

**AN ANALYSIS OF FACTORS THAT RESULT IN VOTE DENIAL  
FOR AMERICAN INDIAN VOTERS LIVING ON  
RESERVATIONS IN MONTANA**

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## ABSTRACT

On October 10, 2012, sixteen members of American Indian tribes living on Reservations in Montana filed a federal complaint seeking the establishment of satellite offices at locations on their Reservations where voters could register and/or cast an in-person absentee ballot in the 30 days leading up to an election allowed under Montana state statute. Almost all of the plaintiffs were veterans who had served in the U.S. armed forces. The basis of this dispute was that the failure to establish such offices denied American Indian voters living on Reservations in Montana equal opportunities to participate in the political process as required by Sections 2 of the Voting Rights Act of 1965 and the Equal Protection Clause of the Constitution. Factors such as the history of voting related discrimination, and the effects of discrimination against American Indians in education, employment and health combined with travel distance to impose additional costs that denied American Indians equal opportunity to vote. After protracted litigation, the action brought by Mark Wandering Medicine and others was settled in June 2014 with the counties agreeing to allow satellite locations on Reservations where the plaintiffs lived – albeit with reduced hours of operation, and only if requested to by tribal leaders. This settlement did nothing to address unequal access on other Reservations. With requests from Glacier County, and the threat of additional litigation on July 30, 2014, Montana’s Secretary of State issued an Election Advisory allowing any county to offer satellite election offices on Reservations to create better access to the voting process for American Indians, but leaving the hours of operation to the counties and again requiring tribal leaders to request this remedy each federal election. On October 15, 2015, Secretary of State McCulloch issued an Election Directive outlining the conditions required for establishing satellite election offices in Reservations. Like the Election Advisory, the Directive offered no guidance that would guarantee equal access through the equal provision of services on Reservations. Instead, it opened the door to effectively scale back the progress made in *Wandering Medicine*.

This paper outlines factors resulting in the denial of voting rights for American Indians living on Montana Reservations. The analysis focuses on the Blackfeet, Crow, Fort Belknap, Northern Cheyenne and Rocky Boy’s Reservations. While much of the argument I make can be applied to the Flathead and Fort Peck Reservations, the analysis supporting satellite election offices on those Reservations would be different, because those Reservations contain a county seat within their boundaries. Given that conditions on Montana Reservations result in vote denial and thus violate the Voting Rights Act, it is the responsibility of the Secretary of State, as chief elections officer of the state of Montana, to direct the counties to provide satellite election offices on Reservations that operate in an identical manner as the election office in the county seats in the thirty days leading up to and including Election Day to ensure the uniform application of election laws and thus promote equality of access for all Montana voters.

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*Political participation will help Native people improve their lives. Why are the state and counties stopping us? All we want is equality. Everyone says we Indians have to get in step – better ourselves, move forward. Voting will let us do that.*

~ Mark Wandering Medicine (Woodard, 2013a)

## I. INTRODUCTION

On October 10, 2012, litigation was initiated by sixteen members of four tribes living on three Reservations against the state of Montana and their respective counties – Big Horn, Blaine and Rosebud – seeking the establishment of satellite election offices in Reservation locations where residents could register and/or cast an in-person absentee ballot in the period leading up to a general election allowed under Montana law. Legal action was brought after twenty separate documented requests by representatives of the Blackfeet, Crow, Chippewa Cree, Gros Ventre and Assiniboine, and Northern Cheyenne Tribes for satellite election offices on their respective Reservations. This paper extends the analysis conducted in support of the plaintiffs' claims in *Wandering Medicine v McCulloch*.

*Wandering Medicine v McCulloch* was brought under Section 2 of the Voting Rights Act in establishing that the conditions facing American Indians living on Reservations in Montana combined with the location of election offices (where residents could register to vote and/or cast an in-person absentee ballot in the thirty days preceding a federal election), at the county seat great distances from Reservations, to deny them equal opportunity to participate in the political process. Rosebud County Commissioner and enrolled Northern Cheyenne tribal member, Danny Sioux sums up the conditions he faces in seeking to vote:

The present practices – including extreme distances to the current voting offices, cultural communication barriers, demands for forms of street addresses that don't exist on the reservation when we try to register and law enforcement racial profiling when we go to the county seat to vote – deny access to Native voters. (Woodard, 2012b).

The disproportionate costs borne by American Indians living on Reservations form barriers to access to the full range of voting options available to others in Montana that

are paralleled by the costs that state and county defendants imposed on the plaintiffs in *Wandering Medicine v. McCulloch* and those working on their behalf in seeking greater access to the political process for American Indians in Montana.

This paper lays out the substance of the case in *Wandering Medicine* in discussing the legal standards required to establish a claim of vote denial under Section 2 of the Voting Rights Act: the history of official voting related discrimination against American Indians in Montana, racial polarization, and the legacy of discrimination in areas such as education, employment, health and poverty that hinder the ability of American Indians living on Reservations to fully participate in the political process.

Paying particular attention to the costs imposed by distance and time, I examine the past and present reality of voters living on Reservations in Montana that result in the denial or abridgement of the right to vote.

## **II. VOTING IN MONTANA**

The core of the claim in *Wandering Medicine v. McCulloch* was that failure to establish satellite election offices on Reservations constituted a denial of voting rights of American Indians, and furthered the history of official racial discrimination in voting. Montana statute permits voters to cast an in-person ballot on Election Day at the polling location designated for their precinct, or by casting an absentee ballot. Any registered voter can vote by receiving an absentee ballot and returning it before Election Day. Registered voters receive such absentee ballots by mail, fax, e-mail, or through a designated person who collects the ballot from the county election office. Absentee ballots are generally returned by mail or delivered to an election office. Alternatively, a registered voter can request and cast an in-person absentee ballot in the period beginning 30 days before an election at an official county election office.

“Late registration” allows would-be voters to register to vote (or update their registration) by appearing in-person at an election office, generally the County Court

House, or other location designated by the county election administrator in the 30<sup>1</sup> days before an election and up to 8:00 p.m. on Election Day (Mont. Code Ann. § 13-2-304, 2012). “Early voting” (also known as in-person absentee voting) permits registered voters to receive, mark, and submit an absentee ballot in-person at the county election office or any other location designated by the county election administrator from the time that absentee ballots become available – generally the 30 days before an election – until noon on the day before the election (Mont. Code Ann. §§ 13-13-205, -211, -222, 2012). If the voter chooses, he/she can take the absentee ballot home and return it by +mail or in-person to the election office up to the day before the election. Unlike late registration, there is no in-person absentee voting on Election Day; however, an absentee ballot issued prior to Election Day can also be returned to the voter’s designated polling location on Election Day with some additional verification.

Maintaining late registration and in-person absentee voting sites at satellite election offices would permit voters in Montana to both register to vote, or change their registration, and/or cast a ballot with a single visit to a designated site in the time allowed by Montana law without having to travel to the county seat. Satellite election offices would also allow those already registered to vote to cast an in-person absentee ballot at any time during the period allowed by statute leading up to Election Day – thereby effectively extending the period for voting. Thus, a significant part of the vote denial claim was that American Indians living on Reservations in Montana had a mere single day on which to vote, Election Day, compared to the twenty-plus working days leading up to the election available to other voters.

It is important to note that while the vote-by-mail variant of absentee voting, where the ballot is received and generally returned by mail, is an option available to Montana voters, this is distinguished from in-person absentee voting, and is not considered a viable alternative for most American Indians living on Reservations. Montana voters have the option of applying to be added to the list of absentee voters,

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<sup>1</sup> Under § 13-13-205 absentee ballots for absentee voting must be available at least 25 days prior to an election.

and thereby gain permanent absentee voter status. Permanent absentees receive their ballots by mail approximately 25 days before every federal election and need never visit their polling locations. Receiving a permanent absentee ballot extends the period for voting. However, a number of factors preclude vote-by-mail as a permanent absentee voter from being a viable option for most American Indian voters living on Reservations. The majority of American Indians living on Reservations in Montana receive their mail through P.O. Boxes, and have to travel to collect their mail. Also, postal service on Reservations in Montana varies greatly, sometimes with Post Offices within a single county operating under different administrative rules, so that equal access to the mail cannot be assumed for all Montana voters.

The practicalities of living in poverty also impact the ability of American Indians to vote-by-mail. American Indians have greater flexibility in household organization than other voters, resulting in arrangements where children and/or adults live for varying periods of time in different households. For example, between the 2012 and 2014 elections Sarah Stray Calf, enrolled Crow tribal member and one of the original plaintiffs in *Wandering Medicine*, lived at three different addresses when she was not in hospital receiving treatment for complications resulting from severe arthritis. Mark Wandering Medicine's household in Birney expands and contracts to accommodate family members, particularly the family of his youngest daughter, who works in Ashland, which is 28.1 miles away with the journey each way taking 55 minutes under ideal weather and road conditions. The fluidity of living arrangements in many Reservation homes can make it difficult for individuals to regularly access their mail. Perhaps reflecting the history of restrictions faced by American Indians seeking equality in voting, many American Indians, like Fort Belknap plaintiffs Ed (Buster) Moore and Donovan Archambault, have a strong preference for the immediacy of in-person voting in their local communities, where they can vote without leaving the Reservation. In a September 2012 interrogatory Archambault stated: "I will not absentee vote by mail because I do not trust that my vote will be counted if I mail it. I prefer to see my ballot enter the ballot box."

The preference away from vote-by-mail is evident in the low number of American Indians who have applied to be added to the list of permanent absentee voters. Counties with polling locations on Reservation consistently report the lowest proportions of voters on the permanent absentee list. For example, in March 2014 less than 6 percent of the voters registered at the three precincts on the Fort Belknap Reservation in Blaine County were on the list of permanent absentee voters. This is significantly lower than the 20 percent of the voters registered at other precincts in Blaine County who are on the permanent absentee list and receive their ballots by mail.

