

Voting Access for Native Americans in Montana



An Advisory Memorandum of the
Montana Advisory Committee to the
U.S. Commission on Civil Rights

June 2021

Advisory Committees to the U.S. Commission on Civil Rights

By law, the U.S. Commission on Civil Rights has established an advisory committee in each of the 50 states and the District of Columbia. The committees are composed of state citizens who serve without compensation. The committees advise the Commission of civil rights issues in their states that are within the Commission's jurisdiction. More specifically, they are authorized to advise the Commission in writing of any knowledge or information they have of any alleged deprivation of voting rights and alleged discrimination based on race, color, religion, sex, age, disability, national origin, or in the administration of justice; advise the Commission on matters of their state's concern in the preparation of Commission reports to the President and the Congress; receive reports, suggestions, and recommendations from individuals, public officials, and representatives of public and private organizations to committee inquiries; forward advice and recommendations to the Commission, as requested; and observe any open hearing or conference conducted by the Commission in their states.

**Montana Advisory Committee to the
U.S. Commission on Civil Rights**

The Montana Advisory Committee to the U.S. Commission on Civil Rights submits this advisory memorandum regarding access to voting for Native Americans. The Committee submits this memorandum as part of its responsibility to study and report on civil-rights issues in the state, especially in the area of voting rights. The contents of this memorandum are primarily based on testimony the Committee heard during public meetings held via videoconference on March 2, 2021; March 25, 2021; and April 15, 2021.

The memo begins with a brief background on Native American voting rights and notable court cases, identifies primary findings as they emerged from this testimony, and recommendations for addressing related civil rights concerns. While other important topics may have surfaced throughout the Committee’s inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion.

**Montana Advisory Committee to the
U.S. Commission on Civil Rights**

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Advisory Memorandum

To: The U.S. Commission on Civil Rights

From: The Montana Advisory Committee to the U.S. Commission on Civil Rights

Date: June 8, 2021

Subject: Voting Access for Native Americans in Montana

The Montana Advisory Committee (Committee) to the U.S. Commission on Civil Rights (Commission) convened a series of public meetings to hear testimony regarding voting access for Native Americans in Montana. Central to the Committee's inquiry was election administration, barriers to voting, and solutions to improving access. This study topic is within the jurisdiction of the U.S. Commission on Civil Rights and coincides with issues discussed in the Commission's 2018 reports, *An Assessment of Minority Voting Rights Access in the United States*,¹ and *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*,² and the Committee's 2019 report, *Bordertown Discrimination in Montana*.³

The following advisory memorandum results from the testimony provided during their web hearing series on March 2, 2021; March 25, 2021; and April 15, 2021. The advisory memorandum begins with a brief background of Native American voting rights, identifies primary findings as they emerged from testimony, and recommendations for addressing related civil rights concerns. While other important topics may have surfaced throughout the Committee's inquiry, those matters that are outside the scope of this specific civil rights mandate are left for another discussion. This memo and the recommendations included within it were adopted by a majority of the Committee on June 8, 2021.

Background

From its inception, the United States has maintained a legal relationship with Native Americans fraught with tension and ambiguity. Article 1, Section 2 of the Constitution states that Native Americans are not under the control of the United States, and therefore cannot be taxed if they reside on tribal lands.⁴ Historically, Native Americans, as "Indians not taxed," were viewed as

¹ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (September 2018), https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf.

² U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* (December 2018), <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.

³ Montana Advisory to the U.S. Commission on Civil Rights, *Bordertown Discrimination in Montana* (May 2019), <https://www.usccr.gov/pubs/2019/05-29-Bordertown-Discrimination-Montana.pdf>.

⁴ U.S. Const, art. 1, § 2.

citizens of their respective tribes or nations, and not of the United States.⁵ As Native Americans were deemed non-citizens, the states were permitted to deny Native Americans the right to vote.⁶

The United States did not grant citizenship to most Native Americans until the passage of the Indian Citizenship Act of 1924.⁷ For decades after the Indian Citizenship Act of 1924, many states continued to disenfranchise Native Americans. Despite awareness of treaty rights exempting member nations from most regulations and taxation, as well as language in several state constitutions specifying that state governments cannot extend their jurisdiction or taxing authority over Indians or tribes inside Indian Country, states still wrongly concluded that they could exclude Indians from the political process, including voting.⁸ Several states prevented Indians from voting into the 1950s and 1960s.⁹

Native American Voting Rights Issues

Due to the limited amount of primary source data available on issues pertaining to Native American voting rights in non-tribal elections, a coalition of nonprofit organizations led by the Native American Rights Fund released survey results from Native American voters in four states, Arizona, New Mexico, Nevada and South Dakota, in which 2,687 individual respondents participated.¹⁰ This report identified factors that contribute to the difficulty many Native Americans face when voting, including (i) a very low level of trust in local government; (ii) a lack of information on how and where to register and vote; (iii) long distances to travel to the polls; (iv) low levels of access to the Internet; and (v) some local officials and poll workers who are hostile, unhelpful, ill-informed or intimidating to voters.¹¹ Although Montana voters were not surveyed at

