



A R I Z O N A S T A T E U N I V E R S I T Y

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Arizona Native Vote Election Protection Project 2008

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**2008 Election Review
Committee on House Administration
Subcommittee on Elections**

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NATIONAL CONGRESS OF AMERICAN INDIANS

TESTIMONY TO HOUSE ADMINISTRATION COMMITTEE SUBCOMMITTEE ON ELECTIONS

Hearing on the 2008 Elections
March 26, 2009

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On behalf of the tribal nations of the National Congress of American Indians (NCAI), we are pleased to present testimony on the 2008 Elections to the House Administration Committee. The National Congress of American Indians (NCAI) is the oldest and largest national organization representing tribal governments. NCAI also runs the national Native Vote program in conjunction with Tribes and tribal communities.

THE NATIVE VOTE CAMPAIGN

The Native Vote Campaign is a national non-partisan effort to mobilize the American Indian and Alaska Native vote in collaboration with Tribal governments, regional inter-Tribals, the national Indian organizations, and urban Indian centers. In 2004, 2006, and 2008, Native Vote spearheaded this groundbreaking campaign to register and turn out a record number of American Indian and Alaska Native voters. Native Vote is about training ourselves and creating an election infrastructure within our own communities to make sure our voices are heard.

Every Tribe and every Native community is encouraged to participate in Native Vote. However, each election cycle we identify states in which specific emphasis will be placed. In 2008, nearly 20 states were chosen:

Alaska	Minnesota	Oregon
Arizona	Montana	South Dakota
California	Nevada	Texas
Colorado	New Mexico	Washington
Florida	North Dakota	Wisconsin
Idaho	Oklahoma	Wyoming
Michigan		

Within each state, NCAI has a Native Vote coordinator to focus on voter registration and get-out-the vote efforts, and a Native Vote Election Protection Coordinator to focus on ensuring that Natives have a smooth voting experience on Election Day. Each Tribe within each Native Vote state replicates this infrastructure.

TRENDS IN INDIAN VOTING

Indians were first granted the right to vote in 1924. Since first being granted citizenship 80 years ago, Native Americans have become increasingly active in the electoral process. Several major recent elections have been heavily influenced by Native American issues and Native voting patterns.

In 2000, the Indian vote was credited with defeating Senator Slade Gorton in Washington State. In 2002, the Indian vote helped retain a Senate seat for Senator Johnson in South Dakota, who won by just over 500 votes. The Native Vote has also been credited with Senator Tester's win in Montana, as well as a number of past Congressional races such as former Congresswoman Heather Wilson in New Mexico. Native American voters tend to be loyal to candidates who champion their issues.

However, it has been a long and difficult road to this increased political participation. Native Americans were denied the right to vote longer than any other community in the United States, and they continue to struggle against ongoing disenfranchisement and voter suppression actions.

HISTORICAL OBSTACLES TO INDIAN VOTING

Eighty years ago, with the passage of the *Indian Citizenship Act of 1924*,¹ Native Americans were first granted U.S. citizenship and the corollary right to vote—54 years after African-American men were formally enfranchised with the 15th amendment (1870), and four years after women received the right with the 19th Amendment (1920).²

However, voting procedures are delegated to the states, and well past 1924 some states misused this power to continue to deny Native Americans the right to vote. For example, as late as 1962, New Mexico still overtly prohibited Native Americans from voting. Even with the passage of the Voting Rights Act in 1965, states used English literacy tests to prevent Native Americans from registering to vote.³

Legal obstacles

Historically, there were four major arguments used by states to justify their continued disenfranchisement of Native voters:

- 1) Indians were under federal guardianship, or were federal “wards,” and therefore not independent and competent for voting;⁴
- 2) Indians living on reservation lands were residents of their reservation and not of the state (even though the Supreme Court declared all reservation Indians residents of their states in 1881);⁵
- 3) Indians did not pay state taxes and, therefore, should not be able to affect revenue decisions;⁶ and

¹ *Snyder Act*, June 2, 1924.

