 U.S. 674, 689-690 (2008)).

The Ninth Circuit applies these four factors under a sliding scale: "the elements of the preliminary injunction are balanced, so that a stronger showing of one element may offset a weaker showing of another." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). The Ninth Circuit Court of Appeals has summarized its test for preliminary injunction to require the Plaintiffs "show 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also

shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." Id. at 1135.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Plaintiffs assert claims based upon the following: (1) Section 2 of the VRA; (2) the 14th Amendment to the United States Constitution; and (3) Montana's Constitution.

A. Voting Rights Act

The VRA was aimed at subtle but obvious state actions that effectively deny citizens their right to vote because of their race. Allen v. State Bd. of Elections, 393 U.S. 544, 565-66, 89 S. Ct. 817, 831-32, 22 L. Ed. 2d 1 (1969). "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 VRA protects the rights of Indian voters. *See e.g.* Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006). "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).

This certainly is not the first time the U.S. District Court of Montana has addressed Section 2 of the VRA. In fact, all three counties have lost or settled past Section 2 litigation. The first challenge was brought in Big Horn County in 1983. Windy Boy v. County of Big Horn, 647 F.Supp. 1007 (D.C. Mont, 1986). The plaintiffs were members of the Crow and Northern Cheyenne Tribes. At that time, Indians constituted 41% of the county's voting age population. The plaintiffs contended that the at-large election of county commission and school board members allowed the non-Indian majority to control the outcomes and prevented Indian voters from electing candidates of their choice.

Following a lengthy trial, the district court found that the at-large system diluted Indian voting strength in violation of Section 2. The court concluded that "this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act" because of "racial bloc voting in" the county, "laws prohibiting voting precincts on Indian reservations," and "discrimination in hiring." Following the

implementation of single-member districts, an Indian was elected to the county commission for the first time.

In another case, the United States sued Blaine County in November 1999 for its use of at-large elections, which were alleged to dilute Indian voting strength. U.S. v. Blaine County, 363 F.3d 897 (9th Cir. 2004). Blaine County is 45% Indian and home to the Fort Belknap Reservation. The court concluded: (1) there was a history of official discrimination against Indians, including "extensive evidence of official discrimination by federal, state, and local governments against Montana's American Indian population;" (2) there was racially polarized voting that "made it impossible for an American Indian to succeed in an at-large election;" (3) voting procedures, including staggered terms of office and "the County's enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide," enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; and (5) there was a tenuous justification for the at-large system. Id. To remedy the County's violations of the VRA, the court adopted a single member district plan. Id. At the next election an Indian was elected from a majority Indian district.

In Alden v. Rosebud County Board of Commissioners, Civ. No. 99-148-BLG (D. Mont. May 10, 2000), Indians sued Rosebud County and Ronan School District 30 in Flathead County for their use of at-large elections. Rather than face prolonged litigation, the two jurisdictions entered into settlement agreements adopting district elections. The difficulty Indians have experienced in getting elected to office was particularly evident in Ronan School District 30. From 1972 to 1999, seventeen Indians had run for the school board, but only one, Ronald Bick, had been elected.[8] The settlement plan increased the school board size from five to seven members and created a majority-Indian district that would elect two members to the board. In the election held under the new plan, two Indians were elected from the majority-Indian district.

Congress amended the VRA in 1982 to clarify that plaintiffs seeking relief under Section 2 do not have to show discriminatory intent, only discriminatory result. 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 emphasized that the

[8] With no formal or announced tribal affiliation at the time, Bick was elected to the board in 1990. But he was defeated for reelection in 1993, after it became known he had joined the Flathead Nation.

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." Id. at 44 (citing 28 U.S.C. Cong. & Admin. News 1982, p. 206. *See also* Id., at 2, 27, 29, n. 118, 36.)

> "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).

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).

The dates and location of polling places are a "standard, practice, or procedure with respect to voting" under Section 2 of the Voting Rights Act.