⁵ A trio of cases in the 1830's, known as the Marshall trilogy, helped to define the relationship between sovereignty and voting status for Native Americans. In *Cherokee Nation v. Georgia*, the U.S. Supreme Court held that the Cherokee nation was a state, but not a "foreign state" in the sense used in the U.S. Constitution. 30 U.S. 1, 17 (1831) available at <https://supreme.justia.com/cases/federal/us/30/1/case.html>. The *Cherokee Nation* case was the second case in the Marshall trilogy. The others are *Johnson v. M'Intosh*, 21 U.S. 543, 544-62 (1823) and *Worcester v. Georgia*, 31 U.S. 515, 535-63 (1832).

⁶ *Elk v. Wilkins*, 112 U.S. 94, 94-109 (1884).

⁷ The Indian Citizenship Act of 1924, as amended, 8 U.S.C. § 1401 (1924), granted full citizenship rights to all Native Americans. It provided that, "all noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." See *Iron Crow v. Oglala Sioux Tribe*, 231 F.2d 89, 96-97 (8th Cir. 1956). However, some Native Americans were already considered U.S. citizens, whether by virtue of marriage, military service, or special statute.

⁸ Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 Mont. L. Rev. 269, 272-74 (2004).

⁹ *Ibid.*

¹⁰ See Native American Rights Fund, "About the Native American Voting Rights Coalition," at <https://www.narf.org/native-american-voting-rights-coalition/> (last visited Oct. 1, 2018).

¹¹ Native American Voting Rights Coalition, *Voting Barriers Encountered by Native Americans in Arizona, New Mexico, Nevada and South Dakota*, Executive Summary and Policy Reform Recommendations (Jan. 2018), at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-summary.pdf>. The full survey

the time of this study, these states share some geographic and historical characteristics with Montana, including the historical disenfranchisement of Native Americans.

The proceeding examples demonstrate a range of voting rights issues that resulted in federal litigation.

In 2015, a settlement was reached in an Alaska lawsuit, *Toyukak v. Mallott*, alleging a violation of Section 203 of the Voting Rights Act based on failure to provide language assistance to Alaska Native citizens with limited English proficiency, especially those who reside in three census areas of the state.¹²

A year later, a Nevada federal court issued a preliminary injunction ordering early voting and in-person voting on Election Day at locations on Native American reservations in two counties.¹³ Then in 2018, the Navajo Nation Human Rights Commission alleged that county election administrators in San Juan County, Utah failed to provide effective language assistance to Navajo-speaking voters thereby creating unequal voting opportunities.¹⁴ The Utah county ultimately settled out of court and agreed to provide tribal accessible polling places and Navajo language assistance.

Lastly, litigation in North Dakota, *Brakebill v. Jaeger*, details the disproportionate impact that voter identification laws can have on Native Americans.¹⁵ North Dakota law required forms of voter identification that included residential addresses.¹⁶ Voters living on reservations in North Dakota are geographically isolated with little to no addressing.¹⁷ Resultantly, tribal IDs often have P.O. Boxes instead of residential addresses.¹⁸ The district court enjoined in North Dakota's voter

research report is available at <https://www.narf.org/wordpress/wp-content/uploads/2018/01/2017NAVRCsurvey-results.pdf> (last visited Oct. 1, 2018).

¹² *Toyukak v. Mallott*, No. 3:13-cv-00137-SLG-LCL (D. Alaska Sept. 8, 2015), available at https://narf.org/nill/documents/20150930_alaska_voting_order.pdf. In a September 8, 2015 Stipulated Judgement and Order (“Order”), the parties reached a settlement agreement that includes changes to the official election pamphlet which informs voters of the language assistance rights, a toll-free number for voters to determine the identity of bilingual workers in the voter’s village and when events are scheduled, and modifications to the certificate of outreach.

¹³ *Sanchez v. Cegavske*, No. 3:16-cv-00523-MMD-WGC, 2016 WL 5936918 (D. Nev. Oct. 7, 2016), available at https://narf.org/nill/bulletins/federal/documents/sanchez_v_cegavske.html.

¹⁴ *Navajo Nation Hum. Rts. Comm’n. v. San Juan Cnty.*, No. 2:16-cv-00154-JNP-BCW, (D. Utah Apr. 3, 2018), available at https://acluutah.org/images/173-MEMORANDUM_DECISION_and_Order_Dismissing_Certain_Claims.pdf.

¹⁵ *Brakebill v. Jaeger*, 2018 WL 1612190 1, 2-3 (D.N.D. 2018).

¹⁶ *Id.* at 1.

¹⁷ *Id.* at 2-8.