Within the political science literature, alternatives to traditional Election Day polling place voting – such as absentee voting, electronic voting and vote by mail – have been categorized as ‘convenience voting’ (Gronke et al., 2008). To date few studies have addressed the impact of alternatives to traditional polling place voting on minority and/or remote rural populations. While Montana allows for absentee ballots to be requested by fax or email; however, like vote-by-mail these options are not readily available to American Indians living on Reservations due to poverty and access to technology. Addressing the digital divide on Reservations, in a March 2010 address to the National Council of American Indians, the Chairman of the FCC, Julius Genachowski, noted that: “ONLY 65 percent of Americans have broadband in the home. In Indian Country, 65 percent is roughly the adoption rate for TELEPHONE service” (Genachowski, 2010 – his emphasis). He further commented: “The best evidence indicates that the broadband deployment rate on Tribal lands is less than 10 percent... [and] may be as low as 5 percent” (Genachowski, 2010). Thus voting alternatives that rely on technology such as the internet or fax to apply for and/or receive ballots are unlikely to be available to American Indians living on Reservations in Montana. The alternative of having a designated person collect a ballot from the county election office in the thirty days leading up to an election involves the same barriers as leaving the Reservation and traveling to cast an in-person absentee ballot, and/or late register.

The “MVP – My Voter Page,” the public access portal for Montana voters that allows registered voters to check their voter status, view sample ballots, and find



locations to their polling locations relies on internet access (<https://app.mt.gov/voterinfo/>). Services and information available through My Voter Page are unlikely to be easily accessible to voters registered at Reservation precincts. Therefore satellite election offices on Reservations could provide an important alternative means of access to voter information that many Montana voters take for granted. Disparities in access to broadband, and the hardware that accesses services and information through it, prevents many American Indians living on Reservations from digitally accessing information through the My Voter Page internet portal. The categorization of satellite election offices on Reservations in terms of convenience<sup>2</sup> ignores inequalities that result from economic, social and historical conditions that create two very different constituencies – American Indians living on Reservations and other residents within Montana.

These differences are reflected in voting trends. In the 2000 General Election, less than 10 percent of Montana’s registered voters utilized an absentee ballot. Table 1 shows absentee voting as a percentage of registered voters for Montana and for the four counties with the largest percentages of American Indian residents. Across all counties in Montana there is no correlation between utilization of absentee voting and voter turnout ( $r = -0.099, p = 0.467$ ). This results suggests that in general registered voters are substituting traditional Election Day polling for absentee voting in the period allowed under Montana statute.

Table 1: Absentee Voting as a Percentage of Registered Voters from 2000 to 2012

<b>ABSENTEE VOTING</b>	<b>Big Horn</b>	<b>Blaine</b>	<b>Glacier</b>	<b>Rosebud</b>	<b>MONTANA</b>
2000 General	0.52%	6.63%	5.15%	5.98%	9.38%
2004 General	8.19%	9.21%	12.64%	9.14%	15.69%
2006 General	11.36%	12.21%	15.74%	11.14%	18.67%
2008 General	16.44%	17.75%	19.51%	17.86%	31.73%
2010 General	10.60%	13.72%	12.47%	9.45%	26.57%

In contrast to the statewide trend, Table 1 shows that in counties with large populations

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<sup>2</sup> I am completing the analysis critiquing the characterization of provisions for extended voting in minority communities living in poverty for publication in a special issue of *Critical Ethnic Studies* focusing on justice.

of American Indians living on Reservations the percentages of absentee voters lag behind. The magnitude of a county's American Indian population negatively correlates with both the utilization of absentee voting ( $r = -0.32, p = 0.045$ ) and voter turnout in general ( $r = -0.696, p < 0.001$ ) showing that both voter turnout and absentee voting rates are lower in areas with substantial American Indian populations. In his deposition in support of the defendants in *Wandering Medicine v McCulloch*, Robert Stein a Political Scientist at Rice University suggested that American Indians living on Reservations in Montana are ambivalent to the political process. The drop off in absentee voting in 2010 suggests that even with the convenience of mail voting – that is not equally available to American Indian voters – white voters tend to be infrequent, and perhaps ambivalent, voters in midterm elections.

Although not included in the rationale for requesting satellite election offices on American Indian Reservations in Montana, an additional reason for extending the period for voting for these voters is that this extended time frame not only decreases the cost of voting, but also increases the cost of voter intimidation. Since American Indians are less likely to vote by mail, and cost and distance form barriers to in-person absentee voting at election offices in the county seats in the 30 days leading up to an election allowed under Montana law, polling locations on Reservations are likely to have much greater concentrations<sup>3</sup> of voters on Election Day than other polling locations throughout Montana. For example, while the Crow School on Crow Agency is not the polling location with the greatest number of registered voters in Big Horn (1,853 compare to 1,907 voters registered at precincts voting in a school auditorium in Hardin), Crow School is the polling location with the greatest number of registered voters who are not on the list of permanent absentee voters. Crow School is the polling location in Big Horn expected to serve the greatest number of voters casting traditional ballots on Election Day in the absence of a satellite election office on the Crow Reservation. Such concentrations of

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<sup>3</sup> I am writing up this statistically significant result for presentation at the Midwest Political Science Association Meeting in 2016 in Chicago.

voters at polling locations on Election Day allow for the intimidation of the maximum number of voters with this small window of time.

In the 2012 Presidential election an individual associated with Republican candidate Dennis Rehberg harassed voters at the polling location in Browning, on the Blackfeet Reservation, that serves the greatest number of registered voters in Glacier County. This individual asked people going to vote for identification, told them that possessing palm cards listing candidates endorsed by a Native rights organization was illegal, and generally made them feel threatened or angry at the intrusion (Schemo, 2012; Woodard, 2012c). Further compounding the logistics of serving large numbers of voters within a single day, a package containing a substance similar in appearance to anthrax was delivered to the Browning polling location mid-afternoon on Election Day (Woodard, 2012c). Therefore, an argument can be made that the provision of satellite offices on American Indian Reservations in Montana helps preserve the integrity of the election process for some of the states most disadvantaged voters.

Traveling to non-Native county seats to cast an in-person absentee ballot is not an option for many American Indians like Mark Wandering Medicine whose round trip journey to his county seat in Forsyth is over 180 miles and takes approximately two hours each way during summer when the weather is more conducive to travel providing there are no livestock or other animals on the roads. This journey costs him approximately \$100. Wandering Medicine noted: “My people can’t make it. Many of us don’t have cars or don’t have gas money. In my village, we don’t have a gas station; we can’t vote by mail instead, because we don’t have a post office” (Woodard, 2014). Legal action in *Wandering Medicine v. McCulloch* was brought in response to concerns such as those articulated by Mark Wandering Medicine and after repeated requests to multiple counties and the state of Montana to provide satellite election offices at Reservation locations to allow American Indians living on Reservations the same access to late registration and early voting as other residents of their respective counties as required under Section 2 of the Voting Rights Act. Reservation satellite election offices were not requested as a convenience, but rather as a remedy that would provide American

Indians living on Reservations the same period in which to register to vote, change their voter registration and cast a vote as other voters in Montana.

### III. VOTE DENIAL UNDER SECTION 2 OF THE VOTING RIGHTS ACT

#### A. *An Overview of Section 2*

The Voting Rights Act was signed into law by Lyndon B. Johnson in 1965 at the height of the Civil Rights Movement. This landmark piece of legislation was designed to enforce the right to vote enshrined in the Fourteenth and Fifteenth Amendments of the United States Constitution. Among the provisions of the Voting Rights Act, Section 2 prohibits voting procedures that deny or abridge the right to vote on account of race (42 U.S.C. 1973). The portion of the Act specifically applied in requesting satellite election offices on Reservations in Montana, Section 2 Paragraph (a), states that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State 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.

Under Paragraph (b), a plaintiff may establish a violation of this provision if:

based on the totality of the 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.

Two types of claims can be brought under Section 2 of the Voting Rights Act: vote dilution and vote denial. As opposed to vote dilution, where a state or political subdivision's voting standard results in weakening or 'diluting' the vote of a minority group, vote denial occurs when the state or political subdivision's voting standard, practice or procedure "results in the denial of the right to vote on account of race" (*Johnson v. Governor of Florida*, 405 F.3d at 1228). Vote denial claims include those alleging the denial of equal opportunities to participate in the political process, and are often brought in response to practices or procedures that interfere with, or impair, the

ability of would-be voters to register and cast a vote or have that vote counted (*Farrakahn v. Gregoire*, 590 F.3d 989, n. 13 - 9th Cir.) Thus while vote dilution can be seen as how your vote counts once you cast it; vote denial is what stops you from getting to cast your vote in the first place.

In 1982, Congress amended the Voting Rights Act in response to the Supreme Court finding of 1980 *City of Mobile v. Bolden* that held that in order to establish a violation of Section 2, or of the Constitution, minority plaintiffs had to prove that a challenged voting practice was adopted or being maintained with a racially discriminatory purpose. In concluding that Section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself” – which required proof of a discriminatory purpose to establish a violation – the Court increased the burden imposed on plaintiffs and essentially curtailed Section 2 litigation. In amending the Voting Rights Act in 1982, Congress restored the intent that violations to the Voting Rights Act, including Section 2, could be established by demonstrating the discriminatory effect of a challenged practice without reference to purpose – thereby encoding a discriminatory “results” standard.

In assessing vote denial cases, if the Court determines the processes in question are not equally open to participation, the Court then considers the “totality of the circumstances.” In making this determination, the Court assesses the factors articulated by the Senate Committee on the Judiciary in 1982 (SEN. REP. NO. 97-417, 9th Cong., 2d Sess. 27-28, 1982). Those factors include:

1. the history of official voting-related discrimination in the state or political subdivision;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. 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, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate slating processes;
5. the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. the use of overt or subtle racial appeals in political campaigns; and,

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

In 1986 the Supreme Court interpreted Section 2 in *Thornburg v. Gingles* (478 U.S. 30) and recognized that: “political participation tends to be depressed where minority group members suffer the effects of prior discrimination such as inferior education, poor employment opportunities and low incomes.” *Gingles* challenged the use of multi-member (at-large) districts in North Carolina’s 1982 reapportionment plan. The Court held that in order to prevail in a vote dilution challenge under Section 2, the plaintiff must prove three things (now commonly referred to as the *Gingles* factors): that the minority is “sufficiently large and geographically compact”; that the minority is politically cohesive, or tends to vote as a bloc; and that the majority votes as a bloc usually to defeat the minority’s preferred candidate. The Court explained: “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 candidates.”