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). A polling place location's accessibility 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.*

In this case, the location of satellite offices is a "standard, practice, or procedure with respect to voting" under Section 2 of the VRA. *See* Jacksonville, 351 F. Supp. 2d at 1334. Montana law establishes the standards, practices, and procedures for the Secretary of State and the election administrator to administer elections and offer absentee voting. *See e.g.* MONT. CODE ANN. § 13-13-205; MONT. CODE ANN. § 13-13-222; MONT. CODE ANN. § 13-1-201(2); MONT. CODE. ANN. 13-13-213.

Once it is established that the case involves a "standard, practice or procedure" as defined in Section 2 of the VRA, 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 plaintiffs' minority group. *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 the Senate Report, Congress specified a list of factors now referred to as the totality of circumstances test that are important in determining 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. *See e.g.* Cottier v. City of Martin, 445 F.3d 1113, 1116 (8th Cir. 2006) (quoting Gingles, 478 U.S. at 47, 106 S.Ct. 2752 ("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 black and white voters to elect their preferred representatives")).

The 1982 Senate Report stresses that this list of typical factors is neither comprehensive nor exclusive. Gingles, 478 U.S. 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).

Unless the Court issues an order compelling Defendants to provide Plaintiffs with satellite offices for in-person absentee voting and late registration in Fort Belknap, Crow Agency and Lame Deer as required by Montana law and the VRA, Plaintiffs will have restricted access to voting. Any limitation on the opportunity of protected class members to participate in an election impairs their ability to elect legislators of their choice. Chisom, 501 U.S. at 397. The inability to take the time or spend the money necessary for an extended drive to vote early by absentee ballot 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. Because of the high unemployment rate, high poverty rate, and low-income levels on the reservations, Indian voters face an undue hardship when they are forced to travel 27.2 miles to Hardin; 43

miles to Chinook; and 113.8 miles to Forsyth in order to cast an absentee ballot.

In a recent Section 2 case, Spirit Lake Tribe v. Benson County, North Dakota, 2010 WL 4226614 *3 (D. N.Dak. 2010), the court enjoined the closing of polling places on the Spirit Lake Reservation in North Dakota on the grounds, *inter alia*, that it "will have a discriminatory impact on members of the Spirit Lake Tribe because a significant percentage of the population will be unable to get to the voting places in Minnewauken [the county seat] to vote." In the case at bar, the great distance between the County courthouses in Chinook, Crow Agency and Lame Deer and large tribal populations in Ft. Belknap, Crow Agency and Lame Deer will have a similar discriminatory impact on Indian residents. *See also* Perkins v. Matthews, 400 U.S. 379, 388 (1971) (acknowledging that the location of polling places "at distances remote from black communities" has an obvious potential from abridging the right to vote); Brown v. Dean, 555 F.Supp. 502, 505 (D. R.I. 1982) (enjoining the relocation of a polling place under Section 2 because it "may well abridge" minorities' free exercise of the right to vote).

Defendants have a duty to provide Indian voters the same opportunity for absentee voting that non-Indian county residents 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). Because the current voting practice provides for less opportunity for Indian voters to participate in the political process and elect their preferred candidates, this Court should find that Plaintiffs are likely to succeed on the merits of their claim.

B. Fourteenth Amendment

Plaintiffs are also likely to succeed on the merits of their claim that limited access to in-person absentee voting and late registration violates their rights under the 14th Amendment to the United States Constitution. Defendants' decision to deny the Tribes' request for a satellite location is an action taken under color of state law.

"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). Unequal access to in-person absentee voting and late registration has a discriminatory impact on the Plaintiffs because they have fewer opportunities to vote than residents of other Montana 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). Given the history of racial tension between residents of border communities and Indian Reservations and that the vast majority of non-Indian Montana voters do not have to drive long distances to vote in-person absentee and register to vote, a discriminatory intent can be inferred by Defendants' failure to provide equal access to voting at a location densely populated by Indians.

Because of the discriminatory impact, Plaintiffs are likely to succeed on the merits of their claim that the lack of in-person absentee voting and late registration on the Fort Belknap, Crow and Northern Cheyenne Indian Reservations violates the Equal Protection Clause of the 14th Amendment.

