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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

MIKE TOYUKAK, et al., Plaintiffs, v. MEAD TREADWELL, et al., Defendants.	CASE NO. 3:13-CV-137-SLG **STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA**

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of the United States in any pending suit. This case implicates the interpretation and application of the language minority requirements of Section 203 of the Voting Rights Act, 42 U.S.C. § 1973aa-1a (Section 203). Congress gave the Attorney General authority to enforce the Voting Rights Act, including Section 203, on behalf of the United States. *See* 42 U.S.C. §§ 1973j, 1973aa-2. Accordingly, the United States has a substantial interest in ensuring that Section 203 is properly interpreted and that it is vigorously and uniformly enforced.

I. BACKGROUND

In the instant action, the Plaintiffs allege, among other things, that the Defendants have violated Section 203 by failing to translate all of the election materials and information provided in English into the covered native languages and appropriate dialects in the Dillingham Census Area (DCA), Wade Hampton Census Area (WHCA), and the Yukon-Koyokuk Census Area (YKCA). *See* ECF No. 21 at 12-15 and 17-18. Both the Plaintiffs and the Defendants have filed dispositive motions pursuant to Rule 56 of the Federal Rules of Civil Procedure, along with voluminous exhibits and supporting information. *See* ECF Nos. 47, 69, 82, 86, 96 (Defendants' motions and memoranda); and ECF Nos. 056, 74, 87, 97 (Plaintiffs' motions and memoranda).

In their motion for summary judgment, the Plaintiffs argue that there is no dispute of material fact regarding the failure of Defendants to translate all election materials and information provided in English into the covered native languages and dialects in the DCA, WHCA, and YKCA. *See* ECF No. 56 at 4-5; and ECF No. 55-59.

In their motions for summary judgment, the Defendants do not dispute that they are not translating all election-related materials and information. Instead, they argue that it is undisputed

that they are providing election materials and information in the covered languages to some degree. *See* ECF Nos. 47, 69, 82, 86, and 96. They then argue that the Plaintiffs have the burden of proof to show that the language programs at issue are not effective, or that there are additional reasonable steps that the Defendants must take to comply with Section 203. *See* ECF Nos. 47 and 69. During a hearing on May 30, 2014, Defendants further argued that the statutory proviso for historically unwritten Native languages,[1] in conjunction with the flexibility in the Department of Justice's guidance for implementing Section 203,[2] enables the State to decide *whether* and *to what extent* information needs to be provided. *See* Transcript of Oral Argument on Motion for Summary Judgment at 41-42, Toyukak v. Treadwell, No. 3:13-CV-137-SLG (D. Alaska May 30, 2014) (hereinafter, "Transcript at __") (agreeing with the Court's characterization of its position as being that the State "can figure out just what really is important for them to get and not provide all of the same information that might that people are otherwise entitled to if they have a written language"); *see generally id.* at 36-37.

The limited purpose of this Statement of Interest is to set out the Attorney General's position that, contrary to Defendants' argument, Section 203 requires providing *all* the election information in the covered minority languages. The statutory proviso for historically unwritten languages addresses only the question of *how* the required translation is to be accomplished, not *whether* it must be done. Moreover, this Court should draw no inference about the propriety of the State's conduct from the fact that the Attorney General has not brought suit. Beyond

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[1] "*Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting." 42 U.S.C. § 1973aa-1a(c) (emphasis in original).

[2] 28 C.F.R. Part 55

addressing those issues, this Statement takes no position as to whether summary judgment in favor of either party is appropriate.