² Up until then, Indian citizenship was granted only when an Indian was deemed “competent and capable of managing his or her own affairs.” (*Burke Act*, 1906)

³ In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Supreme Court upheld the Voting Rights Act ban on literacy tests and noted that Arizona had “a serious problem of deficient voter registration among Indians.”

⁴ In **Arizona**, the state Supreme Court disqualified Indians from voting because they were under “federal guardianship,” a status construed by the court to be synonymous with “persons under disability.” A decision enforced until the court reversed itself in 1948. *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948).

⁵ **Utah** disenfranchised Indian voters by claiming that Indians residing on reservations did not qualify as residents of the state, despite the 1881 Supreme Court decision to the contrary. This statute stood until 1957 when, under threat of reversal by Supreme Court, the state legislature abolished it.

⁶ **Idaho, Maine, Mississippi, New Mexico, and Washington** prohibited “Indians not taxed” from voting as late as 1968, even though they granted the franchise to whites who were not taxed. IDAHO CONST. art. VI, S 3 (1890, amended 1950); N.M. CONST. art. XII, S 1; WASH. CONST. art. VI, S 1; MISS. CONST. art. 12 S 241 (1890, amended 1968).

- 4) Indians were not “civilized,” and their continued participation in their Tribal communities precluded participation in other elections.

Cultural Obstacles

It was this last legal prohibition, the requirement that Native Americans be “civilized” before being granted the right to vote, that compounded the already complex and difficult issue of citizenship and civil participation for Natives. Many Indians had no interest in U.S. citizenship and even rejected it. Some believed that accepting citizenship with the very government that had oppressed one’s community seemed tantamount to treason, or, at best, foolishness.

Problems with “Registering” with the Government. Past governmental efforts at registering or identifying community members had been for the purpose of taking land, relocating a community, or forcefully removing children to boarding schools. These experiences, ingrained in the collective memory of Native communities, are apparent in the ongoing resistance to “register” for a government ID, to “register” to vote, or, to “register” for any purpose with any state of federal governmental entity.

Requirement of Being “Civilized” To Vote. These concerns were only exacerbated by the requirement of many states, including Idaho⁷, Minnesota⁸, North Dakota⁹, and South Dakota¹⁰, that Indians had to relinquish their tribal allegiances and become “civilized,” according to the majority community’s standards, before they were able to vote.¹¹ The negative association between betrayal of their own community and voting has had long-lasting effects on current attitudes toward voting in the Native community.

CURRENT OBSTACLES TO INDIAN VOTING

Even with all of the success resulting from recent legislative protections and litigation, a number of legal and cultural obstacles continue to hinder full enfranchisement of America’s Native community. For example:

Vote Dilution. Electoral systems continue to be designed in manners that result in diluting the strength of the Native voice. At-large and multi-member voting districts, and discriminatory reapportionment plans can all have a negative effect on the ability of Native communities to have their electoral voice heard. For example, Buffalo County South Dakota went out of its way to draw its water district lines in a way that grouped nearly 90% of the Native population into one of the three voting districts.¹²

⁷ IDAHO CONST. art. VI S 3 (1890, repealed 1950).

⁸ The Minnesota Supreme Court defined its constitutional provision of “civilized” Indians as those who had taken up their “abode outside the reservations and there pursuing the customs and habits of civilization.” MINN. CONST. art. VII, S 1, cl. 4 (1857, repealed 1960); *In re Liquor Election in Beltrami County*, 138 Minn. 42, 163 N.W. 988 (1917).

⁹ North Dakota’s constitution contained a provision that extended the vote only to “civilized persons of Indian descent who shall have severed their tribal relations.” N.D. Const. Art. V, S 121 (1889, repealed 1922).

¹⁰ South Dakota prohibited Indians from voting or holding office “while maintaining tribal relations.” S.D. Codified Laws Ann. S 92 (1929, repealed 1951). Indians from Todd and Shannon Counties were still prevented from holding office until 1980 as a result of litigation brought on their behalf. *United States v. South Dakota*, 636 F.2d 241, 243 (8th Cir. 1980).

