

Voter Identification Challenge for Native Americans Without Recognized Residential Street Addresses

Spirit Lake Tribe v. Jaeger
(Daniel L. Hovland, D.N.D. 1:18-cv-222)

Although acknowledging that the plaintiffs' claims were not without merit, a district judge denied immediate relief in a 2018 suit challenging the application of a voter identification requirement to residents of Indian reservations. The plaintiffs claimed that Native American voters often did not have recognized residential street addresses. But the complaint was filed only one week before the election. The case, and a related 2016 case, were resolved by a consent decree in 2020 that recognized tribal identification documents.

Subject: Voter identification. *Topics:* Voter identification; laches; interlocutory appeal; attorney fees.

North Dakota has no voter registration requirement, so a resident may appear at the polls on election day and cast a ballot without any previous expression of desire to vote. Election officials at the polls are charged with determining whether a person who appears is qualified to vote. Before 2013, voters could establish their qualifications by using certain forms of identification. If a voter could not present proper identification, the voter was nonetheless permitted to cast a ballot after swearing an affidavit or upon vouching by a poll worker.¹

An Indian tribe and six members of Indian tribes filed a federal complaint in the District of North Dakota one week before the 2018 general election to challenge a state requirement that voters show identification proving current residential addresses.²

Many streets on the Spirit Lake Reservation do not have marked signs on them and many houses are not labeled with numbers. On parts of the Reservation, the residences do not have street addresses assigned. Many members who do have street addresses assigned by 911 do not know their address and have not been notified of their address. On parts of the Reservation, mail service does not exist and members often rely upon P.O. boxes to receive mail.³

On the next day, the plaintiffs filed a motion for a temporary restraining order.⁴

1. Brakebill v. Jaeger, 932 F.3d 671, 674 (8th Cir. 2019).

2. Complaint, Spirit Lake Tribe v. Jaeger, No. 1:18-cv-222 (D.N.D. Oct. 30, 2018), D.E. 1.

3. *Id.* at 4–5.

4. Temporary Restraining Order Motion, *id.* (Oct. 31, 2018), D.E. 8; see Amy Dalrymple, *Court Case Seeks Relief for Native Voters in N.D.*, Bismarck Trib., Nov. 1, 2018, at A1.

An Earlier Stayed Injunction

The case was filed after the court of appeals stayed, on September 24, an injunction issued in a 2016 case.⁵

In its order granting injunctive relief, the district court highlighted its concern that under current state law, a resident who does not have a “current residential street address” will never be qualified to vote. No plaintiff in this case falls in that category. If any resident of North Dakota lacks a current residential street address and is denied an opportunity to vote on that basis, the courthouse doors remain open.⁶

The earlier case began with a January 20, 2016, federal complaint in the District of North Dakota filed by seven Native American voters challenging recently enacted voter identification laws.⁷ Judge Daniel L. Hovland issued a preliminary injunction on August 1.⁸

Until recently, North Dakota used a system of small voting precincts, whereby election boards and poll workers generally knew who were and who were not eligible voters in their precincts. If a poll clerk happened not to know a voter, they could ask that voter to produce one of many forms of an acceptable identification (“ID”) showing the voter’s residential address and birthday.⁹

As a fail-safe, “the voter could execute an affidavit swearing under penalty of perjury that he or she was a qualified elector in the precinct.”¹⁰ Subsequent legislation tightened voter identification options and removed the fail-safe provision.¹¹ Judge Hovland’s injunction prohibited North Dakota from enforcing its voter identification requirements without an adequate fail-safe provision.¹²

Legislation following Judge Hovland’s injunction provided for the set-aside of a ballot cast by a voter without sufficient identification so that the

5. *Brakebill v. Jaeger*, 905 F.3d 553 (8th Cir. 2018); see Second Preliminary Injunction, *Brakebill v. Jaeger*, No. 1:16-cv-8 (D.N.D. Apr. 3, 2018), D.E. 99 [hereinafter Second *Brakebill* Preliminary Injunction], 2018 WL 1612190.