¹⁸ *Id.*

ID law lawsuit due to these concerns.¹⁹ The Eighth Circuit recently lifted the injunction, and an appeal is now pending before the Supreme Court.²⁰

While federal litigation is sometimes used to address voting issues, it does not always improve access for some in Native American communities. Recently, the U.S. Department of Justice and some states used the Americans with Disabilities Act to shut down polling places in predominately minority communities, including at least one Native American community.²¹ This is notable because Native Americans have the highest percentage of disability of any racial/ethnic group in the United States.²² Additionally, people with disabilities tend to earn 70 percent less than people without disabilities, further limiting access to resources such as access to transportation and housing.²³

Native American Voting Rights in Montana

Over the last few decades, Native Americans in Montana have seen three major voting rights cases, each ruling on details around enfranchisement.

In the 1986 case of *Windy Boy v. County of Big Horn*,²⁴ the District Court for Montana held that Big Horn County's at-large elections were unlawful after the plaintiffs showed past and present discrimination against Crow and Northern Cheyenne members. This case demonstrated the dilution of the Native American vote occurring through either at-large voting, where the majority voters can choose all members or officials, or reapportionment plans, which divide or concentrate minority voters.²⁵ As a remedy, the Justice Department made election officials redraw the lines in Big Horn County so districts would reflect what the population actually looked like.²⁶ In just a year later, a Crow tribal member was elected as county commissioner, the first in Big Horn County's history.²⁷

In the second voting rights case, *Wandering Medicine v. McCulloch*,²⁸ filed in 2012, three Montana tribes sued the State because Native American voters had to travel more than 100 miles round trip

¹⁹ *Id.*

²⁰ *Brakebill v. Jaeger*, 932 F.3d 671, 674 (8th Cir. 2018), *appeal filed* Case No.18-1725 (U.S. Sept. 28, 2018) available at https://www.supremecourt.gov/DocketPDF/18/18A335/65122/20180927184807295_Application.pdf.

²¹ The ADA is being used to disenfranchise minority voters. ThinkProgress, August 24, 2018, <https://thinkprogress.org/ada-voter-suppression-cd7031080bfd/>.

²² Center for American Progress: 5 Ways to Increase Voter turnout in AI/AN Communities, June 12, 2018, <https://www.americanprogress.org/issues/race/news/2018/06/12/451979/5-ways-increase-voter-turnout-american-indian-alaska-native-communities/>.

²³ Pew Research Center: 7 Facts About Americans with Disabilities, July 27, 2017, www.pewresearch.org.

²⁴ *Windy Boy v. Big Horn Cnty.*, 647 F. Supp. 1002,1023-24 (D. Mont. 1986).

²⁵ *Id.*

²⁶ *Id.*

²⁷ ACLU Montana, "*Windy Boy v. Big Horn County*," <https://www.aclumontana.org/en/cases/windy-boy-v-big-horn-county>

²⁸ *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083, 1085-87 (D. Mont. 2012).

to cast an absentee ballot in person at county courthouses. Tribal members living on the Crow, Northern Cheyenne and Fort Belknap Reservations were at a voting disadvantage compared to white voters in Rosebud, Blaine, and Big Horn Counties because the only late registration and early voting sites available were at county courthouses, which were often long distances from reservation communities.²⁹ A June 2014 settlement established satellite offices on the Crow, Fort Belknap, and Northern Cheyenne reservations twice a week through Election Day for the first time.³⁰

The third case occurred in March of 2020 focused on restrictions on ballot collection efforts that would affect Native American voters living on rural reservations in *Western Native Voice v. Stapleton*.³¹ The law, Montana Ballot Interference Prevention Act, set a limit on the number of ballots an individual could collect and restricted the categories of individuals who were permitted to collect ballots.³² The ruling permitted Native American-led organizations assisting Native Americans living on rural reservations to continue collecting and transporting ballots to election offices that would otherwise be inaccessible because of distance, lack of access to transportation or other socio-economic barriers.³³

While these few cases demonstrate challenges to obtain voting rights, there are many documented issues affecting Native American voters in Montana with registering to vote, casting votes, and having votes counted that were never litigated in the courts but are worth noting. The findings below detail these issues and relevant civil rights concerns as shared through testimony on March 2, 2021; March 25, 2021; and April 15, 2021 via videoconference.

Findings

1. Native American tribal members living on reservations have significant barriers to voting due to long distances to election services, lack of residential mailing addressing, lack of understanding of acceptable IDs, and unreliable and infrequent mail delivery services. The examples below demonstrate these challenges.
 - a) Economic barriers
Montana is ranked 22nd in the nation with a population that is below poverty level.³⁴ When examining counties with reservations in Montana, Big Horn County has the highest percentage of residents who are below poverty level at 26.1 percent. Glacier County is second at 25 percent and Roosevelt County at 24 percent below poverty level. These economic barriers coupled with long distances to election

²⁹ *Id.*

³⁰ *Id.*

³¹ *Western Native Voice v. Stapleton*, DV-2020-0377 (D. Mont. Sept. 25, 2020) available at: <https://www.aclu.org/legal-document/complaint-western-native-voice-v-stapleton>.