Although *Gingles* was a vote dilution case, its influence has extended beyond that context and it is generally cited in any Section 2 Voting Rights Act claim. As a vote dilution case, *Gingles* itself did not articulate a clear test for vote denial claims under Section 2. While *Gingles* and subsequent cases have generated a well-established standard for vote dilution, there remains no standard test for vote denial under Section 2 of the Voting Rights Act. One certainty in the aftermath of *Gingles* is that the “results” test and the “totality of circumstances” factors apply equally to vote denial and vote dilution cases. The Section 2 amendment and *Gingles* were critical in bringing about what has been described as a “quiet revolution” in voting rights and consequent office holding for minorities in the United States (McDonald, 1989).

In assessing vote denial, the Ninth Circuit Court has identified Senate Factors 1, 2 and 5 as being of particularly relevance (*Gonzales*, 677 F.3d at 405-406, 2012). There is no requirement that any particular number of factors be proven or that a majority of them point one way or the other when evaluating the totality of the circumstances.

Instead, in *Gonzales* the Ninth Circuit held that the question of “whether the political processes are ‘equally open’ depends upon a searching practical evaluation of the ‘past and present reality.’” The above factors that are used to determine a claim of vote denial guide the following discussion of the conditions facing American Indians living on Reservations in Montana seeking to vote and/or register to vote.

***B. The History of Official Voting Related Discrimination in Montana***

With a population of 78,601 (and making up 7.9 percent of the population), American Indians are Montana’s largest minority group. The majority of American Indians in Montana live on the one of the seven Reservations shown in Figure 1. Although there are 56 counties in Montana, over one third of the American Indian population (37.1 percent) live in Big Horn, Blaine, Glacier and Rosebud Counties, with those populations concentrated on the Crow, Fort Belknap, Blackfeet and Northern Cheyenne Reservations. The star on the map in Figure 1 represents the Little Shell Tribe of Chippewa Indians that, although recognized by the State of Montana, has yet to gain federal recognition and has no Reservation land base.

Figure 1: American Indian Reservations in Montana



The history of restrictions on the participation of American Indians in civic life at the federal level is paralleled by the actions of legislators and other elected officials in Montana in precluding American Indians from full political participation at the state and local levels. From its inception in 1889, the Constitution of the State of Montana restricted office holding and service in the state militia to U.S. citizens – thereby excluding American Indians who at that time were not classified as citizens. In 1897 the Montana attorney general determined that American Indians were only eligible to vote if they owned property and lived outside of Reservation boundaries. Voting for American Indians in Montana became almost impossible in 1899 when the legislature requested that the federal government restrict American Indians to their Reservations. In the 1911 election, individuals living on Reservations were deemed not residents of Montana, and were thus disqualified from voting. A year later, in 1912, the Attorney General of Montana ruled that anyone receiving tribal funding or participating in tribal affairs was ineligible to vote. Restrictions on the franchise for American Indians were further codified in a 1919 law that prohibited the creation of electoral districts on American Indian lands, or location of precincts at trading posts that might be accessible to American Indians.



Following the 1924 passage of the Indian Citizenship Act, American Indian candidates ran for office in Montana without success in the 1924, 1928, 1932 and 1934 elections. In 1932 the Montana State Legislature amended the state Constitution so that only taxpayers could vote – essentially rendering American Indians, who were exempt from local taxes, ineligible to vote. In 1937, two pieces of state legislation further disenfranchised American Indians: the first cancelled all voter registration as of June 1, 1937; and the second required that registered voters be tax paying residents of their precincts (McDonald, 2010). This second law remained on the books until 1975 – ten years after the 1965 enactment of the Voting Rights Act.

Although the intention of the Voting Rights Act – as interpreted by the Supreme Court in upholding its constitutionality – was “to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of the country for nearly a century,” (*South Carolina v. Katzenbach*, 383 U.S. 301, 308, 1966), this law was poorly enforced in Indian Country. McDonald et al. (2006) outline a number of reasons for this lack of enforcement including: the isolation of American Indian communities, lack of resources and access to legal assistance, and the legacy of years of discrimination by the federal and state governments. Perhaps in keeping with this general laxity in enforcing the Voting Rights Act in relation to the rights of American Indians, it is interesting to note that a challenge to the constitutionality of applying this legislation, and in particular Section 2, to Indian Country was brought in 1999 by Blaine County defendants in response to Voting Rights Act litigation in Montana.

In 1976, more than ten years after the enactment of the Voting Rights Act, the first voting rights case in Montana was brought by the Department of Justice on behalf of American Indians on the Fort Peck Reservation that straddles portions of Daniels, Sheridan, Roosevelt and Valley Counties. Legal action in *Simenson v. Bell* (originally *Simenson v. Levi*, Civ. No. 79-59-HG) was brought under the minority language provisions of Section 203. The County Clerk of Roosevelt County sought bailout under section 203 on the grounds that there had been no response to public notices seeking American Indians who could not read English (McCool et al., 2007).

In 1983 the first Section 2 case was brought in Montana in *Windy Boy v. Big Horn County* (Civ. No. 83-255-BLG). This was the first challenge to at-large election districts in the 1980s brought by American Indian plaintiffs, and one of the first voting rights cases brought after the 1982 Amendment of the Voting Rights Act. Under the at-large electoral system, no American Indian had been elected to the County Commission in Big Horn, Montana – in spite of American Indians making up 41 percent of the county’s voting aged population at the time this litigation was initiated. Brought by the ACLU on behalf of members of the Crow and Northern Cheyenne Tribes, *Windy Boy v. Big Horn County* challenged at-large elections for the County Commission of Big Horn as diluting American Indian voting strength, allowing the white majority to control electoral outcomes, and preventing American Indians from electing candidates of their choice. It is interesting to note that the county defendants in this action were represented by John W. Ross and Michael P. Heringer of Anderson, Brown, Gerbase, Cebull & Jones. Because of the magnitude of this case in asserting American Indian voting rights, and the contentious relationship between members of the Crow Nation and the state, this case has been referred to as the “Second Battle of Big Horn” (Wood, 1986). *Windy Boy* was heard in Los Angeles by federal judge Edward Rafeedle, who sat by designation after the Montana federal judge assigned declined to hear the case (Shaw, 1986). The Court heard evidence that:

The statistics demonstrate that Indians in Big Horn County do not fare well relative to Whites. Indian per capita income at \$2,987 is less than half of that for Whites. Unemployment for Indians at 32.6% is eight times that of Whites. Some studies have shown unemployment well over 50 percent. Over a third of Indian households have no phone. (*Windy Boy v. Big Horn*, 1986, 647 F. Supp 102.)

The Court not only determined that depressed socioeconomic conditions made it “more difficult for Indians to participate in the political process,” but also that “reduced participation and reduced effective participation of Indians in local politics can be explained by many factors... but the lingering effects of past discrimination is certainly one of those factors.”

Among evidence that “tend[ed] to show an intent to discriminate against Indians,” the Court found that American Indians in Big Horn County had been “refused voter registration cards by the County” and the names of some registered voters who voted in the primary had been removed from voting list thereby preventing them from voting in the general election. As a remedy, the Court adopted single-member districts for the County Commission and School Board in Big Horn. The next election resulted in the successful candidacy of the first American Indian County Commissioner in the history of Big Horn County. Although not directly related to this case, within weeks of the decision in *Windy Boy*, the Supreme Court issued its ruling in *Thornburg v. Gingles* (478 U.S. 30) crystalizing the standard for vote dilution cases.

Although *Thornburg v Gingles* invalidated the use of at-large districts as impairing the ability of cohesive groups of minority voters to participate equally in the political process, this system of political organization persisted in Montana. A number of vote dilution cases were initiated under Section 2 of the Voting Rights Act in Montana in the late 1990s and into this century. In 1999 the Department of Justice brought actions against Blaine County (*United States v. Blaine County*, Civ. No. 99-122-GF-DWM) on behalf of the Gros Ventre and Assiniboine of the Fort Belknap Reservation, and Roosevelt County (*United States v. Roosevelt County*, Civ. No. 00-50-BLG-JDS) behalf of members of members of the Assiniboine and Sioux Tribes of Fort Peck Reservation. These cases alleged that at-large electoral districts diluted American Indian voting strength and thus violated Section 2 of the Voting Rights Act.

While Roosevelt County quickly settled and instituted single-member districts, the litigation involving Blaine County was costly and protracted. Following the institution of single member districts in Roosevelt, the first American Indian was elected to the Roosevelt County Commission in 2000. At that point American Indians from the Gros Ventre and Assiboine tribes made up 45 percent of the population of Blaine County, but no American Indian had ever been elected to the Blaine County Commission. The Mountain States Legal Foundation – a nonprofit law firm based in Denver, Colorado with a history of opposing affirmative action lawsuits that contrasts itself to “scores of left of

center foundations”<sup>4</sup> on its website – represented Blaine County. The Mountain States Legal Foundation appeared on behalf of Blaine County pro bono on the condition that the defendants allow the case to be used to challenge to the constitutionality of applying Section 2 of the Voting Rights Act in Indian Country (ACLU, 2009). These lawyers for the county argued that the 1982 amendment to Section 2 rendered the Voting Rights Act unconstitutional. They asserted that there was:

no evidence before it that there existed intentional unconstitutional discrimination by Montana. . . . From 1965 through the present, the only “evidence” before Congress of voting discrimination against American Indians concerned the Navaho [sic] in Arizona and one incident each in Wisconsin, Nevada, Nebraska, New Mexico, and South Dakota. In all of those instances lawsuit [sic] were brought and successfully prosecuted, or consent decrees were obtained, based on allegations of unconstitutional, intentional discrimination. (Memorandum in Support of Defendants’ Motion for Summary Judgment, January 31, 2001, 28–9).

They further claimed that at the time of the 1982 Voting Rights Act amendment, Congress had no evidence of a “systematic, nationwide pattern of intentional and unconstitutional use, by legislative bodies, of at-large elections to dilute the voting strength of American Indians” (Reply to the United States’ Response to Blaine County’s Motion for Summary Judgment, March 14, 2001, 4). As in *Windy Boy*, the judge hearing *U.S. v. Blaine County* did not sit on the Montana bench, but instead was Nevada District Court judge, Philip Pro.