6. *Brakebill*, 905 F.3d at 561.

7. Complaint, *Brakebill*, No. 1:16-cv-8 (D.N.D. Jan. 20, 2016), D.E. 1; see Amended Complaint, *id.* (Dec. 27, 2017), D.E. 77; see also James MacPherson, *Tribal Members Sue N.D. Over Voter ID*, Bismarck Trib., Jan. 22, 2016, at A1.

8. First Preliminary Injunction, *Brakebill*, No. 1:16-cv-8 (D.N.D. Aug. 1, 2016), D.E. 50 [hereinafter First *Brakebill* Preliminary Injunction], 2016 WL 7118548; see Robert Barnes, *Judge Rules N. Dakota’s Voter-ID Law Unfair to Native Americans*, Wash. Post, Aug. 2, 2016, at A15; John Hageman, *N.D. Preps for Election After Ruling on Voter ID*, Bismarck Trib., Aug. 14, 2016, at A1; Mike Nowatzki, *Judge Blocks Elector ID Law*, Bismarck Trib., Aug. 2, 2016, at A1.

“North Dakota’s secretary of state, Alvin Jaeger, indicated in an interview that the state would not appeal the decision and that November’s election would revert to using less restrictive identification rules that were in force before the 2013 law was enacted.” Michael Wines, *Judge Blocks North Dakota’s Voter ID Law*, N.Y. Times, Aug. 2, 2016, at A16.

9. First *Brakebill* Preliminary Injunction, *supra* note 8, at 2.

10. *Id.*

11. *Id.* at 3–4.

12. *Id.* at 28–29.

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voter could return with identification before the meeting of the canvassing board six days after the election.¹³

On April 3, 2018, Judge Hovland concluded, “The current law completely disenfranchises anyone who does not have a ‘current residential street address.’”¹⁴ He determined that “the Secretary of State shall allow a qualified voter to receive a ballot if they provide . . . identification that includes either a ‘current residential street address’ or a current mailing address (P.O. Box or other address) in North Dakota.”¹⁵

On September 24, the court of appeals, by a vote of two to one, stayed as too broad the injunction’s allowance of a mailing address as proof of eligibility to vote.¹⁶ “[A]ssuming that some communities lack residential street addresses, that fact does not justify a statewide injunction that prevents the Secretary from requiring a form of identification with a residential street address from the vast majority of residents who have residential street addresses.”¹⁷ Over a dissent by Justices Ginsburg and Kagan, the Supreme Court declined on October 9 to vacate the stay.¹⁸

No Injunction for the Spirit Lake Tribe

Because of how close the complaint was filed before the election, Judge Hovland denied the Spirit Lake Tribe and the other plaintiffs in the new case immediate relief on Thursday, November 1.¹⁹

In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern. The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit eleventh-hour changes to election laws.²⁰

On November 2, Judge Hovland adopted a negotiated stipulation by the parties confirming the individual plaintiffs’ eligibility to vote in the Novem-

13. Second *Brakebill* Preliminary Injunction, *supra* note 5.

14. *Id.* at 13 (citation omitted).

15. *Id.* at 15.

16. *Brakebill v. Jaeger*, 905 F.3d 553, 561 (8th Cir. 2018); *Brakebill v. Jaeger*, 932 F.3d 671, 676 (8th Cir. 2019); see John Hageman, *Appeals Court Ruling a Setback*, Bismarck Trib., Sept. 25, 2018, at B1.

17. *Brakebill*, 905 F.3d at 558; see *Brakebill*, 932 F.3d at 678 (coming to the same conclusion when finally resolving the appeal).

18. *Brakebill v. Jaeger*, 586 U.S. ___, 139 S. Ct. 10 (2018).

19. Injunction Denial Opinion, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-222 (D.N.D. Nov. 1, 2018), D.E. 33 [hereinafter *Spirit Lake Tribe* Injunction Denial Opinion], 2018 WL 5722665; see Amy Dalrymple, *Judge Denies Emergency Motion*, Bismarck Trib., Nov. 2, 2018, at A1.