³² *Id.*

³³ *Id.*

³⁴ U.S. Census Bureau, Income and Poverty Data, Small Area Income and Poverty Estimates; See also Montana Department of Commerce, <https://ceic.mt.gov/People-and-Housing/Income-and-Poverty>.

services make engaging with the election system difficult as it requires resources to purchase a mailbox, a vehicle, car insurance, gas, time off work, etc.³⁵ Such a need for resources make it simply impossible to engage in the franchise.

b) Long distances to election services

The vast majority of Native Americans living on reservations experience challenges with accessing election services. For instance, if a member of Fort Belknap tribe wanted to register to vote, they must travel off the reservation to Chinook which is over 120 miles round trip. Similarly, for Blackfeet members who vote in person at Pondera courthouse, it is 130 miles round trip from Heart Butte. Testimony indicated that members face difficult decisions as to pay for transportation and other essential expenses or spend money to make a 130-mile trip to cast their ballot.³⁶ Finally, when accessing services at the post office, those on the reservation have to travel up to 40 miles.³⁷

c) Lack of understanding of acceptable IDs

Election service administrators such as poll workers continue to lack the understanding of acceptable IDs. Native Americans with tribal IDs have been turned away from the polls because some IDs indicate an expiration date when some do not have a date.³⁸

d) Lack of residential mailing addressing makes it challenging to register to vote.

In some cases, there are up to 10 people living in a small home, and sometimes these residents do not have proof of their address and their name.³⁹ Also, homes on reservations are less likely to have addresses; therefore, it is impossible for many tribal members to have an address on their ID.

In addition, tribal members who get their mail through post office boxes in Lodge Pole have to use the address “Lodge Pole Route,” their box number, followed by “Dodson, Montana,” which is located in Phillips County. However, the locations of their residences are in Precinct 15, which is in Blaine County. When they attempt to register, Blaine County requires the “legal description” of their address, which they have difficulty obtaining.⁴⁰ Also, a Montana law allows election administrators to deny voter registration based on geographical descriptions using

³⁵ Shelly Fyant, testimony, *Web Hearing Before the Montana Advisory Committee to the U.S. Commission on Civil Rights*, Mar. 2, 2021, transcript, pp. 2-3 (hereafter cited as *3/2/21 Web Hearing*); Werk Jr. Testimony, *3/2/21 Web Hearing*, p. 12; Davis Testimony, *3/2/21 Web Hearing*, p. 8.

³⁶ Davis Testimony, *3/2/21 Web Hearing*, p. 8.

³⁷ Werk Jr. Testimony, *3/2/21 Web Hearing*, p. 12.

³⁸ Keaton Sunchild, testimony, *Web Hearing Before the Montana Advisory Committee to the U.S. Commission on Civil Rights*, Apr. 15, 2021, transcript, pp. 14-15 (hereafter cited as *4/15/21 Web Hearing*).

³⁹ Werk Jr. Testimony, *3/2/21 Web Hearing*, p. 11.

⁴⁰ “*Obstacles at Every Turn: Barriers to Political Participation Faced by Native American Voters*,” *Native American Rights Fund*, p. 70 https://vote.narf.org/wp-content/uploads/2020/06/obstacles_at_every_turn.pdf (hereafter cited as *Obstacles at Every Turn*).

the subjective standard in which it is determined that “the location of the elector’s residence” may not “be easily determined.”⁴¹

e) Unreliable and infrequent mail delivery services

Testimony indicated that deficient mail system makes in-person voting the more viable option for many tribal members. Also related to the issue of accessibility to mail services, those on the reservation not only have to travel many miles to go to the post office, but many offices have very limited hours of operation which impacts the ability to receive and send mail.

2. There is disproportionate access to the polls among Native Americans on reservations and non-natives. The lack of satellite voting offices on reservations across Montana creates barriers to voting, since without them many Native people would otherwise travel two to three times⁴² farther than non-Natives to get to the polls. In a scenario demonstrating challenges with in-person voting, in Blaine County, Montana, when the Lodge Pole precinct was merged with the Hays precinct, Native American voters were forced to travel up to 114 miles round trip to their new polling location. In Big Horn County, the distances are not as great, but Native voters nonetheless must travel twice as far to reach their polling places as non-Natives, 44 miles round-trip for Natives compared to 23.2 miles for non-Natives. Similarly, Native American voters who live in Hot Springs, Montana, must drive 94 miles round trip to reach their polling place in Thompson Falls.⁴³ Since the *Wandering Medicine v. McCulloch* ruling in 2012, satellite elections offices have been established in some, but not all reservation communities lessening the distance that Native American voters have to travel to be enfranchised. Unfortunately, even when satellite elections offices are in place, Native American voters often find the office understaffed or open odd or inconvenient hours.
3. Members of the Montana Legislature introduced several bills during the 2021 legislative session that are likely to impact voting rights for Native Americans. The bills are as follows:
 - a) HB 176 which eliminates election day registration;⁴⁴
 - b) SB 169 which limits voter IDs;⁴⁵
 - c) HB 406 which bans the practice of ballot collection and conveyance;⁴⁶

⁴¹ Mont. Code Ann. § 13-2-208(1) (2001).