II. SECTION 203 REQUIRES THAT ALL ELECTION MATERIALS AND INFORMATION ALASKA PROVIDES IN ENGLISH ALSO BE PROVIDED IN THE LANGUAGE OF THE APPLICABLE MINORITY GROUP IN THE COVERED JURISDICTIONS

Section 203 requires that "whenever any [covered jurisdiction] provides *any* registration or voting notices, forms, instructions, assistance or other materials or information relating to the electoral process, including ballots, *it shall provide them in the language of the applicable minority group* as well as in the English language." 42 U.S.C. § 1973aa-1a(c) (emphasis added). The statutory language of Section 203 is clear and broad any information related to the electoral process, including ballots, that is provided to voters in English also must be provided in the covered language, whether the method of providing the information is in written or oral form. Reported decisions are consistent with the plain language. *See U.S. v. Sandoval Cnty*, 797 F. Supp.2d 1249, 1251 (D. N.M. 2011) (characterizing as a violation of Section 203 the county's "fail[ure] to furnish to covered voters all oral instructions, assistance, and other information related to voting in the [covered] languages"); *U.S. v. Metro. Dade Cnty*, 815 F. Supp. 1475, 1478 (S.D. Fla. 1993) (requiring the translation of a pamphlet concerning electoral information). The Director of the Census determines which jurisdictions must comply with Section 203 and that decision is not reviewable. 42 U.S.C. § 1973aa-1a(b). There is no question that Defendants are required to comply with Section 203 with respect to Alaska Native languages for the DCA, WHCA, and YKCAs, and have been covered continuously since 1975. *See* 40 Fed. Reg. 41, 827 (Sept. 3, 1975); 49 Fed. Reg. 25, 887 (June 25, 1984); 57 Fed. Reg. 43, 213 (Sept. 18, 1992); 67 Fed. Reg. 48, 871 (July 26, 2002); and 76 Fed. Reg. 63, 602 (Oct. 13, 2011).

The objective of Section 203 is to "enable members of applicable language minority groups to *participate effectively* in the electoral process." 28 C.F.R. § 55.2(b) (emphasis added). In order to achieve that goal, two basic standards must be met: "(1) that materials and assistance should be *provided in a way* designed to allow members of applicable language minority groups to be *effectively informed of and participate effectively* in voting-connected activities; and (2) [t]hat an affected jurisdiction should take all reasonable steps to achieve that goal." *See* 28 C.F.R. § 55.2(b) (emphasis added). With respect to the first criterion, the Attorney General has consistently taken the position that effective participation requires providing *all* election-related or voting-connected materials in the covered languages.

The second criterion involves the means by which those materials are provided including pre-Election Day outreach to the minority community, poll official training, bilingual oral assistance, and translated written materials. Contrary to Defendants' position, the guidance to "take all reasonable steps" does not exempt a covered jurisdiction from its statutory obligation. Rather, it articulates the requirement that the jurisdiction take the necessary steps to provide the information contained in *all* election materials to covered groups in a form that enables protected voters to participate effectively.

The history of Section 203 enforcement confirms this point. The Attorney General has entered into court-ordered consent decrees and agreements to resolve Section 203 violations that consistently have required comprehensive translation of election-related materials; what differs from one setting to another is how jurisdictions have tailored those comprehensive programs to meet the unique needs of their language minority groups. *See* http://www.justice.gov/crt/about/vot/litigation/caselist.php. In particular, the consent decrees and agreements with jurisdictions in Indian Country require implementation of election information programs that are as

comprehensive in scope as those involving other language minorities; they differ only in that they obligate those jurisdictions to provide all election information and materials that are provided to voters in English orally in the native language (where the Native language is only oral or historically unwritten), rather than in written form.[3] Filed herewith as Exhibit 1 are consent decrees and agreements obtained by the United States in jurisdictions with covered languages that are historically unwritten.[4]

All of the consent decrees and agreements entered into by the United States, regardless of whether they relate to written or historically unwritten languages, provide for the translation and dissemination of *all* pre-election and election-day materials and information to voters in the covered languages. The dissemination of pre-election materials and information in the covered

