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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Maria M. Gonzalez, et al.,)	No. CV 06-1268-PHX-ROS
Plaintiffs,)	ORDER
vs.)	
State of Arizona, et al.,)	
Defendants.)	
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On February 8, 2007, the Court held a hearing to allow the Navajo Nation Plaintiffs to present additional evidence regarding their statutory claims. Based on the evidence presented, the request for a preliminary injunction will be denied. Pursuant to Federal Rule of Civil Procedure 52(a), the Court makes the following findings of fact and conclusions of law.

I. Background

The Navajo Nation Plaintiffs ("Plaintiffs") brought two statutory-based challenges to Proposition 200. First, Plaintiffs claimed Prop. 200 violated Section 2 of the Voting Rights Act. 42 U.S.C. § 1973(a). Second, Plaintiffs claimed Prop. 200 violated two provisions of the Civil Rights Act. 42 U.S.C. § 1971(a)(2)(A) and 42 U.S.C. § 1971(a)(2)(B). In a previous order, the Court rejected the Civil Rights Act claims based on the clear statutory language. During recent proceedings, the parties have focused on the Voting Rights Act

1 claim. Accordingly, the Civil Rights Act claims are rejected for the reasons previously set
2 forth and this Order addresses the Voting Rights Act claim in more detail. (Doc. 219)

3 **II. Section 2**

4 Section 2 of the Voting Rights Act states

5 No voting qualification or prerequisite to voting or standard,
6 practice, or procedure shall be imposed or applied by any State
7 or political subdivision in a manner which results in a denial or
abridgement of the right of any citizen of the United States to
vote on account of race or color

8 42 U.S.C. § 1973(a). This section allows disparate impact claims. Smith v. Salt River
9 Project Agr. Imp. and Power Dist., 109 F.3d 586, 594 (9th Cir. 1997) ("Section 2 requires
10 proof only of a discriminatory result, not of discriminatory intent."). To succeed on a Section
11 2 claim, Plaintiffs must establish three related propositions: 1) the challenged voting practice
12 results in a disparate impact; 2) there is a history of racial discrimination; and 3) there is a
13 causal connection between the discrimination and the resulting disparate impact. Id. at 595.

14 **III. Disparate Impact**

15 The parties provided statistics gathered from the primary and general election. In the
16 primary election, approximately 98% of the voters on the Navajo Reservation complied with
17 Prop. 200 and cast a regular ballot. Approximately 99% of off-reservation voters cast a
18 regular ballot. (Ex. 127) In the general election, approximately 99% of the voters on the
19 Navajo Reservation cast a regular ballot and 99.5% of off-reservation voters cast a regular
20 ballot. Off-reservation voters forced to cast conditional provisional ballots were much more
21 likely than on-reservation voters to return with identification and have those ballots counted.
22 No reliable statistics were provided regarding individuals that chose not to attempt to vote
23 based on their inability to comply with Prop. 200. Thus, at best, Plaintiffs have shown a one-
24 percent difference between on-reservation voters and off-reservation voters regarding
25 compliance with Prop. 200. The Court doubts that a one-percent or one-half of one-percent
26 difference is sufficient evidence of disparate impact to sustain a Section 2 analysis. See
27 Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at * 9 (E.D. Wash. July

1 7, 2006) ("If the denial or abridgement of *one citizen's* right to vote 'on account of race or
2 color' established a violation of § 2 of the VRA, this Court would find for Plaintiffs in this
3 matter."). Assuming, however, that such a showing is sufficient evidence of a disparate
4 impact, Plaintiffs also had to show a history of discrimination.