⁴² *Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083, 1085-87 (D. Mont. 2012).

⁴³ *Obstacles at Every Turn* at 91.

⁴⁴ H.B. 176, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0176.pdf>.

⁴⁵ S.B. 169, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0169.pdf>.

⁴⁶ H.B. 406, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0406.pdf>.

- d) HB 325 which divides up tribal reservations when creating seven districts across the state;⁴⁷
- e) HB 455 which eliminates the ability to receive a ballot at a PO box;⁴⁸
- f) HB 506 which allows an individual not yet eligible to vote to register if they will become eligible on or before Election Day;⁴⁹
- g) SB 196 which expands a range of low population polling locations that may open at noon on election day instead of 7:00 AM;⁵⁰
- h) SB 335 which prohibits certain funding to be used for state or local elections;⁵¹ and
- i) HB 530 bans ballot collection.⁵²

While discussing such bills, Native American tribes expressed concern with their state legislature, but the response from legislators during hearings is such that if tribes do not agree with proposed bills that they ought to prepare for litigation.⁵³ This is of concern because legislators appear to be reluctant to including voices of stakeholders who are impacted by proposed bills and preventing likely disenfranchisement.

As of May 2021, the status of these bills are as follows:

- a) HB 176 which eliminates election day registration⁵⁴ was signed into law. Shortly after its passage, the ACLU of Montana and the Native American Rights Fund filed suit against the state arguing that the new laws will disproportionately disenfranchise Native voters.⁵⁵
- b) SB 169 which limits voter IDs⁵⁶ was signed into law. Lawsuits have been filed suit against the state challenging this law.⁵⁷

⁴⁷ H.B. 325, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0325.pdf>.

⁴⁸ H.B. 455, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0455.pdf>.

⁴⁹ H.B. 506, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0506.pdf>.

⁵⁰ S.B. 196, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0196.pdf>.

⁵¹ S.B. 335, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0335.pdf>.

⁵² H.B. 530, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0530.pdf>.

⁵³ Werk Jr. Testimony, 3/2/21 *Web Hearing*, p. 12.

⁵⁴ H.B. 176, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0176.pdf>.

⁵⁵ Keith Schubert, "Montana tribes, nonprofits sue over voting laws," *Daily Montanan*, May 17, 2021. <https://dailymontan.com/2021/05/17/montana-tribes-nonprofits-sue-over-voting-laws/>.

⁵⁶ S.B. 169, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0169.pdf>.

⁵⁷ Keith Schubert, "Montana tribes, nonprofits sue over voting laws," *Daily Montanan*, May 17, 2021. <https://dailymontan.com/2021/05/17/montana-tribes-nonprofits-sue-over-voting-laws/>.

- c) HB 406 which bans the practice of ballot collection and conveyance⁵⁸ did not pass.⁵⁹
 - d) HB 325 which divides up tribal reservations when creating seven districts across the state became law.⁶⁰
 - e) HB 455 which eliminates the ability to receive a ballot at a PO box⁶¹ did not pass.⁶²
 - f) HB 506 which allows an individual not yet eligible to vote to register if they will become eligible on or before Election Day and establishes priorities for development of congressional districts⁶³ was signed into law.
 - g) SB 196 which expands a range of low population polling locations that may open at noon on election day instead of 7:00 AM was signed into law.⁶⁴
 - h) SB 335 which prohibits certain funding to be used for state or local elections⁶⁵ did not pass.⁶⁶
 - i) HB 530 bans ballot collection was signed into law.⁶⁷ HB 530 is also being challenged by Native American voting rights groups.⁶⁸
4. The existing challenges that Native American communities face on the reservation layered with the COVID-19 pandemic altered the way Native American communities participated in the recent election cycle. Mail-in ballots often present challenges to Native American voters within Indian country due to the lack of residential mail delivery and pickup, barriers on receiving ballots at PO boxes, the limited hours some post offices are open, the distances required to travel to the post office and concerns about timely delivery of voted ballots

⁵⁸ H.B. 406, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0406.pdf>.

⁵⁹

[http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=406&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=406&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=)

⁶⁰ H.B. 325, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0325.pdf>.

⁶¹ H.B. 455, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0455.pdf>.

⁶²

[http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=455&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=HB&P_BILL_NO=455&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=)

⁶³ H.B. 506, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0506.pdf>.

⁶⁴ H.B. 196, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0196.pdf>.

⁶⁵ H.B. 335, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/SB0335.pdf>.