C. State Constitution Claim

Montana's Constitution provides that "[n]o person shall be denied the equal protection of the laws. Neither the state nor any person, firm corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas." Art. II, Sec. 4. Furthermore, the Montana Constitution provides that "all elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Art. II, Sec. 13. Plaintiffs are being discriminated against in their attempts to exercise their civil and political rights due to their race, color, social origin and condition. Montana elections are not equal because Plaintiffs do not have equal access to in-person absentee voting and late registration. Accordingly, Plaintiffs are likely to succeed on the merits of their claim that unequal access to voting violates the Montana Constitution.

II. THE BALANCE OF HARDSHIPS FAVORS GRANTING PLAINTIFFS' MOTION.

If the Court grants the Plaintiffs' motion, Defendants will be minimally inconvenienced because the cost of a satellite office is not overly burdensome. Moreover, Montana counties are allowed to accept donations from private sources. Ex. 10. Indeed, a nonprofit has already offered to cover the expenses of the satellite office for all three counties. The expense or administrative inconvenience of providing equal access is outweighed by the loss of Indian voters' equal right to vote. As the court held in Spirit Lake Tribe, 2010 WL 4226614 *5, "the potential harm that would be suffered by Plaintiffs if they were deprived of their Constitutional right to vote outweighs any monetary harm which would fall upon Benson County."

The right to vote is one of the most fundamental rights in our system of government. Reynolds v. Sims, 377 U.S. 533, 554 (1964). Accordingly, it is entitled to special constitutional protection because:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. . . . [T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil rights.

Reynolds v. Sims, 377 U.S. at 555, 562. *Accord*, Wesberry v. Sanders, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined").

The threatened injury to Plaintiffs outweighs any harm that an injunction might cause Defendants. "Administrative convenience" cannot justify a state practice that impinges upon a fundamental right. Taylor v. Louisiana, 419 U.S. 522, 535 (1975). In any event, inconvenience to the State is no justification for allowing citizens to be burdened in exercising 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 voting continues to be denied. Accordingly, this factor weighs in favor of granting the Plaintiffs' motion for preliminary injunction.

III. PLAINTIFFS WILL BE IRREPARABLY HARMED WITHOUT EQUAL ACCESS TO VOTING

Plaintiffs will not be able to fully exercise their fundamental right to vote in the 2012 general election unless the 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). Because of the preferred place it occupies in our constitutional scheme, "any illegal impediment to the right to vote, as guaranteed by the U.S. Constitution or statute, would by its nature be an irreparable injury." Harris v. Graddick, 593 F. Supp. 128, 135 (M.D. Ala. 1984). *Accord*, Dillard v. Crenshaw County, 640 F. Supp. 1347, 1363 (M.D. Ala. 1986) ("denial of the right to vote" constitutes irreparable injury); Cook v. Luckett, 575 F. Supp. 479, 484 (S.D. Miss. 1983) ("perpetuating voter dilution" constitutes "irreparable injury"); Foster v. Kusper, 587 F. Supp. 1191, 1193 (N.D. Ill. 1984) (denial of the right to vote for candidate of choice constitutes "irreparable harm"). *See also* Elrod v. Burns, 427 U.S. at 373 (the loss of constitutionally protected freedoms "for even minimal periods of time, constitutes irreparable injury").

Once the right to vote is denied or suppressed, there is no way to remedy the wrong. As the court held in Spirit Lake Tribe, "there is simply no remedy at law for such harm other than an injunction." Spirit Lake Tribe v. Benson County, 2010 U.S. Dist. LEXIS 116827, *12 (D.N.D. Oct. 21, 2010). Indian voters will suffer irreparable injury if they are denied an equal opportunity to vote in the 2012 and future elections. Unequal access to voting cannot be addressed with monetary damages. Accordingly, this factor weighs in favor of granting the preliminary injunction.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING PLAINTIFFS' MOTION