5 **IV. Discrimination**

6 "In determining whether a challenged voting practice violates § 2, the district court
7 must examine the totality of the circumstances and determine, based upon a searching
8 practical evaluation of the past and present reality . . . whether the political process is equally
9 open to minority voters. This examination is intensely fact-based and localized." Smith v.
10 Salt River Project Agr. Imp. and Power Dist., 109 F.3d 586, 591 (9th Cir. 1997) (citations
11 and quotations omitted). The Ninth Circuit relies on the "Senate Factors" when evaluating
12 the "past and present reality." Id. These factors are not meant to be "comprehensive or
13 exclusive." Farrakhan v. Washington, 338 F.3d 1009, 1015 (9th Cir. 2003). Rather, these
14 factors direct a court's attention to relevant considerations. The factors are:

15 (1) the extent of any history of official discrimination in the state
16 or political subdivision that touched the right of the members of
17 the minority group to register, to vote, or otherwise to
participate in the democratic process;

18 (2) the extent to which voting in the elections of the state or
political subdivision is racially polarized;

19 (3) the extent to which the state or political subdivision has used
20 unusually large election districts, majority vote requirements,
21 anti-single shot provisions, or other voting practices or
procedures that may enhance the opportunity for discrimination
against the minority group;

22 (4) if there is a candidate slating process, whether the members
23 of the minority group have been denied access to that process;

24 (5) the extent to which members of the minority group in the
25 state or political subdivision bear the effects of discrimination
26 in such areas as education, employment and health, which
27 hinder their ability to participate effectively in the political
28 process;

(6) whether political campaigns have been characterized by
overt or subtle racial appeals;

1 (7) the extent to which members of the minority group have
2 been elected to public office in the jurisdiction;

3 (8) whether there is a significant lack of responsiveness on the
4 part of elected officials to the particularized needs of the
5 members of the minority group;

6 (9) whether the policy underlying the state or political
7 subdivision's use of such voting qualification, prerequisite to
8 voting, or standard, practice or procedure is tenuous.

9 Id. (quoting S.Rep. No. 97-417, at 28-29 (1982)).

10 The testimony presented at the February 8, 2007 hearing focused on one aspect of
11 factor five: the discrimination Navajos have been subject to in the field of education.
12 Plaintiffs presented documentary evidence regarding some of the other factors.¹ An analysis
13 of the testimony and documentary evidence highlights deficiencies in that evidence.

14 **A. Official Discrimination**

15 Plaintiffs submitted documents establishing a history of official discrimination. (Ex.
16 154-157) Members of the Navajo Nation were not allowed to vote until 1970. Also, the
17 Department of Justice repeatedly objected to election procedures in the past because the
18 procedures did not give Navajos an equal opportunity to participate. The majority of the
19 evidence regarding official discrimination is over twenty years old. The only recent evidence
20 of official discrimination is a report of voter intimidation in 2002 and a question to the
21 Attorney General of Arizona in 2003 regarding tribal members' eligibility to serve on the
22 Commission of Appellate Court Appointments. Thus, Plaintiffs have been subject to official
23 discrimination in the past. Plaintiffs did not present, however, persuasive evidence of recent
24 official discrimination.

25 ¹ Prior to the hearing, the State conceded that it did "not dispute the historical, social
26 and economic challenges that affect life and politics within the Navajo Nation." (Doc. 213)
27 The state now disputes the reliability or relevance of almost all of the Plaintiffs' evidence.
28 Thus, it is unclear what the state concedes and what it wishes to dispute.

1 **B. Racially Polarized Elections**

2 The only evidence presented of racially polarized elections were allegations of
3 plaintiffs in two cases from years ago.

4 **C. Unusually Large Election Districts**

5 Plaintiffs cited a 1975 case and a 1984 statement by the Department of Justice as
6 evidence of unusually large election districts. No evidence setting forth more recent
7 practices was presented.