¹¹ Suzanne E. Evans (University of California at Berkeley), Encyclopedia of North American Indians, Voting (Houghton Mifflin), (viewed September 28, 2004) http://college.hmco.com/history/readerscomp/naind/html/na_041800_voting.htm

¹² *Kirkie v. Buffalo County*, CIV No. 03-3011 (D.S.D. Feb. 12, 2004).

Voter Suppression Tactics. Unfortunately, as the Native voting population turns out in larger numbers, attention to their voting influence has also attracted efforts to discourage them on Election Day. One of the most common tactics employed in recent elections has been the challenging of Natives' voting status on Indian reservations by non-native partisan poll watchers on Election Day.

Linguistic Barriers. Section 203 of the *Voting Rights Act* provides for language protections for many Native communities. However, many states continue to not be in compliance. The State of Alaska, for example, has never been in compliance, despite the fact that their Native communities have one of the largest percentages of individuals who only speak their Native language. The native communities in Alaska have been in on-going litigation with the State.

Distant Poll Locations. Much of Indian Country is in very rural and remote locations. Limited state resources often place polling precincts over 60 miles from voters. With no public transportation on most reservations, limited resources for gas money, and often inhospitable weather in November, distant polls often mean disenfranchisement for Native Americans.¹³

Transitory Restrictions. The current electoral system is antiquated and designed for western populations that live in one location for long periods of time. Many of our reservations are large and encompass many different counties. A Native family will live within its Nation's boundaries but may go back and forth between families and homes depending upon the time of year. One of the largest forms of disenfranchisement in Indian Country is the requirement of voting in a particular precinct. The access to ballots should be modernized, or at a minimum "up ballot" voting should be required.

Restrictive ID Requirements. There have been a number of recent state efforts at restrictive ID requirements for voters. Many Indians do not have federal or state government IDs—some due to the historical concerns previously discussed, some due to cultural issues, and others because they have not previously had a need for one. For those who do have some form of official ID, that ID is often a tribal ID card, which many states still continue to reject as acceptable voting identification. It is these new restrictive ID requirements on which we will be expanding upon for the remainder of this testimony.

THE EFFECT OF ID REQUIREMENTS ON INDIAN VOTING

Tribes Are Sovereign Governments and Produce Their Own Identification

Tribal governments pre-date the existence of the U.S. government. There are over 560 independent tribal nations with their own laws, governmental structures, and citizenship policies. As independent sovereign nations, tribal governments issue their own documents and forms of identification, such as tribal identification cards, tribal or Bureau of Indian Affairs (BIA) Certificates of Degree of Indian Blood, tribal birth certificates, or letters of enrollment from the tribal enrollment office.

The federal government has a unique treaty and trust relationship with and unique obligation to members of federally-recognized tribal governments. That relationship is directly between the Tribes and the federal government, not state governments. As such, tribal members should not be forced to go to a different government, a State government, to obtain proof of who they are. Tribal government documents should be accepted as any government documents.

¹³ Polling places on the reservations have been moved or closed to reduce Native turnout. See *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

Lack of Access to State ID Cards

No Tribal Documents Accepted for State Drivers Licenses - REAL ID Law. Tribes have been in ongoing disagreement with DHS for not including tribal documents in the list of acceptable documents for obtaining a REAL ID compliant state drivers license. The irony of this oversight is that DHS does accept tribal documents for the much higher security requirement of crossing the international border. The practical effect of this has been a decrease in access to state drivers licenses for Native Americans. If tribal documents are not accepted by states, the next document usually required is a birth certificate. That is also not an option for much of Indian Country.

Lack of Birth Certificates in Indian Country. High Rate of Home Deliveries. Many Native Americans are born outside of a modern hospital system. Because they are both born at home, and because there is not a strong association with the State government, many never receive a birth certificate. However, in many instances there will be documentation and birth records available through tribal genealogy records and tribal identification. At a recent meeting of tribal leaders, many tribes estimated that as high as 30% of their population did not have birth certificates. States have even rejected delayed Affidavits of Birth issued by the tribe for purposes of obtaining a state ID.