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[http://laws.leg.mt.gov/legprd/LAW0203W\\$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=335&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=](http://laws.leg.mt.gov/legprd/LAW0203W$BSRV.ActionQuery?P_SESS=20211&P_BLTP_BILL_TYP_CD=SB&P_BILL_NO=335&P_BILL_DFT_NO=&P_CHPT_NO=&Z_ACTION=Find&P_ENTY_ID_SEQ2=&P_SBJT_SB_J_CD=&P_ENTY_ID_SEQ=)

⁶⁷ H.B. 530, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0530.pdf>

⁶⁸ Alex Sarariassen, "Lawsuit challenges new election laws," *Montana Free Press*, May 18, 2021

<https://montanafreepress.org/2021/05/18/montana-election-laws-challenged-in-court/>.

deposited in the USPS. Legislative attempts to restrict ballot collection efforts impacts ballot return options for all rural communities where a significant numbers of individuals may experience limit resources for travel.

5. Despite a Montana court striking down Montana Ballot Interference Prevention Act in *Western Native Voice v. Stapleton*,⁶⁹ the Montana legislature pursued similar legislation making ballot collection harder. This is of concern for two reasons: it is common practice among Native American tribal members residing on reservations, who often face socio-economic barriers and infrequently receive mail service, to give their ballots to civic organizations and/or trusted members of the community to drop off their voted ballots and/or other mail to post offices and/or ballot drop boxes. Testimony indicates that this is an effective way to increase Native American voter turnout. For instance, during the 2020 election cycle, 66 percent turned out, which is 2 percent higher than the last election cycle.⁷⁰ Secondly, the Montana Legislature recently passed HB 530,⁷¹ which is another ballot collection bill. The passage of a bill that imposes the same burdens is intentional discrimination and will increase barriers to voting for Native Americans on reservations in Montana.
6. Voter intimidation was noted as a strategy to disenfranchise Native Americans while voting. For example, a tribal member testified when their reservation hosted community feeds to encourage tribal members to engage in the voting process, he witnessed governmental officials, who have attended local anti-Native American meetings, attend their community feeds. There is a belief that this presence is a means of not only intimidation, but information gathering that would aim to limit engagement in the voting process.⁷²
7. Relationships between tribal governments and county government agencies range from good to contemptuous. Some county agencies involve tribal governments and respond to their election access needs while others refuse to engage and/or may intentionally delay responses. Specifically, election administrators have a legal obligation to provide certain services, but tribal governments have had to resort to litigation to pressure compliance with election laws. In a second example, in 2020, the Blackfeet tribe had formally requested that election officials set up a satellite office in Heart Butte for the June 2nd primary, a community which is 35 miles South of Browning. The chairman of the County commissioners responded via mail to Blackfeet Tribe leadership noting that the satellite office had been canceled for the June 2nd primary; however, mail, as previously noted is very difficult to obtain. There is a belief that the chairman of the County commissioners

⁶⁹ *Western Native Voice v. Stapleton*, DV-2020-0377 (D. Mont. Sept. 25, 2020) available at: <https://www.aclu.org/legal-document/complaint-western-native-voice-v-stapleton>.

⁷⁰ Sunchild Testimony, 4/15/21 *Web Hearing*, p. 16.

⁷¹ H.B. 530, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0530.pdf>.

⁷² Yawakie Testimony, 3/2/21 *Web Hearing*, p. 28.

sent it through mail to make it harder for him to realize the satellite office in Heart Butte was being denied. The letter was not received until months later.⁷³

8. While the Montana Secretary of State's office testified that election administrators are required to follow the *Wandering Medicine* settlement agreement, which provides satellite offices at various administrative offices two days a week for the 30 days prior to the election and also implemented a 2015 directive providing uniformity consistent with the *Wandering Medicine* settlement agreement only for counties who have an American Indian reservation on their county as not all tribes were represented in the settlement agreement,⁷⁴ tribal leadership testified that it continues to be incumbent on tribal members to remind their election administrators their legal obligation. In addition, tribal leadership have had to remind election administrators, on a yearly basis, to ensure that the remedies outlined in the *Wandering Medicine* case are followed.
9. While there have been a handful of victories that would protect voting rights for Native American tribes⁷⁵ through litigation, it is the implementation of culturally relevant curricula – that is embedded in the state constitution⁷⁶ – that recognize the distinct cultural heritage of Native Americans in Montana that would strengthen the ability to push back against overt discrimination.
10. There is a lack of outreach to tribes in encouraging voter engagement and resolving voting concerns.⁷⁷ Testimony indicated there is willingness from the Secretary of State's office to leverage partnerships at the legislative branch, county government, and tribal government levels to encourage voter engagement.⁷⁸
11. Racist and hostile sentiment toward Native Americans continues to be palpable in the Montana Legislature and in everyday interactions. The onslaught of newly introduced legislation during the 2021 legislative session serves as an example that has the potential to institutionalize such racism. In addition, such racism and hostility cannot be ignored when a culturally significant monument was defaced⁷⁹ and during the 2020 election cycle, a man dressed as a KKK member won the costume contest the weekend before the election in a town that borders the Fort Peck Reservation.⁸⁰

⁷³ Davis Testimony, 3/2/21 *Web Hearing*, p. 8.