Associated with *U.S. v. Blaine County*, legal action in *McConnell v. Blaine County* (Civ. No. 01-91-GF-RFC) was brought by the ACLU on behalf of Fort Belknap tribal members who were permitted to have input at the remedy stage of proceedings (McDonald, 2010). In July 2001 Judge Pro denied the defendants motion for summary judgment noting not only that Section 2 had been unsuccessfully challenged both before and after the 1982 amendments, but also that Section 2 was applicable in Indian Country. In addressing the applicability of the Voting Rights Act in Indian Country, the Court held:

The fact that the Act was primarily intended to remedy discrimination against African Americans in the southern states in the 1960s does not make it any less

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<sup>4</sup> <https://www.mountainstateslegal.org/about#.VeTaak7n9Yc>. Accessed 26 August 2015.

proper to use as a remedy for discrimination against Native Americans today. There is ample evidence that American Indians have historically been the subject of discrimination in the area of voting” (*U.S. v. Blaine County*, 2001, 1152).

In March 2002, Judge Pro rendered his decision in favor of the plaintiffs and ordered the county to create “an election plan” to remedy the Section 2 violations. As in Big Horn County after *Windy Boy*, Blaine County adopted a single-member district plan. In 2002 Delores Plumage, an American Indian from a district that covers most of Fort Belknap Reservation in which Gros Ventre and Assiniboine constitute the majority of registered voters, was the first American Indian elected to the Blaine County Commission.

The Mountain States Legal Foundation and Blaine County appealed this decision and again focused the appeal on the constitutionality of the amendments to Section 2. In 2004 the Ninth Circuit Court of Appeals upheld the District Court decision in supporting the constitutionality of Section 2. In dismissing the claim that American Indians had no distinct political interest in politics at the county level, the Ninth Circuit held:

[I]t is actual voting patterns, not subjective interpretations of a minority group’s political interests, that informs the political cohesiveness analysis. . . . [The County] essentially asks us to deny the validity of American Indian voter’s self-professed interests. Were we to do so, we would be answering what is inherently a political question, best left to the voters and their elected representatives. (*U.S. v. Blaine County*, 2004, 910).

The Ninth Circuit also concurred with the District Court in concluding that there existed:

- depressed social-economic conditions for American Indians
- a history of official discrimination against American Indians, including “extensive evidence of official discrimination by federal, state and local governments against Montana’s American Indian population”
- racially polarized voting “made it impossible for an American Indian to succeed in an at-large election”
- voting procedures including staggered terms of office and “the County’s enormous size, which makes it difficult for American Indian candidates to campaign county-wide” enhanced opportunities for discrimination against American Indians
- tenuous justification for the at-large system, in that state law did not require at-large elections, and the County Government depended heavily on its districts for other purposes including “road maintenance and appointments to the County

Boards, Authorities and Commissions” (*U.S. v. Blaine County*, 363 F.3d 897, 900, 909-11).

*U.S. v. Blaine County* played an important part in the timeline of dismantling at-large electoral districts in Montana, and securing greater access for American Indian voters in Blaine County and beyond. In addition to providing evidence of the resistance at the county level to initiatives that increase access to voting for American Indians, this case has further significance as the test case that reinforced the applicability of Section 2 in Indian Country.

Barriers to election for American Indians in Montana is further evident in the history of the Ronan School District in Lake County – one of the counties containing a portion of the Flathead Reservation, home of the Confederated Salish and Kootenai. In 1999 the majority of students in District 30 on the Ronan School Board were American Indian. From 1972 to 1999 seventeen American Indians had run to represent District 30 on the School Board. The only American Indian elected during this period was Ronald Brick, who was elected in 1990 without any known tribal affiliation. Brick was defeated in 1993 when he ran for reelection after it became known that he had joined the Flathead Nation (ACLU, 2009).

In 1999, working with plaintiffs from the Flathead Nation and Northern Cheyenne, the ACLU initiated actions against the Ronan School District (*Matt v. Ronan School District*, Civ. No. 99-94) and Rosebud County (*Alden v. Rosebud County Board of Commissioner*, Civ. No. 99-148-BLG), for persisting in the use at-large elections. Facing the prospect of protracted litigation as experienced in *Windy Boy* and *United States v. Blaine County*, the defendants capitulated with a settlement that created single-member districts. The settlement plan in *Matt v Ronan School District* also included expanding the School Board from five to seven members with the creation of majority American Indian districts that would elect two members to the expanded board.

The most recent vote dilution case brought under Section 2 in Montana was initiated as recently as August 2013 by the ACLU on behalf of seven members of the Assiniboine and Sioux Tribes living on the Fort Peck Reservation. *Jackson v. Wolf Point School District* (Civ. No. 13-65-GF-BMM) revolved around the plaintiffs’ claim that

District 3, the majority white voting district, elected one member to the school board for every 143 residents compared to District 45, the American Indian district, which elected one board member for every 841 residents. In addition to the breach of Section 2, the plaintiffs argued that Wolf Point School Districts violated the equal protection clause of the Fourteenth Amendment and the one person, one vote standard. In January 2014 this case was settled with the establishment of five single-member districts that varied by no more than 1.54 percent of the population as recorded in the Census with representatives on the high school and elementary school boards, and one member elected at-large district wide to serve only on the high school board. The cases outlined above demonstrate the persistence of electoral practices and procedures that resulted in vote dilution for American Indians living on Reservations in Montana at the county and sub-county levels.

Section 2 of the Voting Rights Act has also been used to challenge redistricting practices in Montana on a statewide level in 1996. With twenty years of contentious redistricting, tracing back to 1965, in 1983 the Districting and Apportionment Commission adopted a redistricting plan that contained only one majority American Indian district that was located on the Blackfeet Reservation in Glacier County. Ostensibly based on the 1980 Census, the redistricting plan effectively fragmented American Indian Reservation populations in other parts of the state. The 1993 Districting and Apportionment Commission adopted a plan that was similarly disproportionate to Census population distributions. According to the 1993 plan, only one of the fifty Senate Districts in Montana contained an American Indian majority – less than one third of what was suggested by a proportional plan based on the total population. *Old Person v. Cooney* (Civ. No. S-96-04-GF-PMP) – which over the course of the litigation would become *Old Person v. Brown* with the election of a different Secretary of State – was initiated in 1996 by plaintiffs from the Blackfeet and Flathead Reservations who claimed that the Montana redistricting plan diluted the strength of the American Indian vote. As chief election officer, the Montana Secretary of State was the lead defendant in this action.

Although the District Court dismissed the case, it made note of the “history of official discrimination against American Indians during the 19<sup>th</sup> and early 20<sup>th</sup> century by both the state and federal government.” The Court found that “Indians continue to bear the effects of past discrimination in areas such as education, employment and health, which, in turn, impacts upon their ability to participate effectively in the political process.” On appeal, the case was returned to the District Court where it was once again dismissed. Although the original judge assigned to *Old Person* was Paul Hatfield of the Montana District Court, after his death, Judge Philip Pro of Nevada was appointed to the case.

A second appeal in *Old Person* also found no evidence of vote dilution in the redistricting plan. Continued action was rendered redundant when a new Districting and Apportionment Commission was appointed – including Janine Windy Boy, a registered member of the Crow Nation and lead plaintiff in the *Windy Boy* litigation – in anticipation of the results of the 2000 Census. After holding a series of hearings, in January 2003 this new Commission submitted its redistricting plan that provided for six of Montana’s 100 House Districts and one of the 50 Senate Districts that would have American Indian majorities. The Legislature responded by enacting HB 309, which sought to invalidate the redistricting plan and amend the Constitution of the state of Montana. The Governor signed HB 309 into law on February 4, 2003. On February 5, 2003 the Commission formally adopted its redistricting plan and filed it with the Secretary of State, who immediately refused to accept it. The Secretary of State then filed a complaint against the Commission with the State Court alleging that the redistricting plan was unconstitutional and failed to comply with HB 309. In July 2003 the State Court held that HB 309 itself was unconstitutional and ruled that the Secretary of State must accept the redistricting plan as originally submitted.

The *Old Person* case spanned eight years and, like the history of litigation challenging the use of at-large districts, illustrates the state of Montana’s resistance to any proactive measures that would facilitate equal access to the ballot box for American Indian voters living on Reservations. It is worth noting that in the aftermath of *Old*



*Person*, under the new redistricting plan, eight enrolled tribal members were elected to the Montana House and Senate in the 2004 election. Success in electing American Indian candidates to office at the state and county levels resulted from the history of litigation rather than proactive policy changes initiated by state or county governments.

With the exception of the Chippewa Cree of the Rocky Boy's Reservation, Montana's smallest Reservation whose residents vote in two different counties, vote dilution litigation under Section 2 of the Voting Rights Act has been brought by American Indians living on every Reservation in Montana. In discussing 2013 redistricting in Montana, Assiniboine attorney Pat Smith from Fort Belknap commented: "During the 20-year period following 1984, Montana was the most litigated state in the nation on enforcing the Federal Voting Rights Act in Indian Country" (Mayer, 2012).

Drawing direct parallels between the status African Americans in the early years of the civil rights movement and current conditions facing American Indians seeking to vote in South Dakota and Montana, Tom Rodgers, enrolled member of the Blackfeet Nation who was instrumental in requesting greater access to the ballot for American Indians on the Blackfeet Reservation in Glacier County commented: "South Dakota is the Mississippi of the Great Plains, Sadly, Montana is becoming the Alabama" (Gumbel, 2013). Table 2 provides an overview of the cases discussed above to provide a timeline of Section 2 litigation and facilitate ease of comparison

Table 2: Overview of Section 2 Voting Rights Cases in Montana

Case Name	Year Filed: Civil Action Number	Legal Issue	Level of Government	Outcome
<i>Windy Boy v. Big Horn County</i>	1983: 83-255-BLG	Vote dilution through at-large districts	County Commission & School Board	1986 Judgment for plaintiffs
<i>Old Person v. Brown</i> (originally <i>Old Person v. Cooney</i> )	1996: S-96-04-GF-PMP	Vote dilution – redistricting	State	2002 Decision moot with 2002 redistricting
<i>Matt v. Ronan School Board</i>	1999: 99-94-M-DWM	Vote dilution – at-large districts	School Board	2000 Stipulation
<i>U.S. v. Blaine County</i>	1999: 99-122-GF-DWM	Vote dilution – at-large districts	County Commission	2002 Judgment for plaintiffs
<i>Alden v. Board of Commissioners of Rosebud County</i>	1999: 99-148-BLG-DWM	Vote dilution – at-large districts	County Commission	2000 Judgment for the plaintiffs
<i>U.S. v. Roosevelt County</i>	2000: 00-50-BLG-JDS	Vote dilution – at-large districts	County Commission	2000 Consent Decree
<i>McConnell v. Blaine County</i>	2001: 01-91-GF-RFC	Vote dilution – at-large districts	County Commission	Follow up to <i>U.S. v Blaine</i>
<i>Jackson v. Wolf Point School District</i>	2013: 13-65-GF-BMM	Vote dilution - malapportioned voting districts	School Board	2014 Consent Decree

These cases offer insights into racial polarization, the history of official discrimination and some of the structural and attitudinal barriers confronting American Indians seeking equal access to political participation in Montana. Success in electing American Indians to office resulted from the history of litigation rather than proactive policy changes. The proliferation of Section 2 litigation on Montana is evidence of the ongoing pattern of discrimination. The fact that American Indians can now be elected to public office in areas of Montana where American Indian voters make up the majority has been hard fought for and won. The success of American Indian candidates in districts where American Indians constitute the majority of voters is now a natural outcome of simple majoritarian voting rules, based on population distribution and the removal of practices and procedures that diluted the Native vote. Such representation indicates that that the system for aggregating votes once they have been cast functions in an equitable manner: It says nothing about equality in access to political participation.