20. *Spirit Lake Tribe* Injunction Denial Opinion, *supra* note 19, at 2 (quotation marks omitted).

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ber 6 general election.²¹ An amended complaint includes a second tribe as a plaintiff.²² On June 17, 2019, Judge Hovland struck from the amended complaint incorporations by reference to the other case's complaint.²³

Resolution of the Earlier Appeal

With the same vote as issued the stay in 2018, the court of appeals vacated Judge Hovland's stayed injunction on July 31, 2019.²⁴

The district court in this case enjoined entirely the statutory requirements concerning a residential street address, valid form of identification, and supplemental documents. If the court had rejected the request for statewide injunctive relief and required the plaintiffs to proceed with as-applied challenges based on their individual circumstances, then there may well have been time before the most recent election to consider whether narrower relief was justified.²⁵

Settlement

On February 10, 2020, Judge Hovland denied a motion to dismiss a second amended complaint in the 2018 case.²⁶ A settlement is now awaiting tribal council approval.²⁷

In this year's elections, Native American voters will be allowed to mark their homes on a map, and it will be the state's responsibility to use that information to verify their official addresses and make sure their ballots are counted. The state will also be required to provide the official addresses to the voters and their tribes, which could then issue tribal identification for use in future elections.

This formalizes an arrangement that some tribes used in the 2018 midterms, when a federal court allowed the voter ID law to take effect less than two months before Election Day. Tribal officials were stationed at polling places on reservations to issue handwritten identification on the spot, using ad hoc addresses, to voters who pointed out their homes on a map.²⁸

21. Order, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Nov. 2, 2018), D.E. 35; see Stipulation, *id.* (Nov. 2, 2018), D.E. 34; see also Amy Dalrymple, *ID Law Challengers Allowed to Vote*, Bismarck Trib., Nov. 3, 2018, at B1.

22. Amended Complaint, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Feb. 28, 2019), D.E. 43; see Blake Nicholson, *Tribe Joins in Challenge*, Bismarck Trib., Mar. 6, 2019, at B2.

23. Opinion, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. June 17, 2019), D.E. 50.

24. *Brakebill v. Jaeger*, 932 F.3d 671 (8th Cir. 2019).

25. *Id.* at 680–81.

26. Opinion, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Feb. 10, 2020), D.E. 79, 2020 WL 625279; see Second Amended Complaint, *id.* (June 20, 2019), D.E. 51.

27. See Motion for Extension of Time to Answer Second Amended Complaint, *id.* (Feb. 19, 2020), D.E. 83 (“The parties are currently in the process of preparing and negotiating final settlement documents.”); see Maggie Astor, *Voting Rights Victory for N. Dakota Tribes*, N.Y. Times, Feb. 14, 2020, at A16.

28. Astor, *supra* note 27.

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On April 24, Judge Hovland consolidated the 2016 case and the 2018 case for purposes of an April 27 consent decree.²⁹ Among the provisions of the decree were the following:

6. The Secretary of State shall recognize tribal IDs and supplemental documentation issued to tribal members and to non-member residents who are qualified electors living within the Tribal Government's jurisdiction.

7. The designation by a Tribal Government of a voter's current residential street address within the Tribal Government's jurisdiction is valid and conclusive for purposes of voting.³⁰

On May 7, Judge Hovland awarded the plaintiffs in the 2016 case \$452,983.76 in attorney fees.³¹ North Dakota's appeal is pending.³²

29. Consent Decree, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. Apr. 27, 2020), D.E. 97; Order, *id.* (D.N.D. Apr. 24, 2020), D.E. 95.

30. Consent Decree, *supra* note 29.

31. Order, *Spirit Lake Tribe*, No. 1:18-cv-222 (D.N.D. May 6, 2020), D.E. 98.

32. Docket Sheet, *Spirit Lake Tribe v. Jaeger*, No. 20-2142 (8th Cir. June 8, 2020).