8 **D. Candidate Slating Process**

9 No evidence was presented on this issue.

10 **E. Education, Employment, Health**

11 Members of the Navajo Nation have not obtained the same level of education as other
12 members of society. This is reflected in statistics regarding educational attainment.
13 Approximately 12% of the members of the Navajo Nation have received no education. This
14 is eight times higher than the figure for Arizona's general population. Also, members of the
15 Navajo Nation are twice as likely as the general population not to have a high school diploma
16 and three times as likely not to have obtained a bachelor degree. (Ex. 149) The witnesses
17 at the hearing detailed the historical attempts by the federal government and state
18 governments to provide education for the Navajos. These attempts were often underfunded
19 and Navajos did not receive the same treatment as the population at large. For example,
20 members of the Navajo Nation often had to travel very long distances between their homes
21 and schools. In recent years, however, the state has made efforts to rectify the differential
22 treatment by providing substantial amounts of funding.

23 **F. Racial Appeals**

24 The only evidence presented by Plaintiffs of racial appeals comes from an election
25 that took place in 1976.

26 **G. Minorities in Public Office**

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1 One of the witnesses at the hearing was a former state senator. Plaintiffs have
2 presented no other evidence regarding minorities in public office.

3 **H. Lack of Responsiveness**

4 Plaintiffs cited to the educational disparities as proof of lack of responsiveness by
5 elected officials. In particular, Plaintiffs believe certain school boards have not taken
6 adequate steps to reduce the long bus trips Navajo students must take. Plaintiffs also believe
7 that the Arizona Legislature has not provided adequate funding for the Dine College.
8 Evidence was presented, however, that funding of new school facilities for Navajos has
9 improved in the recent past.

10 **I. Policy Underlying Prop. 200**

11 Plaintiffs believe the policy underlying Prop. 200 is tenuous because there is no
12 history of voter fraud or impersonation on the reservation. The policy proffered by the State
13 is that Prop. 200 is meant to preserve the general integrity of elections.

14 The preceding factors establish Plaintiffs have suffered from official discrimination
15 and deficiencies in education. Plaintiffs have not established that Arizona elections are
16 racially polarized, that unusually large election districts exist, that the candidate slating
17 process is not open to minorities, that elections contain racial appeals, that minorities do not
18 serve in public office, or that elected officials are unresponsive to their needs. Thus,
19 Plaintiffs have not met the majority of the Senate Factors. This failure does not prevent the
20 Court from finding a Section 2 violation, but it is instructive. See Farrakhan v. Washington,
21 338 F.3d 1009, 1015 (9th Cir. 2003).

22 **V. Causal Connection**

23 Assuming that Plaintiffs' relatively little evidence is adequate evidence of
24 discrimination, they must also "show a causal connection between the challenged voting
25 practice and [a] prohibited discriminatory result." Smith v. Salt River Project Agricultural
26 Improvement and Power District, 109 F.3d 586, 595 (9th Cir. 1997). "[A] causal connection
27 may be shown where the discriminatory impact of a challenged voting practice is attributable
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1 to racial discrimination in the surrounding social and historical circumstances." Farrakhan,
2 338 F.3d at 1019. In this case, Plaintiffs had to show that the one-percent or one-half of one-
3 percent differences in compliance with Prop. 200 were attributable to the evidence of racial
4 discrimination they provided.

5 The witnesses at the hearing were asked about the connection between discrimination
6 and Prop. 200. The first witness was Tommy Lewis, Ph.D., the Superintendent of Schools
7 for the Department of Dine Education within the Navajo Nation. Dr. Lewis was asked for
8 his opinion regarding the connection between poor education and the voter identification
9 requirement.

10 **Question:** And does this history of discrimination in education
11 affect the ability of Navajos to comply with the voter
identification requirement?

12 **Answer:** Yes. Many of them have a problem in understanding
13 the whole purpose. Many of them don't have the level of
14 education and training that is necessary to understand the need
to have multiple forms of identification, particularly our older
people. (Transcript p.46-47)

15 On cross examination, Dr. Lewis was asked to clarify his opinion regarding the connection.

16 **Question:** Dr. Lewis, is it your testimony that many Navajos do
17 not have the education to understand that they need
identification when voting at the polls?

18 **Answer:** Yes.

19 **Question:** And what's the basis for that opinion?