While vote dilution cases tended to challenge discriminatory practices on a county-by-county or specific district level, vote denial under Section 2 results from procedures that deny or abridge the right to vote on account of race at a more general level. In moving from vote dilution to vote denial in general elections, the unit of analysis most relevant is the county, as the ‘totality of the circumstances’ faced by a class of citizens interacts with state and county election administration practices so that members of that category of citizens have less opportunity than other members of the electorate to participate in the political process. Vote dilution can be viewed as the ability to elect candidates once a voter gets to where he or she votes, but the ability of the voter to cast that vote in the first place that is at issue in vote denial. It is entirely possible that vote denial prevents vast numbers of the electorate from voting, but those who do vote are able to have their vote count in the absence of vote dilution.

Having shown the history of discrimination in voting, the discussion now examines how the effects of past discrimination is reflected in areas such as education, employment, health and poverty that contribute to a totality of circumstances that render political processes fundamentally unequally in terms of facilitating participation for American Indians living on Reservations in Montana.

### ***C. The Specific Conditions of American Indians on Montana Reservations***

Although Montana contains some of the largest and most populated reservations in the United States, with the exception of the Flathead Reservation, Montana’s Reservations tend to be located in remote and sparsely populated areas of the state. Montana’s seven Reservations, like many Montana counties, retain frontier status, which is generally defined as having a population density of less than seven people per square mile. The Crow Reservation, located in parts of Big Horn, Yellowstone and Treasure Counties in southern Montana, and covering a total area of 3,593.6 square miles (9,340.9 km<sup>2</sup>), is the largest Reservation in Montana and ranks either fifth or sixth largest in the U.S. depending on whether total area, or land mass is used for comparison. The Crow Reservation covers approximately 64.2 percent of the landmass of Big Horn County.

The Northern Cheyenne Reservation lies adjacent to the Crow Reservation in the northeast portion of Big Horn County (representing a further 6.4 percent of that county's land mass) and parts of Rosebud County. With a landmass of 444,000 acres, the Northern Cheyenne is one of Montana's smaller Reservations, with the majority of that landmass within Montana's fourth largest county of Rosebud.

Located in a remote region of northwestern Montana along the slopes of the Rocky Mountains, the Blackfeet Reservation is home to Montana's largest tribe and the ninth largest American Indian population within a statistical area in the United States (US Census, 2012). The Blackfeet Reservation covers approximately 3,000 square miles (7,800 km<sup>2</sup>), spans portions of Glacier and Pondera Counties, and is bordered by Canada to the north and Glacier National Park to the west. Approximately 70.9 percent of Glacier County's land area lies within the Blackfeet Reservation (comparable to the 70.6 percent of Big Horn County that lies within Crow and Northern Cheyenne Reservation boundaries).

Covering 3,289.4 square miles (8,519.5 km<sup>2</sup>) and spanning portions of Roosevelt, Valley, Daniels and Sheridan Counties, the Fort Peck Reservation is the ninth largest in the U.S. and home to members of the Assiniboine and Sioux tribes. Over 74 percent of the landmass of Roosevelt County lies on the Fort Peck Reservation. Created in 1919 through the division of Sheridan County, the Roosevelt County Seat at Wolf Point lies within Fort Peck Reservation boundaries. This reflects the legacy of the Dawes Act as less than half of Reservation land is tribally owned – either individually or in trust.

The Flathead Reservation covers 1,938 square miles (5,020 km<sup>2</sup>) spanning portions of Lake, Saunders, Missoula and Flathead Counties. It is home to the Bitterroot Salish, Kootenai and Pend d'Oreilles Tribes, also known as the Confederated Salish and Kootenai Tribes of the Flathead Nation and ranks just behind the Blackfeet Reservation as the tenth largest American Indian population within a statistically defined area in the United States (US Census, 2012). Over two thirds of the landmass of Lake County lies within the boundaries of the Flathead Reservation. As in Roosevelt County, the Lake County Seat of Polson lies on the Flathead Reservation. Approximately one third of the

land on the Flathead Reservation is not tribally owned – either in trust or by individual tribal members.

The Fort Belknap Reservation covers 1,014.1 square miles (2,626.4 km<sup>2</sup>) spanning Blaine and a small portion of Phillips Counties in north central Montana. It is home to members of the Gros Ventre and Assiniboine tribes. According to the 2010 U.S. Census the county's population is almost evenly split between American Indians who make up 49 percent of the population and the white population who make up 48 percent.

The Rocky Boy's Reservation of the Chippewa Cree is the smallest in Montana covering just 56,038 acres (226.8 km<sup>2</sup>) in portions of Hill and Choteau Counties. Unlike the Crow and Fort Belknap Reservations, where polling locations within the Reservation boundaries are administered by a single county, voters registered to vote at polling locations on the Rocky Boy's Reservation cast their votes in both Hill and Choteau Counties.

An additional group of American Indians, the Little Shell Tribe of Chippewa Indians, is recognized by the State of Montana, but has yet to gain federal recognition. With no Reservation land base, the Little Shell Tribe has its headquarters in Great Falls in Cascade County, and population concentrations in Hays and Chinook in Blaine County, Havre in Hill County, Helena in Lewis and Clark County, Lewiston in Fergus County, Butte in Silver Bow County, Wolf Point in Roosevelt County, Hamilton in Ravalli County, and Billings in Yellowstone County.

The extremely cursory summary offered above indicates some of the diversity between American Indians Tribes in Montana. The largest Reservations in terms of land mass are not necessarily homes to the largest populations of American Indians. Also the history of plains settlement in the U.S., with the policy of keeping American Indians remote from settler populations, meant that American Indian populations are often situated in some of the most inhospitable locations – sometimes within Reservations when substantial portions of Reservation lands are not tribally owned. In addition to studying nations within a nation – each with a distinct history and language(s) – a

confounding consideration in looking at life on American Indian Reservations in relation to county and state government is cartography and the fact that Reservations tend not to conform to county boundaries. The disjunction between county and tribal boundaries contributed to redistricting processes that diluted the American Indian vote and were challenged under Section 2 of the Voting Rights Act in *Old Person*. Of the seven Reservations in Montana, only on the Crow and Fort Belknap Reservations do all the voters registered at polling locations on the Reservation vote within a single county – Big Horn for the Crow and Blaine for the Assiniboine and Gros Ventre. Boundary differences and the legacy of the Dawes Act in creating different land ownership patterns within Reservations also create methodological challenges in determining the appropriate unit of analysis in studies such as this.

### ***1. Life on Selected Reservations: The Legacy of Past and Continuing Discrimination***

This analysis focuses on the Crow, Fort Belknap, Blackfeet, Northern Cheyenne and Rocky Boy's Reservations in Big Horn, Blaine, Glacier and Pondera, Rosebud, Chouteau and Hill Counties. These counties all have polling locations located on Reservation lands. A similar analysis could be completed for Flathead and Fort Peck Reservations, but adjustments would have to be made for the large white populations living on these Reservations, and the fact that both of these Reservations contain county seats within their boundaries. The analysis could also be extended to counties such as Yellowstone County that contains portions of the Crow Reservation, but does not administer polling locations on the Reservation. Thus, this portion of the analysis focuses on the enduring effects of discrimination in areas such as education, employment, poverty and health that hinder the ability of American Indians living on five Reservations to vote in seven counties with polling locations within reservation boundaries.

A further complication in this analysis is the legacy of Dawes Act and how differences in the application of the allotment system in Montana have resulted in different land ownership patterns between Reservations. In all of the counties examined

American Indians are more likely to live on Reservation lands than in other county locations. With the exception of Big Horn County, over 90 percent of the populations of each of the Reservations examined identify as American Indian, with over 96 percent of the population of Fort Belknap in Blaine County identifying as American Indian. By contrast in Big Horn County, 15.8 percent of the population living on the Crow Reservation identified as white. According to the 2010 Census, just under two thirds of the population of Big Horn County identify as American Indian. Approximately 82.7 percent of American Indians in Big Horn live on the Crow Reservation. However, the separation of settler communities on lands within Reservations is evident in where white communities are clustered in Big Horn County. Figure 2 shows the locations of all of the polling locations in Big Horn County in the 2014 election.

Figure 2: Map of Polling Locations in Big Horn County



While the north-western portion of the Crow Reservation lies within Yellowstone County, there are no polling places located in the Yellowstone portion of the Crow Reservation. Thus, in addition to having to travel to the county seat in Billings – a one-way journey of up to 35 miles that takes over 50 minutes during winter – to access the

full range of options for voting in the 30 days leading up to an election, Reservation residents living in Yellowstone County must leave Crow Reservation in order to cast a ballot on Election Day. Thus, while this analysis focuses on Crow Reservation voters living in Big Horn County, the availability of a satellite office in the Yellowstone portion of the Reservation is also important to ensure that all Crow Reservation voters have equal access to vote – that is equivalent to the access enjoyed by other residents in Yellowstone and Big Horn Counties.