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[3] Because of the statutory proviso for historically unwritten native languages, the Attorney General has not required *written* translations of election materials and information for *oral or unwritten* native languages in its consent decrees and agreements. However, where a written form of the relevant native languages exists, jurisdictions are free to translate information and materials in that written form to supplement its oral translation program where it can assist in outreach and training, and to help ensure consistent and accurate translations. The Attorney General agrees that in some circumstances providing written translations of election materials and information either for the voters or for the training of poll officials can help to ensure that LEP voters are able to effectively understand and participate in the electoral process. The provision of written translations, however, is not a substitute for trained bilingual voting coordinators and outreach workers developing and deploying the language program prior to election day, and bilingual poll officials assisting voters in the polls on election day. *See* the consent decrees and agreements cited *infra.*

[4] Exhibit 1_A is a memorandum of agreement with Shannon County, SD (2010) for the Lakota language; Exhibit 1_B is a consent decree with Bernalillo County, NM (1998) for the Navajo language; Exhibit 1_C is a consent decree with Socorro County, NM (1994) for the Navajo language); Exhibit 1_D is a order modifying and extending a 1993 consent decree with Cibola County, NM (2004) for the Keresan and Navajo languages; Exhibit 1_E is a consent decree with the State of Arizona (1989) for the Navajo language); Exhibit 1_F is an order extending and modifying past consent decrees with Sandoval County, NM (2007) for the Keresan, Navajo and Towa languages; Exhibit 1_G is a consent decree with McKinley County, NM (1986) for the Navajo language; and Exhibit 1_H is an agreed settlement and order with San Juan County, UT (1984) for the Navajo language.

languages is accomplished by airing the translations of election information on the radio, producing written or oral advertisements and notices, and deploying designated bilingual voting coordinators or outreach workers. The dissemination of materials and information in the covered languages on election day is accomplished by the written translation of information and materials at the polling place, including ballots, *and* the oral translation of those materials and information by bilingual poll officials. In its recent agreement with Shannon County, South Dakota, for example, the United States required that the County provide the electronic voting machine audio ballot in the Lakota language, as well as assistance through bilingual poll officials.

In short, jurisdictions have flexibility to use targeting and choose reasonable methods to enable effective participation by covered populations. Targeting allows a covered jurisdiction to expend its resources within the jurisdiction in a way that will reasonably reach the individuals the statute is intended to serve, not to give the jurisdiction a basis to completely disregard the coverage determinations made by the Director of the Census. *See* 28 C.F.R. 55.17.

For example, a village with a single polling site and a small number of limited-English proficient (LEP) individuals might need only one trained bilingual poll official present on election day to provide effective assistance, as opposed to having all poll officials working at that site be bilingual. Provision of that single bilingual poll official might be a sufficiently "reasonable ste[p]" that additional efforts would be unnecessary. In contrast, at a large polling site with a high number of LEP individuals, one bilingual poll official might not be sufficient and more than one bilingual poll official might be necessary for the jurisdiction to satisfy the "reasonableness" criterion. Similarly, a large city with a concentrated LEP population in a limited set of voting precincts might act reasonably in targeting its use of bilingual poll officials to the voting precincts with the greatest need, rather than hiring bilingual poll officials for each

of the city's precincts.

At the same time, the steps a covered jurisdiction takes towards compliance cannot be viewed as "reasonable" if the jurisdiction fails to provide effective assistance to voters regarding the content of the ballots. Hiring purportedly "bilingual" poll officials without ensuring their fluency level or training them to competently perform their job is not reasonable and does not reach the standard required by the Attorney General for Section 203 compliance. Reasonable steps for the jurisdiction to take in that situation would be to ensure fluency, competence and adequate training for the bilingual poll officials, so that they *are* able to provide effective assistance.

In light of the plain language of the statute and the longstanding position of the United States in enforcing the language minority requirements of the Voting Rights Act, Defendants are incorrect when they argue that they do not have to provide all information that is provided in English, in the covered Alaska Native languages, in the covered jurisdictions. *See* ECF Nos. 47, 69, 82, and 96; *See also* Transcript at 36-67. Section 203 requires that *any* election materials and information provided in English *must* be provided in the covered language, in order to achieve effective participation in the electoral process. The Defendants admit that they are not doing so. *Id.* Defendants cannot merely assert that they are making a reasonable effort and expect that effort to go unchallenged or unreviewed. The Alaska Native voters deserve more, and the law requires more.