⁷⁴ Dana Corson, testimony, *Web Hearing Before the Montana Advisory Committee to the U.S. Commission on Civil Rights*, Mar. 25, 2021, transcript, p. 3 (hereafter cited as 3/25/21 *Web Hearing*).

⁷⁵ See *infra* notes 24-32.

⁷⁶ Mont. Const. art. X, § 1(2); Mont. Code Ann. § 20-1-501.

⁷⁷ Corson Testimony, 3/25/21 *Web Hearing*, p. 12.

⁷⁸ *Ibid.*

⁷⁹ Kevin Maki, "Lewis and Clark/Salish monument defaced by swastika," *NBC Montana*, Apr. 25, 2021, <https://nbcmontana.com/news/local/lewis-and-clark-salish-monument-defaced-by-swastika> A red swastika was spray painted across a wooden monument that educates passersby on Lewis and Clark's meeting with the Salish Indians in 1805.

⁸⁰ De Leon Testimony, 4/15/21 *Web Hearing*, p. 19.

12. Arbitrary rules around community voter registration efforts. For instance, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given “dirty looks” for bringing in too many at a time.⁸¹
13. Testimony indicated that Montana has a shortage of election judges.⁸² This is of concern because the number of election judges determines not only that elections are fair and accurate, but the number of polling locations especially in rural areas of Montana.⁸³
14. Since 1972, the updated Montana constitution provided for the independent redistricting commission⁸⁴ that has resulted in an increase of Native Americans serving in elected office; however, testimony indicated that the redistricting of city, county, and school board districts, which is not completed by the independent commission, requires vigilance.⁸⁵ Also of concern is the Montana legislature’s effort to set unconstitutional redistricting criteria.⁸⁶ This is especially important because for the first time in decades, Montana will have more than one congressional district.⁸⁷

⁸¹ *Obstacles at Every Turn* at 45.

⁸² Morigeau Testimony, *4/15/2021 Web Hearing*, p. 10.

⁸³ *Ibid.*

⁸⁴ Mont. Const. art. V, § 14(2).

⁸⁵ Rate Testimony, *4/15/2021 Web Hearing*, pp. 4-5.

⁸⁶ H.B. 506, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billhtml/HB0506.htm>. (Montana’s constitution sets up a five person independent redistricting commission. Montana Constitution, Article V §14 and MCA §§5-1-101-115. There have been legislative attempts to limit the independence of the commission and that occurred again this legislature with HB 506. This type of involvement by the legislature has been disallowed by an A.G. opinion 35 A.G. Op. 12 (1973) and struck down by the Montana Supreme Court in *Brown v. Wheat*, 2004 Mt33, 320 Mont. 15, 85 P. 3d 765 (2004) and *Willems, et. al. v. Montana*, 2014 MT 82 (2014). The outcome of the cases reflects that the legislature has no constitutional authority to statutorily limit how the commission draws districts to meet its responsibilities in the redistricting process.)

⁸⁷ Shaylee Ragar, “Montana GOP Pushes for More Redistricting Power After State Gains Congressional Seat,” *NPR*, May 7, 2021 <https://www.npr.org/2021/05/07/994415306/montana-gop-pushes-for-more-redistricting-power-after-state-gains-congressional->.

Recommendations

Among their duties, advisory committees of the Commission are authorized to advise the Agency (1) concerning matters related to discrimination or a denial of equal protection of the laws under the Constitution and the effect of the laws and policies of the Federal Government with respect to equal protection of the laws; and (2) upon matters of mutual concern in the preparation of reports of the Commission to the President and the Congress.⁸⁸

In keeping with these responsibilities, and in consideration of the testimony heard on this topic, the Montana Advisory Committee respectfully submits the recommendations below to the Commission.

1. The U.S. Commission on Civil Rights should send this advisory memorandum to the U.S. Department of Justice for it to strongly enforce the Voting Rights Act, the National Voter Registration Act, and the Americans with Disabilities Act.
2. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a recommendation to U.S. Congress to propose legislation, similar to HR 1, For the People Act, that would expand voting rights for all.
3. The U.S. Commission on Civil Rights should send this advisory memorandum and issue a recommendation to the U.S. Postal Service to:
 - a. Require specific training of Montana postal service employees to handle election material to ensure prompt delivery and return of mail.
 - b. Ensure prompt postmarking of election mail, especially in rural areas of the state. This may include proactive recruitment of postmasters in rural post offices to ensure adequate support to rural residents.
 - c. Expand post office service hours in rural areas of the state especially during election season.
 - d. Prioritize and ensure prompt handling of election mail as among other mail.
4. The U.S. Commission on Civil Rights should send this advisory memorandum and issue recommendations to Montana State Legislature to:
 - a. Cease all efforts to pass legislation that disenfranchises Native American voters and rural voters. Repeal legislation that restricts ballot collection, such as HB 530,⁸⁹ which passed during the 2021 legislative session.

⁸⁸ 45 C.F.R. § 703.2.