In Big Horn County with the exception of Pryor (Point A) that lies towards the western boundary of the Crow Reservation close to Yellowstone County and St. Xavier (Point B) that lies to the west of MT-313, American Indian populations tend to be clustered close to or east of I-90, while white communities on the Crow Reservation tend to lie along MT-313 (the green route in Figure 2). MT-313 provides a direct route north into Hardin so that residents living along that route do not have to venture further into the Crow Reservation in traveling to the county seat of Hardin (Point I). The community of Fort Smith (Point C) that lies at the end of MT-313 on the Crow Reservation has very few American Indian residents. Reflecting this, in their statement of undisputed facts, defendants in *Wandering Medicine* indicated that Big Horn County does not categorize the voting precinct at Fort Smith as a Reservation precinct. The American Indian community of St. Xavier (Point B) lies off MT-313. The road quality is markedly different in traveling off MT-313. The gravel roads into St. Xavier are riddled with potholes that made travel in summer, when field research was conducted, difficult. The communities of Sarpy (Point J) and Decker (Point H) have the only polling locations outside of Hardin that do not lie within Reservation boundaries. Point D is the polling location for the Busby community. Unlike other Reservation polling locations, Busby lies both in Big Horn County and within the boundaries of the Northern Cheyenne Reservation. The contrasts observable in moving between white and American Indian communities on the Crow Reservation in Big Horn reflect the racial polarization of these communities as well as differences in the objective conditions of present reality.



In contrast with the Crow Reservation, with which it shares its southern-most boundary, almost all of the land on the Northern Cheyenne Reservation is tribally owned. Although the Northern Cheyenne Reservation has two polling locations within its boundaries, only one of these lies within Rosebud County. This is located at the Tribal Headquarters in Lame Deer (Point D in Figure 3). The other polling location is in Busby, a community in Big Horn County (and included as point G in Figure 2 above). Thus 60.0 percent of the voters registered at precincts on the Northern Cheyenne Reservation vote in Rosebud County and make up 27.1 percent of that county's registered voters. Figure 3 shows the locations of seven of the eight polling locations in Rosebud County. Point B is the county seat in Forsyth. While the polling location in Forsyth serves the greatest number of registered voters, Forsyth is only the third largest population center in Rosebud County, after both Colstrip and Lame Deer.

Figure 3: Map of Polling Locations in Rosebud County



What is unique about Rosebud County is that of the seven counties examined, Rosebud is the only county with mixed polling locations whose areas cross the Reservation boundary and thus serve both American Indians living on the Northern Cheyenne Reservation and other voters living outside of the reservation. These polling locations in Ashland (Point F in Figure 3 that served 414 registered voters in the 2014 election) and Birney (Point that served 62 registered voters) are in schools that lie outside the Reservation boundary.

Point C is the polling location in Colstrip that has the greatest number of registered voters outside of Forsyth at 1,390, and is the largest population center in Rosebud County, followed closely by Lame Deer. Situated 36 miles from Forsyth, Colstrip is the location of the Rosebud County Satellite Office that offers property tax services, vehicle registration and driver's license services, but no voting services in the thirty days preceding an election. Point D is the polling location in Lame Deer, which serves 1,018 registered voters, and is also the proposed location of the satellite election office. This location is close to the intersection of highways I-212 and M-39, the major access routes running through Rosebud County. The western-most Rosebud polling location lies to the northwest of Forsyth, in Ingomar (not shown in Figure 2), and serves 79 registered voters. As can be seen in Figure 3, the shortest route for voters from Birney and Ashland traveling to Forsyth, or Colstrip runs through Lame Deer. The location of the existing County Satellite Office in Colstrip would be considered inefficient in economic terms. Although Colstrip is Rosebud's largest population center, a greater number of residents (from Lame Deer, Ashland, and Birney) would benefit through decreased travel distances to access county services if the County Satellite Office was located in Lame Deer. A County Satellite Office in Lame Deer would also provide a closer option for resident in Colstrip, who would have the option of traveling 23.2 miles one way to Lame Deer or 36.4 miles one way to Forsyth to access county services.

Polling locations where Northern Cheyenne tribal members have to leave the Reservation to vote create additional barriers to political participation. In Ashland it is not uncommon to see families from the Northern Cheyenne Reservation walking along

the I-212 across the Tongue River, that marks the Reservation boundary, to buy gasoline or groceries. American Indians are hesitant to take their cars into Ashland because of the risk and costs associated with having a car impounded. The Sheriff's Station lies between the Tongue River and the grocery stores in Ashland and is less than half a mile from the polling location at the Ashland School. Birney is a village divided, with 'Old Birney' located on the Northern Cheyenne Reservation and 'White Birney,' where the polling location is situated outside of the Reservation boundary. Although American Indians have to leave the Northern Cheyenne Reservation to vote in both Birney and Ashland, in court documents in *Wandering Medicine v McCulloch* Rosebud County Clerk, Geraldine Custer articulated that the county considers Ashland to be a Reservation precinct, but not Birney.

In conversations with members of the Crow and Northern Cheyenne Nations, experiences of racism when leaving the Reservation became a recurrent theme. A common comment was that while racism and feelings of tension exist in Hardin, Big Horn County, the situation is worse in Colstrip and Forsyth, in Rosebud County. This may be because unlike Big Horn County, American Indians are in the minority in Rosebud County, making up approximately one third of the population. Lead plaintiff, Mark Wandering Medicine spoke of American Indians who travelled to Forsyth to renew their vehicle registration being made to wait while white residents who arrived after them were served before them and county personnel took extended breaks.

One of the sons of plaintiff Marty Other Bull, who traces both Crow and Northern Cheyenne descent, and spent parts of his childhood in Busby and Lame Deer, spoke of the racism and abuse he and his high school teammates faced in leaving the Reservation to play basketball – particularly in Forsyth and Miles City, the county seat of neighboring Custer County. Mark Wandering Medicine also spoke of continued concerns about the treatment of American Indian children traveling to play basketball. He recalled one incident in Belfry, which is close to Billings, where his daughters' basketball team was subject to such verbal abuse and unfair refereeing that their white coach withdrew the team from the game at half time. As the girls returned to the bus, the other team and

their supporters pelted them with snow balls and continued the verbal abuse including cries of “dog eaters.” In responding to an interrogatory question about attending sporting events Buster Moore, one of the plaintiffs from Fort Belknap, responded that children are sacred, and that it was necessary to attend their games to protect them.

The treatment of American Indian school children when they leave their Reservations for school events, such as basketball games, continues to be a concern for parents and elders living on Reservations. Mark Wandering Medicine spoke of how this issue is raised every time campaigning politicians visit the Northern Cheyenne Reservation. “The only time we see someone that’s interested is when they want our votes. When are they going to do something about our kids getting harassed? We don’t get no answers.”<sup>5</sup> These examples show how attending activities such as high school basketball games have a different valence for American Indians living on Reservations, and cannot be viewed as a discretionary recreational activity. Thus while geographic distance creates monetary costs for American Indians seeking the full range of voting services in election offices located in the county seats, the psychological costs related to past experiences of racism and abuse may form a greater barrier to travelling outside of Reservations to late register or cast an in-person absentee ballot.

The above examples drawn from Big Horn and Rosebud Counties demonstrate aspects of racial polarization facing American Indians living on Reservations in Montana. While discussions with tribal members illuminate aspects of continued discrimination in dealing with public agencies and the general public, the effects of discrimination are also evident in enduring disparities between American Indian and white populations in the counties concerned across a range of indicators. Table 3 outlines select demographic and socioeconomic indicators for American Indian and white populations living in the Counties under examination based on data from the 2010 Census and American Community Surveys.

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<sup>5</sup> Interview with Mark and Ilo Wandering Medicine. Monday, 24 August 2014 at 3:00 p.m. at the Northern Cheyenne Tribal Headquarters in Lame Deer, MT.

## **2. *The Legacy of Discrimination in Economic, Education and Health Disparities***

An examination of demographic indicators in the counties with polling locations on the Blackfeet, Crow, Fort Belknap, Northern Cheyenne and Rocky Boy's Reservations reveal major differences between American Indian and white populations across a range of variables. Approximately 20 percent or more of American Indians in these counties have not completed High School. The education gap on the Reservations is more pronounced in higher educational attainment with less than 14 percent of American Indians completing a Bachelor's degree. Laughlin McDonald, Director Emeritus of the Voting Rights Section of the ACLU, who has worked on Native voting rights cases since 1983 and was one of the attorneys who represented Crow plaintiffs in *Windy Boy v. Big Horn County* (Civ. No. 83-255-BLG) connects the high school dropout rate of American Indians in Big Horn County to a number of factors including the real and perceived discrimination from white students and school administration (McDonald, 2010).

Health disparity data is not included in Table 3 because very little is available at the state or county levels. In 2010 the average life expectancy of an American Indian living in Montana was 69.2 years, almost 10 years less than that of white Montana residents, which at 79.1 years was a little above the national average (Arias, 2014). According to the Indian Health Service, the age-adjusted death rate for American Indian adults exceeds that for the general population – with the death resulting from diabetes, chronic liver disease, and accidents occurring at more than three times the national rate (IHS, 2014). Sarche and Spicer (2008) place American Indian health and healthcare disparities across the lifespan within the wider context of social and demographic disparities.