20 **Answer:** Because the education provided by the government for
21 a very long time was mediocre at best.

22 **Question:** Have you done any formal studies or surveys?

23 **Answer:** Yes. We have a report to substantiate.

24 **Question:** To substantiate that many Navajos do not have the
25 education needed to understand that they need identification at
the polls?

26 **Answer:** Well, it's not—I'm sure they understand but the whole
27 education program for a very long time did not explain the need
to have identification. (Id. at p.55-56)

1 The next witness, former state senator Jackie Johnson, Sr., also gave his opinion regarding
2 the connection between education and Prop. 200.

3 **Question:** And, Senator, does the history of discrimination and
4 the current level of discrimination affect the ability of Navajos,
5 Navajo people, particularly the elderly cohort of Navajo people
6 to comply with the voter identification requirements of the state
7 law?

8 **Answer:** Yes. My father never went to school. He never had a
9 driver's license. I don't know what other identification he had
10 but he never participated in an election except when I was
11 running. That's the only time he went there and voted for his
12 son. Somebody had to tell him this is where you mark and he
13 told me that's what he did. The two sisters that I have didn't go
14 to school. . . . The last time they didn't vote because they don't
15 know how to—they don't know what's in there. Because they
16 don't have formal education, they don't have access to
17 information. So, therefore, they don't vote. (Id. at p.76-77)

18 Mr. Johnson was asked to elaborate on this point on cross-examination.

19 **Question:** Is it your opinion that the historical lack of education
20 on the reservation means that many Navajos cannot understand
21 when they are told that they need ID at the polls?

22 **Answer:** Because of the lack of formal education, many of these
23 people are educated in their own way. Because of the lack of
24 formal education, they don't get the information that they need
25 to understand the need for identification. (Id. at p.81-82)

26 Based on this testimony, it is not clear what causal connection Plaintiffs believe exists. The
27 witnesses stated certain Navajos have not received adequate education as a result of
28 discrimination, and the lack of education prevents them from understanding the rationale
behind Prop. 200. But understanding the rationale of Prop. 200 and complying with Prop.
200 are two different situations; an individual need not understand the reasons a law was
passed before he can comply with the law. Defendants have offered a number of possible
non-discriminatory reasons for the slightly different compliance rates recorded in the primary

1 and general elections. Plaintiffs have not carried their burden of proving a causal
2 connection.²

3 **VI. Preliminary Injunction**

4 "A preliminary injunction is appropriate where plaintiffs demonstrate either (1) a
5 likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious
6 questions going to the merits were raised and the balance of hardships tips sharply in [their]
7 favor." Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 917 (9th Cir.
8 2003) (quotation omitted). Plaintiffs have established they have suffered from discrimination
9 in the past, specifically regarding educational opportunities. But Plaintiffs have shown only
10 the slightest of disparate impacts and no causal connection between the discrimination and
11 the disparate impact. Plaintiffs have not presented sufficient evidence to establish a
12 likelihood of success. Also, Plaintiffs seek relief from identification procedures at the polls.
13 There are no elections in the immediate future. Thus, no hardship will occur if the
14 preliminary injunction is denied.

15 Accordingly,

16 **IT IS ORDERED** the Navajo Nation Plaintiffs' request for a preliminary injunction
17 is **DENIED**.

18 **IT IS FURTHER ORDERED** all parties shall submit a joint statement by May 14
19 providing a schedule for the completion of this case.

20 DATED this 3rd day of May, 2007.

21
22 
23 Roslyn O. Silver
United States District Judge

24
25 ² Plaintiffs cite a number of cases stating that once discrimination is shown, "the
26 burden is on those who deny the causal nexus to show that the cause is something else."
27 (Doc. 276 p.6) Plaintiffs did not cite to Ninth Circuit authority providing for this burden
28 shifting. Because this is a preliminary injunction, the burden remained on Plaintiffs to prove
their entitlement to relief.

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