III. THE PROVISO IN SECTION 203 REGARDING HISTORICALLY UNWRITTEN LANGUAGES ADDRESSES THE MEANS OF PROVIDING SUBSTANTIVE INFORMATION TO NATIVE VOTERS, AND PROVIDES NO EXEMPTION FOR PROVIDING THAT INFORMATION

The Defendants argued during the hearing on summary judgment that the proviso in

Section 203 for historically unwritten languages, coupled with the flexibility in the Department's guidelines for implementation of Section 203 by a jurisdiction, allows the Defendants to determine *whether* materials need to or should be provided and to *what extent* those materials have to be provided. *See* Transcript at 40-44, 49-50, 56-61. The Defendants further argued that, despite the coverage determination issued by the Director of the Census, they have discretion to decide whether there is a need for information in a particular area, and what information needs to be provided in the native language. *Id.* Defendants are wrong. Section 203 of the Voting Rights Act is clear any election information or materials provided in the English language must also be provided in the covered minority language. To be sure, Congress recognized that many of the Alaska Native or American Indian languages are historically unwritten. But it did not therefore exempt jurisdictions from providing all materials and information in those Native languages. Rather, it provided that, to comply with Section 203, those jurisdictions covered for unwritten languages are required to provide the translated information and assistance only in oral form.

Defendants' purported exemption finds no support in the text of Section 203 or in three decades of case law involving Indian country. For the last thirty years, the Attorney General has required and courts have approved the same compliance obligations for jurisdictions covered with respect to historically unwritten languages as for those covered with respect to written languages. The only difference lies in the recognition that a purely unwritten language cannot be required to be translated into written form. For covered jurisdictions in Indian Country, the Attorney General has treated the following types of practices as evidence that a jurisdiction has taken "reasonable steps": hiring a bilingual voting coordinator and/or tribal liaison; training bilingual poll officials who can explain the voting process in the Native language and orally translate the ballot into the Native language during the voting process; creating an advisory

group made up of members of the community; and translating, recording, and disseminating pre-election and election day information and materials in the Native language.[5] *See supra*, at 6 n.4.

To read the oral translation proviso as enabling the Defendants to provide less information to Alaska Native voters, or enabling Defendants to decide to not provide any information at all would establish two classes of voters based on the language they speak one entitled to a complete set of election information and the other receiving only a subset. That result contradicts the plain language of the Voting Rights Act and years of precedent. Surely it is not what Congress intended when it added the Section 203 protections in 1975. Jurisdictions covered for Native languages, even though historically unwritten, must provide all election information and materials to their Native voters.

IV. THIS COURT SHOULD DRAW NO INFERENCE THAT THE ATTORNEY GENERAL BELIEVES THAT ALASKA IS IN COMPLIANCE WITH SECTION 203

In their materials filed in opposition to the Plaintiffs' motion for summary judgment, the Defendants assert that they must be in compliance with Section 203, because they have never been sued by the Attorney General. *See* ECF No. 69 at 4. They are mistaken. First, the fact that the Department has not brought suit should not be construed as an indication that the Attorney

[5] The legislative history reinforces the Attorney General's view on the appropriate compliance standards. During the Senate hearings prior to passage of Section 203, Congress discussed the need to provide the same information and assistance orally for unwritten languages: "affected jurisdictions [would need] to provide in the language of the protected group any registration and election materials that are used by the public… [and] [i]f the language of the protected group is not a written language (as used by members of the group), then the requirement of printed materials in that language would not apply but oral assistance would be required." *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rights of the S. Comm. of the Judiciary*, 94th Cong. 1016 (1975) (statement of Sen. John V. Tunney, Chairman, Subcomm. on Constitutional Rights).