Table 3: Selected Demographics for American Indian and White Populations in Seven Counties Containing Reservation Lands

SELECTED DEMOGRAPHICS	Big Horn		Blaine		Chouteau		Hill		Glacier		Pondera		Rosebud		MONT-ANA
	Am. Indian	White	Am. Indian	White	Am. Indian	White	Am. Indian	White	Am. Indian	White	Am. Indian	White	Am. Indian	White	
Population	8,278 64.4%	4,035 31.4	3,209 49.4%	3,130 48.2%	1,273 21.9%	4,409 75.8%	3,504 21.8%	11,896 73.9%	8,796 65.7%	4,165 31.1%	890 14.5%	5,086 82.6%	3,205 34.7%	5,664 61.4%	989,415
Population less than 16 years old	3,319 40.1%	560 12.9%	1,100 34.3%	574 18.3%	584 45.9%	752 17.1%	1,345 38.4%	2,318 19.5%	3,022 34.4%	810 19.4%	218 24.5%	1,058 20.8%	1,301 40.6%	1,160 20.5%	195,030 19.7%
Did not complete High School	694 19.3%	425 13.5%	312 19.3%	261 11.4%	103 21.8%	239 7.3%	279 16.6%	564 7.0%	1,065 23.9%	531 17.5%	70 13.3%	483 13.7%	287 19.9%	347 8.7%	54,629 8.1%
High School Grads over 25	2,893 80.7%	2,732 86.5%	1,305 80.7%	2,036 88.3%	370 78.2%	3,018 92.6%	1,401 83.4%	7,429 93.0%	3,386 76.1%	2,496 82.5%	457 79.7%	3,085 87.4%	1,157 80.0%	3,660 91.3%	202,958 91.9%
Bachelor's degree or higher	373 10.4%	503 15.9	184 11.4%	495 21.6%	44 9.3%	805 24.7%	200 11.9%	1,788 22.4%	323 7.3%	745 24.6%	79 15%	717 20.1%	197 13.6%	772 19.3%	191,216 28.5%
Unemployment	18.9%	1.8%	18.9%	3.1%	11.0%	0.5%	11.5%	2.5%	20.8%	4.4%	15.8%	1.3%	27.0%	2.8%	3.7%
Carpool to work	23.2%	8.7%	18.1%	7.8%	24.3%	8.4%	25.1%	9.3%	15.2%	12.5%	21.8%	6.4%	23.2%	8.9%	10.7%
Median family Income	35,946	47,308	29,438	49,300	23,264	55,024	26,649	60,278	31,266	67,125	26,500	48,750	39,643	60,918	55,725
Average family size	5.05	3.15	3.91	2.75	4.72	2.85	3.86	2.98	3.95	3.27	5.24	3.16	4.24	2.99	2.91
Families living in poverty	28.7%	12.8%	37.6%	12.2%	56.2%	7.7%	42.4%	4.9%	31.7%	2.4%	41.7%	12.1%	31.9%	4.9%	9.7%
Median value owner occupied housing (\$)	59,700	107,400	51,700	79,900	49,200	111,000	49,200	125,900	42,300	76,300	34,000	84,400	55,700	91,700	278,418

A large body of literature has established the relationship between early childhood trauma and a range of poor physical and mental health outcomes that extend throughout the lifespan (Walker et al., 1999; Edwards et al., 2003; Arnow, 2004). Recent studies have found an association between experiences of pervasive racism and increased incidences of psychological disturbance and substance abuse among minority groups (Carter, 2007; Chou et al., 2012). Although American Indians were not included in these studies, they suggest that extreme racism itself constitutes a traumatic experience. Bryant, Davis and Ocampo (2005) document similarities between sexual assault and racism in their lifelong impact on mental health and wellbeing. They note that both sexual assault and racism are experienced as attacks on personhood and the integrity of the individual that are difficult to anticipate and defend against. In studying African American youth in the juvenile justice system. Kang and Burton (2014) found that boys who had experienced extreme racial discrimination had more severe posttraumatic stress symptoms and higher rates of delinquency. These studies indicate a potential causal connection between exposure to racism – such as the experiences of American Indian children playing competitive sports at setting outside their Reservations – poor developmental and health outcomes, and the conditions documented in Table 3. Thus current discrepancies across a range of social outcomes may reflect both past and persisting discrimination.

Although the census data shows unemployment levels among American Indians in these counties far exceeding those of white residents, unemployment levels for Reservation populations are generally underestimated in Census data (Kleinfeld and Kruse, 1982; Gone and Trimble, 2012). Offering insights into the depth of this miscalculation, Haynes and Young, authors of the *Montana Poverty Report Card*, estimated unemployment on the Crow Reservation at 456.5 percent, Fort Belknap at 69.6 percent, Blackfeet Reservation at 68.5 percent and Northern Cheyenne Reservation at 59.8 percent in 2005, compared to 51.6 percent unemployment for all Montana Reservations and 14 percent statewide for Montana that year (Haynes and Young, 2011).

The availability of transportation contributes to unemployment on reservations, given their remote locations and lack of regular public transportation. American Indians employed in each county were more likely to rely on carpooling to travel to work than white workers – with close to one fourth of American Indians relying on someone else’s car to travel for employment. While this offers some indication of access to a reliable vehicle, focusing on work travel is likely to underestimate the problem of vehicle access, and therefore the ability to travel within and outside of Reservations. Although the Census supplies data on car ownership, it does not differentiate between cars that are owned and cars that are operational and/or registered and thus able to be driven off the Reservation. When asked in an October 2012 interrogatory about the number of cars he owns. Woodrow Brien, a plaintiff from the Crow Reservation stated that he while he had two cars, his 1990 Ford F150 pick up had high mileage, and the other car he owned was parked on his lawn and inoperative. A comprehensive survey alternative to the US Census conducted on the Wind River Reservation in Wyoming that asked questions more salient to American Indians and Reservation life can shed light on vehicle access in Montana. In surveying household where the head of household was unemployed, Massey and Blevins (1999) found that 56.7 percent cited the lack of a reliable vehicle as a factor limiting their employment prospects. A 2013 article in the *Washington Post* sited lack of transportation as a factor contributing to high unemployment on the Fort Peck Reservation on Montana (Layton, 2013). Additionally, a 2015 article published as part of the University of Montana, School of Journalism’s Native News Project discussed how the lack of a household car impacts school attendance on the Rocky Boys Reservation (Anderson, 2015). The availability of a reliable car contributes to the costs of participating in a range of economic, educational, social and civic activities.

In reviewing the circumstances facing American Indians in Big Horn County, Laughlin McDonald (2010: 63) offered this summary:

American Indians were caught in a vicious cycle of self-perpetuating causation. Their depressed social status, their lack of access to decent-paying jobs (or any job at all), their isolation from the majority of the community, the stereotyping inflicted on them by some whites, and their low levels of



educational attainment all coalesce to perpetuate the disadvantages that plagued them in most areas of their lives. Their poverty bred poverty. Their isolation bred isolation. Their lack of advantages bred disadvantages.

Twenty-five years later, Table 3 show how little has changed. Persisting disparities combine to increase the cost of voting for American Indians living on the Blackfeet, Crow, Fort Belknap and Northern Cheyenne Reservations. The depressed socioeconomic conditions that made it more difficult for American Indians to participate in the political process at the time of the *Windy Boy* litigation in 1986 persist into the present.

#### **IV. Distance as a Cost of Voting**

A large body of work within the political economy literature focuses on the cost of voting. In his seminal work on voting, Downs states:

We have assumed that voting is a costless act, but this assumption is self-contradictory, because every act takes time. In fact, time is the principal cost of voting: time to register, to discover what parties are running, to deliberate, to go to the polls, and to mark the ballot. Since time is a scarce resource, voting is inherently costly." (1957: 257)

Not only are the monetary costs of voting more salient for those living in poverty, but also the opportunity costs associated with time are greater with larger families and extended networks of family obligations. When costs become sufficiently high, rational voters will abstain by not voting. In theory even tiny changes in cost could lead to wholesale abstention (Niemi, 1976; Sanders, 1980). When onerous registration requirements are imposed, voter participation rates decline (Wolfinger and Rosenstone, 1980; Aldrich, 1993). Returning to Downs' (1957) time costs of voting, Gibson et al. (2012) innumerate the impact of the opportunity cost of traveling to vote in showing that small increases in this opportunity cost have large effects on voter behavior. Thus the impact of greater travel distances is exacerbated by both resource availability and time factors associated with extended family obligations in lowering voter turnout.

The starting point in assessing the ability of voters to travel to the election office in the county seat to take advantage of the full range of late registration and early voting options is to calculate the additional distance they would have to travel from their

precinct polling location to the election office at the County Court House. Table 4 outlines the number of voters registered to vote in the 2014 General Election at precincts on and off the Blackfeet, Crow Northern Cheyenne, and Fort Belknap Reservations, as well as factors impacting driving conditions that might influence the decision of whether or not to travel to the County Court House to late register or early vote as they would have had to prior to August 2014. Since MT Votes system does not include data on race, a methodological assumption made in this analysis is to consider precincts with polling locations situated on Reservations as Reservation precincts – unless there is evidence to the contrary.<sup>6</sup> The incremental distance measure used is a conservative estimate since voters would have to travel from their homes rather than from their polling location into Hardin, Chinook, Cut Bank or Forsyth in order to register and/or cast an early ballot. Inherent in this measure is the assumption that American Indians want to participate in elections.

Since the majority of American Indians living on Reservations have street addresses “that don’t exist” (Woodard, 2012b) – and the systems used for estimating these addresses can differ by county – it is impossible to measure the total travel distance from home to the County Court House for the majority of voters registered to vote at precincts on Reservations. For example, Big Horn County uses township-range approximations (based on a grid system), the most common unconventional address system used in Rosebud County references highways and mile markers – with a number of registered voters having their home address on the Montana electoral role listed as “None, Lame Deer, Lame Deer.”

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<sup>6</sup> In *Wandering Medicine v. McCulloch* there was agreement between the Plaintiffs and the Defendants on Reservation precincts. Fort Smith, although located on the Crow Reservation was not considered a Reservation precinct. Conversely, Rosebud County Commissioners consider the Ashland precinct as a Reservation precinct in spite of its location outside of Northern Cheyenne Reservation Boundaries. Although the Birney precinct is not considered an American Indian precinct, field research conducted in support of the Plaintiffs found that, like Ashland, Birney is a mixed precinct. For these reasons, Fort Smith, Ashland and Birney are excluded from the analysis in Table 4.

Table 4: Distance and Factors Impacting Travel to Vote

2014 VOTING & DISTANCE	Big Horn		Blaine		Chouteau		Hill		Glacier		Pondera		Rosebud	
	Res.	Non-Res.	Res.	Non-Res.	Res.	Non-Res.	Res.	Non-Res.	Res.	Non-Res.	Res.	Non-Res.	Res.	Non-Res.
Registered voters	5,091	2,766	1,574	2,248	362	3,219	1,204	8,153	4,771	2,341	435	3,026	1,018	3,756
Precinct distance to Court House	33.8 mi	7.0 mi	36.9 mi	12.3 mi	59.1 mi	17.1 mi	26.7 mi	4.6 mi	37.9 mi	1 mi	64.8 mi	10.0 mi	59.2 mi	25.6 mi
Average Oct/Nov temperature	26.1° F	26.1° F	24.5° F	24.2° F	30.2° F	26.2° F	30.2° F	30.1° F	26.1° F	25.6° F	30.2° F	42.9° F	26.1° F	26.1° F
Average Oct/Nov snow	2.3 in	2.2 in	2.5 in	2.8 in	2.5 in	2.9 in	2.5 in	3.9 in	9.1 in	2.9 in	9.8 in	3.3 in	2.2 in	2.1 in

Table 4 shows how voters registered at precincts located on the Reservations studied – including the majority of registered voters in Big Horn and Glacier Counties – had to travel significantly further to late register or early vote at the County Court House.<sup>7</sup> Distances were measured using the shortest travel distance on existing roads from precinct polling locations to elections offices in the county seats. A weighted average was then calculated based on the distance and the number of registered voters in each precinct. The most recent studies to examine distance in relation to voting have used the distance travelled, as calculated above, rather than straight-line distances. Gibson et al. (2013) discusses the limitations of using straight-line distances in relation to the individual cost of voting and voting behavior in general.