The VRA is a congressional directive for the immediate removal of all barriers to equal political participation by racial and language minorities. When it adopted the remedial provisions of the Act in 1965, Congress cited the "insidious and pervasive evil" of discrimination in voting and acted "to shift the advantage of time and inertia from the perpetrators of the evil to its victims." South Carolina v. Katzenbach, 383 U.S. 301, 309, 328 (1966). In the legislative history of the 1965 Act, as well as the 1970, 1975, 1982, and 2006 amendments and extensions, Congress repeatedly expressed its intent "that voting restraints on account of race or color should be

removed as quickly as possible in order to 'open the door to the exercise of constitutional rights conferred almost a century ago.'" NAACP v. New York, 413 U.S. 345, 354 (1973) (*quoting* H.R. Rep. No. 439, 89th Cong., 1st Sess. 11 (1965)). *See also* S.Rep. No. 417, at 5, reprinted in 1982 USCCAN 182 ("[o]verall, Congress hoped by passage of the Voting Rights Act to create a set of mechanisms for dealing with continuing voting discrimination, not step by step, but comprehensively and finally"); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, P.L. 109-246, 120 Stat. 577, Section 2(b)(3) ("[t]he continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965").

As the Court held in Briscoe v. Bell, 432 U.S. 404, 410 (1977), the VRA "implements Congress' intention to eradicate the blight of voting discrimination with all possible speed." Given the unambiguous intent of Congress that minority political participation be increased as quickly as possible, an injunction requiring Blaine, Big Horn, and Rosebud county

officials to provide satellite offices for in-person absentee voting and late registration is in the public interest. *See* Harris v. Graddick, 593 F.Supp. at 136 ("when section 2 is violated the public as a whole suffers irreparable injury"); Johnson v. Halifax County, 549 F.Supp. 161, 171 (E.D. N.C. 1984) (the "public interest" is served by enjoining discriminatory election procedures).

The public interest also will benefit from the increased participation of Indian voters. There has been a positive growth in Indian political participation in recent elections at the national, state, and local levels.[9] This increased participation will bring Indian and non-Indian communities closer together and help solve the problems that continue to face Indian

[9] Many things are driving the increased Indian political participation - business development, new income from casinos, the need to interact with non-tribal governments, and obtaining state and federal funds for health clinics, education improvements, water-reclamation projects, and cleanup of old mining areas. According to Jefferson Keel, an officer both of the Chickasaw Nation in Oklahoma and the NCIA, "[t]here's been a sea change in my lifetime . . . people feel a real stake in the system." An organization known as the Indigenous Democratic Network (INDN's List) was formed in 2005 to encourage and train Indians on how to run for political office. In 2006, INDN's List supported 26 candidates from 12 states, representing 21 tribes. The organization's founder, Kalyn Free, a member of the Choctaw Nation of Oklahoma, said that 20 of the candidates were elected to office, nine of whom were elected to office for the first time. In the 2008 elections, 22 American Indians from 16 tribes and 11 states (Alaska, Arizona, California, Colorado, Montana, Nevada, Oklahoma, Pennsylvania, South Dakota, Washington, and Wyoming) won their state and local contests. Kalyn Free, the president of INDN's List, said "tribal members are engaged at all levels of government in an unprecedented manner. To shape history, you have to be willing to make it." RESNET, "22 Natives From 11 States, 16 Tribes Win Elections," November 5, 2008. *See also* Rogers Aff.

communities. Denying equal access to voting can only impede this progress and be counterproductive to the larger interests of all Montana residents.

The public also has a broad interest in the integrity of elected government that is compromised by a system that fails to weigh the votes of all citizens equally. *See* Cook v. Luckett, 575 F. Supp. at 485 ("[t]he public interest must be concerned with the integrity of our representative form of government"). Subjecting Indian voters on Montana reservations to an "inequitable" system that is different from the one offered to non-Indian voters would be adverse to the public interest. Watson v. Commissioners of Harrison County, 616 F.2d 105, 107 (5th Cir. 1980).

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court:

1. Schedule a hearing on this motion for injunctive relief on ____, October, 2012 at __ , or as soon thereafter as possible;
2. Following the hearing, enter a preliminary injunction directing Defendants to establish satellite office locations with in-person absentee voting and late registration in Fort Belknap, Montana, Crow Agency, Montana and Lame Deer, Montana; and,
3. Grant such other relief as this Court deems appropriate.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(A) of United States District Court Rules for the District of Montana, I certify that the word count calculated by Microsoft Word is 6,426 words, excluding captions, certificates of service, table of contents and authorities, exhibit index and this certificate of compliance.

Respectfully submitted this 10 day of October, 2012.

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