General has approval of or disapproval of the Defendants' language program. Second, for many years, the Department has had significant interactions with the Defendants related to numerous voting matters that further confirm that the federal government has made no determination that Defendants are in compliance with Section 203.

The Civil Rights Division of the Department of Justice to whom the Attorney General has delegated responsibility for enforcing Section 203 has significant nationwide enforcement responsibilities under numerous federal statutes, including many requirements of the Voting Rights Act; the Uniformed and Overseas Citizens Absentee Voting Act; the National Voter Registration Act; the Help America Vote Act; and the Civil Rights Act, among others. The Department's resources are not unlimited. Thus, no inference can be drawn from the fact that it has not brought suit against a particular jurisdiction for a particular practice.

Indeed, that is precisely why many of the voting rights statutes the Department of Justice enforces, including the Voting Rights Act, provide for a private right of action. *See*, e.g., *Allen v. Board of Elections*, 393 U.S. 544, 557 (1969) ("The achievement of the [Voting Rights] Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. … The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. It is consistent with the broad purpose of the Act to allow the individual citizen standing to insure that his city or county government complies …"); *Cf. Perkins v. Matthews,* 400 U.S. 379, 392 n.10 (1971) (noting "the acknowledged and anticipated inability of the Justice Department given limited resources to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the [Voting Rights] Act."). Likewise, this was why Congress established a "dual enforcement

mechanism" for enforcing voting rights. S. Rep. No. 94-295, at 40 (1975). Congress has "on the one hand, given enforcement responsibility to a governmental agency, and on the other, has also provided remedies to private persons acting as a class or on their own behalf." *Id.*

The Attorney General has engaged with Defendants regarding Section 203 compliance on several occasions. Defendants acknowledge that in 2011 the Attorney General informed the Defendants of their new and continuing obligations under Section 203, including which Census Areas, Boroughs and villages were covered for which language. *See* ECF No. 47-9, Exhibit I. That letter also described best practices for effective language programs. *Id.*

More pointedly, the Attorney General has expressed concern with the Defendants' failure to provide translations in covered jurisdictions both with respect to election-related public service announcements (PSAs) and with respect to providing an audio ballot in the covered Native languages on the touch-screen voting machines. *See* ECF Nos. 87-2, Exhibit 330, 90-2, Exhibit 336, and 90-3, Exhibit 337.

The Attorney General's concerns with Defendants' compliance with Section 203 are further reflected by his certification of the Bethel Census Area in Alaska for federal election observers in 2009, since that certification rested on his finding that the "appointment of federal observers is necessary to enforce the guarantees of the Fourteenth and Fifteenth Amendments of the Constitution of the United States." *See* 74 Fed. Reg. 51, 320 (Oct. 6, 2009).

Therefore, the fact that the Attorney General has not brought a lawsuit against the Defendants under Section 203, to date, should not be taken as tacit approval of the Defendants' language minority program.

V. CONCLUSION

As set forth above, the statutory language of Section 203 of the Voting Rights Act is

clear: for covered jurisdictions like the ones involved in this lawsuit, any election information and materials provided to voters in English must be provided in the language of the applicable minority group as well. The State of Alaska must comply with Section 203 for the DCA, the WHCA, and the YKCA for the Alaska Native and American Indian languages.

Whether the Defendants have taken all reasonable and effective steps to meet their Section 203 obligations is a question of fact for the court to decide. But Defendants cannot claim a wholesale exemption from the obligation to provide all election-related materials in the Native languages. Defendants' obligations and challenges are no different than those required of other jurisdictions in Indian County. What is reasonable and effective, what has worked for many jurisdictions, and what is required by other jurisdictions in Indian Country is set out in the consent decrees and agreements entered into by the Attorney General and approved by the courts. Those obligations attach by operation of Section 203; they are not contingent on Defendants having been sued by the United States.

Date: June 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2014, a true and correct copy of the foregoing STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA was served electronically on the following parties of record pursuant to the Court's CM/ECF system, which automatically sends notice of filing to all attorneys of record:

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