Given infrequent or nonexistent public transport available on Reservations and the travel distances involved, the notion that services offered at the County Election Office are equally available to all county residents presupposes access to a motor vehicle, which is shown in Table 3 to be a tenuous assumption. In an October 2012 interrogatory Sarah Stray Calf, enrolled member of the Crow Nation and one of the original plaintiffs in *Wandering Medicine*, spoke of the challenges of driving people living on the Crow Reservation who had limited or no access to reliable transport to vote on Election Day 2010. In driving people to vote, she stated that she knew a lot of people who wanted to vote, but there was not enough time on Election Day for her to drive the distances in time to get them to vote at their polling location. She further commented that the polling locations closed before she could get all of the people she knew who wanted to vote to the polls.

Weather conditions in November impose additional costs on American Indians living on Reservations seeking to vote and contribute to the likelihood that Reservation residents will not be able to vote if they are restricted to a single day on which to vote with their only being to cast a ballot at their polling location on Election Day. A storm on Election Day 2012 prevented Mark Wandering Medicine traveling from Birney to his

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<sup>7</sup> In assessing distances, in some cases the polling location could not be located using GIS, Google maps, or other mapping software and were calculated using driving distances collected as part of my fieldwork.

polling location in Lame Deer to vote because he could not move his car. Commenting on how the weather interacts with distance to create a barrier to voting, Wandering Medicine stated: “The weather being a factor also. If somebody lives in outlying districts and we get one of these Montana winter storms on Election Day, you can’t make it” (Cardinale, 2013).

While Mark Wandering Medicine lives in Old Birney and must drive the at least 38.6 miles to vote in Lame Deer, Hugh Clubfoot – who like Mark Wandering Medicine is an enrolled member of the Northern Cheyenne and also lives in Old Birney – votes in White Birney. Mark Wandering Medicine’s journey illustrates an additional cost associated with travel not included in Table 4 – time. Travel time was not included in Table 4 because it directly reflects weather and road conditions, which vary greatly. In traveling from Birney into Lame Deer, Mark Wandering Medicine has two options: the more direct route of 38.6 miles one way can take 1 hour 18 minutes in September; the alternative route through Ashland is 53.5 miles one way and can take 1 hour 30 minutes in September. As weather conditions worsen, travel times increase and the 53.5 mile journey through Ashland can take less time than the direct route from Birney to Lame Deer. Therefore, the travel distances calculated in Table 4 are likely to underestimate the cost of traveling to late register or cast an in-person absentee ballot at the county election office.

Many voters on the Northern Cheyenne Reservation would prefer to incur the monetary costs of travel within Reservation boundaries to vote in Lame Deer during the extended period for voting, rather than face non-monetary costs of leaving the Reservation to vote in Ashland or Birney. In an October 2012 interrogatory Hugh Clubfoot stated that he rarely leaves the Reservation because of the costs. In addition to monetary costs, there are social and psychological barriers to traveling off the Reservation. Echoing the sentiments of many of the Crow and Northern Cheyenne plaintiffs, Clubfoot stated that he only leaves the Reservation to go to White Birney when he has to.

An additional psychological barrier for American Indians traveling to the county seat to access services is the concentration of county operations in a single site. Often the County Court House hosts a range of county services that can include both the county election office and the county jail. In Indian Country the pattern of racial profiling of American Indians by law enforcement is often accompanied by the targeting of American Indians for the prosecution of serious crimes and the imposition of harsher prison sentences (ACLU, 2009). Inadequate legal counsel provided by overburdened public defenders make it more likely that American Indian defendants will take a plea deal – receiving longer sentences than white defendants arrested for similar offences. In 2008 American Indians made up 20 percent of the men and 27 percent of the women in Montana prisons while making up only 7 percent of the state’s population (Rave, 2009). American Indian youth are more likely than their white counterparts to be both arrested and serve time in detention once arrested. In discussing the school-to-prison pipeline in Montana, Healey (2013) notes that in 2009 American Indian juveniles were arrested at a relative rate that is 1.66 times greater than that of white juveniles. This disparity increased with American Indian juvenile cases being transferred to court at 2.58 times that of white juveniles (Healey, 2013). For many American Indians living in Montana, the County House is associated with negative experiences with the criminal justice system. These associations can create another layer of cost for American Indians traveling to access county services that are located in the County Court House.

## **V. THE IMPACT OF DISTANCE AND ACCESS ON VOTING**

Although little research has been conducted on the impact of travel distances on voting in rural areas, Haspel and Knotts (2005) found that in addition to education and wealth, small differences in distance had major impact on voter turnout in urban areas. Table 5 shows voting trends for precincts located on and off Reservation lands in selected counties and demonstrates the impact of distance, health and educational disparities on voting behavior in precincts located on Reservations. With the exception of Big Horn County average voter turnout in Reservation precincts fell more than 20

percentage points below average turnout in precincts outside of Reservation boundaries. Reflecting access to mail service, less than one sixth of Reservation voters utilize vote by mail – with a mere 1.28 percent of Rocky Boys voters in Hill County registered on the list of permanent absentee voters. While the numbers shown are consistent with the general trend towards absentee voting among white voters, with the exception of Chouteau County, Reservation voters are approximately half as likely to cast an absentee ballot.

When Reservation voters utilize the mail vote, their ballots are significantly less likely to make it back to the election office and thus be counted. In Rosebud County in 2012, 43.2 percent of mail votes cast by voters registered at the Lame Deer precinct were classified as unreturned. The trends outlined in Table 5 demonstrate how distance, and socioeconomic conditions interact to deny America Indians living on Reservations the right to vote.

Table 5: Reservation Voting in the 2012 General Election

2012 GENERAL ELECTION	Big Horn		Blaine		Chouteau		Hill		Glacier		Pondera		Rosebud		MON- TANA
	Res.	Off Res.	Res.	Off Res.	Res.	Off Res.	Res.	Off Res.	Res.	Off Res.	Res	Off Res	Res.	Off Res.	
Registered Voters	5,497	2,919	1,670	2,389	391	3,465	1,185	8,622	5,112	2,504	456	3,186	1,117	3,996	681,608
All Votes Cast	2,861	1,843	1,025	1,875	193	2,691	551	6,410	2,673	1,881	261	2,500	544	2,953	491,966
	52.0%	63.1%	62.2%	78.5%	49.3%	77.7%	46.5%	74.3%	52.3%	75.1%	57.3%	78.5%	48.7%	73.0%	72.20%
Regular Votes Cast	2,365	1,108	840	1,013	110	1,433	438	3,056	1,749	729	214	1,571	392	1,617	202,046
Permanent Absentees	709	878	239	909	5	862	70	2,317	221	240	23	1,133	152	1,421	314,329
	12.90%	30.10%	14.30%	38.00%	1.28%	24.87%	5.91%	26.87%	4.32%	9.58%	5.04%	35.57%	13.60%	35.70%	46.10%
Total Votes by Absentees	496	735	185	862	83	1258	113	3,354	924	1,152	47	929	88	1,336	289,920
	17.3%	39.9%	18.0%	50.0%	43.0%	46.8%	20.5%	52.0%	35.0%	61.2%	18.0%	37.1%	16.2%	44.2%	58.9%
In-Person Absentee before Election Day	42	41	54	168	11	180	55	830	18	16	12	331	12	259	
Election Day In-Person Absentee	0	0	2	48	1	32	7	96	0	0	1	27	3	67	
Vote by Mail	452	681	105	644	71	1,050	47	1,787	890	1,086	33	899	58	1,003	
(% of votes cast)	15.8%	37.0%	9.0%	34.3%	36.8%	39.0%	8.5%	27.9%	33.3%	57.7%	12.6%	35.9%	10.7%	34.0%	
Unreturned Absentee Ballots	213	143	54	47	20	82	22	142	374	83	13	35	38	86	24,401
	30.0%	16.3%	22.6%	5.2%	20.6%	6.2%	32.4%	5.6%	29.6%	6.8%	28.9%	3.6%	43.2%	6.7%	7.8%
P.O. Box Addresses	3,366	483	874	752	209	1,256	413	383	2,807	265	296	318	690	1,115	
	61.2%	16.6%	52.3%	31.5%	53.3%	36.3%	34.9%	4.4%	54.9%	10.6%	64.9%	10.0%	61.8%	27.9%	



Given the history of official discrimination in voting, and the legacy of discrimination in areas such as education, health and employment, requiring American Indians living on Reservations to travel into their respective county seats in order to access that full range of options in registering to vote and/or cast an absentee ballot, constitutes a practice or procedure that denies or abridges the rights of American Indians to vote. These conditions and the call for election offices on Reservations in the thirty days preceding a federal election that would remedy the unequal access formed the substance of the claims made by the Plaintiffs in *Wandering Medicine v. McCulloch*. Factors such as conditions on Reservations, access to mail, the weather conditions, and the costs of travelling greater distances to the county seat coalesce to leave little or no choice in voting method for American Indians on Reservations. Therefore, the availability of satellite election offices that would facilitate late registration and in-person absentee voting for American Indians on Reservations for the full period allowed under Montana statute should be promoted by Secretary of State McCulloch in order to obtain and maintain the uniformity in the application of election laws. The analysis offered in this report outlines conditions in Montana that result in vote denial for American Indian voters living on Reservations in Montana. Thus, the provision of satellite election offices on Reservations that allow American Indian voters living on Reservations the same options for voting as other voters over the full period allowed under Montana law is a legal remedy that cannot be categorized as providing a mere convenience.

*"We fought for equality in other countries, so we will fight for equality at home."*

~ Mark Wandering Medicine

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