



## The Year of the Native Voter

BY SARAH CRAWFORD

2018 proved to be the year of the Native voter and Native candidate. Despite controversial voter identification laws in North Dakota, tribal reservations had record-breaking turnouts across the state for a midterm election. Representative Deb Haaland and Representative Sharice Davids were sworn in as the first Native women elected to the U.S. Congress. Minnesota Lt. Governor Peggy Flanagan is also now the highest-ranking woman elected to executive office in the country.

However, Native voters have long witnessed the barriers and blunt disenfranchisement of their right to vote. In a clear picture of the times, during the U.S. Senate floor debates on the passage of the Civil Rights Act in 1886, Sen. Jacob Howard argued that he was “not yet prepared to pass a sweeping act of naturalization by which all the Indian savages, wild or tame, belonging to a tribal relation, are to become my fellow-citizens and go to the polls and vote with me.”<sup>1</sup> It took Congress nearly 38 years to abandon this view and to pass the Indian Citizenship Act of 1924 declaring U.S. citizenship to American Indians.<sup>2</sup> In 1965, Congress passed the Voting Rights Act

(VRA) to address the widespread denial and abridgement of the right to vote based solely on a person’s race.

Since passage of the VRA, tribes across the country have fought against state laws that act to suppress, deny and dilute voting rights for their tribal members. Over the past few years, litigation has focused on barriers to early voting, language assistance, redistricting and voter identification.

### Barriers to Early Voting and Language Assistance

San Juan County, Utah, in 2014 transitioned to an all-mail voting system, reducing its number of physical polling places from nine across the county down to one in the county clerk’s office. The Navajo Nation and the Navajo Human Rights Commission (Commission) staunchly opposed an all-mail voting system and ultimately filed suit, claiming that the mail-in system violated the Voting Rights Act and the Fourteenth Amendment.<sup>3</sup> After the initiation of the lawsuit, the county modified its proposed 2016 election procedures to include three in-person polling sites on the Reservation, as well as language assistance.<sup>4</sup> The court recognized that Navajo Nation tribal members may have less of an opportunity to participate as an

fore, may succeed on the merits.<sup>5</sup> But the court stated that it was logistically impossible for the county to implement substantial procedural changes less than one month from the election.<sup>7</sup> In denying the Commission’s preliminary injunction, the court concluded that balance of the harms weighed against the plaintiff’s claim for relief.<sup>7</sup>

After unsuccessful attempts to settle, both parties moved for summary judgment in 2017. After allowing the Commission to amend its complaint to include VRA claims, the court denied summary judgment in favor of allowing the litigation to go forward to a full trial.<sup>8</sup> This spurred the parties to reach a settlement in February 2018. The county agreed to maintain three polling locations on or near the Navajo Reservation, and prior to Election Day the county must open three satellite offices for voter assistance.



clerk was found to have falsified a voter challenge and misled Grayeyes in notifying him that a challenge existed when there was none.<sup>18</sup> The court granted Grayeyes’ preliminary injunction, reinstating his candidacy.<sup>19</sup>

The court-ordered redistricting and the reinstatement of the candidacy proved to dramatically change the make-up of the County Commission—which now holds a Native majority. Grayeyes defeated his opponent for the District 2 seat, which prior to the forced redistricting was generally held by a non-Native commissioner.<sup>20</sup> Kenneth Maryboy, a citizen of the Navajo Nation, also won the District 3 Commissioner seat.<sup>21</sup> However, in early January 2019, a lawsuit was filed alleging Grayeyes is not a resident of Utah.

### Voter Identification and Residential Addresses

Elvis Norquay, an enrolled member of the Turtle Mountain Band of Chippewa Indian and a U.S. military

veteran, was denied his right to vote in 2014. This denial occurred because Norquay did not have his physical address on his identification. North Dakota had put in place a voter identification law that requires a voter to have documentation with his current residential street address. The State implemented this law despite knowing that tribal communities often do not have residential street addresses. The U.S. District Court of North Dakota, in *Brakehill v. Jaeger*, granted Norquay and his fellow plaintiffs’ motion for preliminary injunction.<sup>22</sup> Judge Hovland stated that the “public interest in protecting the most cherished right to vote for thousands of Native Americans who currently lack a qualifying ID and cannot obtain one, outweighs the purported interest and arguments of the State.”<sup>23</sup>

However, in a reversal, the U.S. Court of Appeals for the Eighth Circuit found that an

county was also required to create radio and newspapers election advertisements in the Navajo language.

### Redistricting and Voter Candidacy

In 2011, San Juan County altered its election districts and left intact a district line along the Navajo Nation Indian Reservation. Instead of filing a voter dilution claim under the Equal Protection Clause, the Navajo Nation filed a traditional strict scrutiny claim under the Equal Protection theory.<sup>9</sup> The claim asserted that San Juan County’s actions of redistricting were based solely on racial classifications.<sup>10</sup> The county acknowledged that it had created the district to have a heavy concentration of Navajo Nation tribal members, leaving the other two districts with far less of a concentration.<sup>11</sup> Finding that the county failed to provide a com-

cluded that the county’s redistricting was unconstitutional, and the county was forced to redraw its districts.<sup>12</sup>

After the county was ordered to redraw its district lines, Willie Grayeyes, a citizen of the Navajo Nation, submitted his required paperwork to be a candidate to run for one of the three new San Juan County Commissioner seats.<sup>13</sup> Despite having been certified to run as a candidate in a 2012 race and having renewed his voter registration with the county, Grayeyes’ candidacy was challenged based on his lack of residency in the county.<sup>14</sup> San Juan County Clerk David Neilson proceeded to revoke Grayeyes’ candidacy.<sup>15</sup> In the analysis of Grayeyes’ motion for preliminary injunction, the court held that Grayeyes would likely succeed on the merits of his claim under the Due Process Clause.<sup>16</sup> The court found that the county clerk had failed to follow statutory procedures of no-

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