Indian Boy/Girl on Birth Certificate. In addition, of those Native children who were born in Indian hospitals, there were long periods of time for many states in which "Indian Boy" or "Indian Girl" was simply entered on a birth certificate, therefore rendering the birth certificate largely useless for the purposes at hand. Many others receive "delayed" birth certificates later in life, often registered with incorrect information.

One such example includes an elder in Washington State. Her name was incorrectly listed on her delayed birth record. She sought to have it rectified in order to obtain a passport, only to be told that "she did not exist." It required lengthy court proceedings to try and rectify this. She has since passed away. She always had sufficient tribal documentation to prove her identity.

Problems with Acceptance – Tribal IDs on Election Day

Native Vote States. Over the last three election cycles of Native Vote, the states have become more aware of the need to accept tribal IDs. However, this is only after years of expensive and time consuming state-by-state advocacy by tribal leaders and the Native Vote team.

Of the twenty Native Vote states surveyed regarding their acceptance of tribal ID cards for voting, only a handful had Tribal ID acceptance included in code or regulation. In most instances, if tribal ID were accepted it was a Secretary of State office decision which was orally conveyed to our Native Vote team. To the best of our knowledge, only the states of Montana and Colorado have taken strides to codify the acceptance of Tribal IDs for voting purposes.

Example: Michigan – Letter of Acceptance

Many states do in fact want to be helpful with regard to accepting tribal ID cards. However, Native Vote is usually subject to the good graces of that specific Secretary of State during that specific election. Michigan is a good example of this; the Michigan Secretary of State issued a letter clarifying that Tribal ID cards would be accepted under HAVA. Each election cycle, we contact the Secretary of State and ask for reaffirmation that tribal IDs will be accepted in this specific election. The reaffirmation usually comes in the form of a letter, which Native Vote and the Tribes distribute to all the precincts to ensure it is honored on Election Day. Each

election cycle, the Native Vote team has to start the advocacy effort with each Secretary of State's office all over again.

Example: Minnesota – Lawsuit for Acceptance

One of the more extreme examples is the State of Minnesota. In the 2004 election cycle, NCAI had to file a lawsuit against the State. In that instance the State passed a statute holding that Native Americans could use their Tribal government ID card only if they lived on an Indian reservation. This had the perverse effect of disenfranchising Natives who went to work or school in the urban areas of Minnesota. Unfortunately the State at the time was unwilling to work with Native Vote on the issue, and a lawsuit ensued. While the court held for the Tribes, it was a very expensive path to enforce basic Tribal rights.

Example: Arizona—Revised ID Procedures

In 2004, Arizona passed a law to require IDs for any elector voting in person on Election Day.¹⁴ The Arizona Secretary of State adopted procedures limiting the types of ID, which failed to take into consideration the inability of many reservation voters to obtain such ID and knew that several tribes did not issue qualifying ID. In addition to the lack of ID access, on-reservation voters—who primarily live in remote locations, do not receive mail at their homes, require language translation assistance, and have fewer early voting sites on-reservation—were disparately impacted because off-reservation voters in Arizona have more opportunities to and tend to participate in Early Voting either in-person or by mail. As predicted by counties and tribes, the ID requirement resulted in a lower turnout on-reservation and numerous uncounted ballots for failure to meet the ID requirement during the primaries. Tribes and tribal organizations challenged the ID requirement but settled the case prior to the 2008 General Election, revising the ID procedures to include additional types of ID possessed by tribal members, so that tribal members would not be further disenfranchised.

RECOMMENDATIONS

- 1) Do not require photo ID for voting. Accept alternative forms of identifications such as inking fingers, community validation, etc.
- 2) If photo IDs are going to continue to be required:
 - o Amend the REAL ID law to accept Tribal documents as proof of identity and citizenship for obtaining a state drivers license.
 - o Amend HAVA to indicate that where any form of ID is required Tribal government documents must also be accepted.

¹⁴ ARIZ. REV. STAT. ANN. § 16-579.