⁸⁹ H.B. 530, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0530.pdf>.

- b. Provide appropriations from the Help America Vote Act fund to support language assistance efforts, voter registration efforts on the reservations as well as other rural locations which received assistance during the last election cycle.
 - c. Pass comprehensive legislation, similar to HB 613,⁹⁰ Native American Rights Act, that creates equal and fair access to the ballot box and remove voting barriers for Native Americans living in rural areas across Montana. This includes creating permanent satellite offices to offer election services, clearer guidelines for accepting tribal IDs, including language that explains a physical address is not required because there are no PO recognized street addresses on the reservation.
 - d. Encourage congressional delegation to ensure prompt mail services and delivery to rural areas of the state.
 - e. Continue improving broadband service in rural areas of the State, to ensure that voters have access to all online election material, including translated official election pamphlets provided by the Division of Elections.
 - f. Pass legislation for same day voter registration, automatic voter registration, and online voter registration.
 - g. Pass legislation to expand qualified election judges, including more opportunities for training and lowering the age to serve to 16 years old.
 - h. Pass legislation that increases voter registration efforts among rural and reservation voters by creating a mobile registration system to meet voters where they are.
5. The U.S. Commission on Civil Rights should send this advisory memorandum and issue recommendations to the Montana Secretary of State to:
- a. Fully comply with the remedies and cost for satellite voting offices put forth in *Wandering Medicine v. Montana Secretary of State* and require all elections office administrators to review and comply.
 - b. Provide appropriations from the Help America Vote Act fund to support voter registration and education outreach on reservations as well as rural areas.
 - c. Fully comply with the Americans with Disabilities Act to ensure that county elections offices and polling locations are accessible by voters with disabilities.
 - d. Engage with low-turnout precincts and develop an actionable plan to improve civic engagement.
 - e. Establish early satellite election offices that provide all services available at the County Election Offices with consistent and equitable operating hours.

⁹⁰ H.B. 613, 67th Leg. (Mont. 2021) <https://leg.mt.gov/bills/2021/billpdf/HB0613.pdf>.

- f. Standardize poll worker training and create train the trainer modules that includes comprehensive understanding of the following: (i) federal and state election law; (ii) use of voter ID and affidavits, (iii) cultural competency when interacting with diverse voter groups; and (vi) instructions on how to accommodate voters with disabilities.
 - g. Conduct voter registration drives especially in rural areas of the state including all reservations.
 - h. Proactively seek, develop, and maintain relationships with Native American tribal leadership to explain recent legislative changes and to encourage all Native voters in Montana to vote. This also includes addressing voting access needs such as providing additional ballot boxes, election material, frequent PSAs regarding election deadlines and changes to polling locations.
6. The U.S. Commission on Civil Rights should send this advisory memorandum and issue recommendations to all County Elections Offices to:
- a. Fully comply with the remedies and cost for satellite voting offices put forth in *Wandering Medicine v. Montana Secretary of State* that involves establishing satellite offices on the reservations twice a week through Election Day.
 - b. Ensure that poll workers are trained in the following areas: (i) federal and state election law; (ii) use of voter ID and affidavits, (iii) cultural competency when interacting with diverse voter groups such as voters with disabilities, transgender voters, and older voters; (vi) instructions on how to accommodate voters with disabilities including how operate accessible voting machines; and (v) why signatures may change over time.
 - c. Proactively seek, develop, and maintain relationships with Native American tribal leadership to explain recent legislative changes and to encourage all Native voters in Montana to vote. This also includes addressing voting access needs such as providing additional ballot boxes, election material, frequent PSAs regarding election deadlines and changes to polling locations.

Appendix

March 2, 2021 Briefing Transcript

- List of speakers:
 - Chairwoman Shelly Fyant and Managing Attorney Rhonda Swaney, Confederated Salish & Kootenai Tribes
 - Timothy Davis, Chairman, Blackfeet Tribe
 - Andy Werk Jr., President, Fort Belknap Tribe
 - Julie Yarlott, Court Administrator for Crow Tribal Court, Crow Tribe

March 2, 2021 Presentation Slides

March 25, 2021 Briefing Transcript

- Speaker: Dana Corson, Elections Director, Office of the Montana Secretary of State

March 25, 2021 Presentation Slides

April 15, 2021 Briefing Transcript

- List of speakers:
 - Shane Morigeau, Senator for District 48
 - Jacqueline De Leon, Staff Attorney, Native American Rights Fund
 - Keaton Sunchild, Political Director, Western Native Voice
 - Alex Rate, Executive Director, ACLU

April 15, 2021 Presentation Slides

Materials can be found here:

https://securisync.intermedia.net/us2/s/folder?public_share=409J0xbKeIQ2vuMJBvQond0011ef58&id=L01UL05hdG12ZSBBbWVyaWNhbiBWb3RpbmcgUmlnaHRz

**Montana Advisory Committee to the
United States Commission on Civil Rights**



U. S. Commission on Civil Rights

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