

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION**

EILEEN JANIS and KIM COLHOFF,)	
)	
Plaintiffs,)	
)	
vs.)	Civil Action No. 09-5019
)	
CHRIS NELSON, in his individual and)	
official capacity as Secretary of State of)	
South Dakota and as a member of the State)	
Board of Elections; MATT MCCAULEY,)	
CINDY SCHULTZ, CHRISTOPHER W.)	
MADSEN, RICHARD CASEY, KAREN M.))	
LAYHER, and LINDA LEA M. VIKEN, in))	
their individual and official capacities as)	
members of the State Board of Elections;)	
SUE GANJE, in her official and individual)	
capacity as Auditor for Shannon County;)	
LA FAWN CONROY, in her individual and))	
official capacity as a poll worker for)	
Shannon County)	
)	
Defendants.)	

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO
COMPEL DISCOVERY FROM DEFENDANT SUE GANJE**

Plaintiffs, by and through counsel, file this reply brief in further support of their motion to compel discovery from Defendant Sue Ganje. In her opposition to Plaintiffs' motion, Defendant Ganje first argues that this Court must rule on the three motions to dismiss [D.E. 55, 62, and 74] pending before the court prior to ruling on Plaintiffs' motion to compel so that the relevant discovery in this case is clearly established. Def. Ganje's Br. at 1-2. Next, she attacks each discovery request at issue individually, but essentially raises the same challenges to each: (1) the requests are "outside the scope of this litigation and irrelevant"; (2) "the information is obtainable from other sources that

are more convenient, less burdensome, and less expensive”; and (3) “the burden and expense of the request outweigh[] any likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”. *Id.* at 3. Finally, she reiterates every single argument raised in the two motions to dismiss she filed. *Id.* at 10-18. All of Defendant Ganje’s arguments fail for the reasons set forth below.

I. DEFENDANT GANJE HAS A LEGAL OBLIGATION TO COMPLY WITH THIS COURT’S SCHEDULING ORDER PENDING THE RESOLUTION OF THE DEFENDANTS’ MOTIONS TO DISMISS.

The state defendants filed their first motion to dismiss Plaintiffs’ claims for monetary damages on April 13, 2009. [D.E. 38]. On June 6, 2009, the parties, pursuant to Fed. R. Civ. P. 26(f), submitted a joint report with proposed discovery deadlines and set forth the types of discovery each party would seek. [D.E. 54]. In the report, Plaintiffs stated they would seek discovery related to:

- (1) the defendants’ responsibilities regarding the administration of elections;
- (2) the manner in which voters are purged from state and county voter registration lists;
- (3) racial statistics regarding criminal prosecutions in South Dakota and the racial composition of jails and counties within South Dakota;
- (4) the training of election officials;
- (5) submissions to the Department of Justice and/or the United States District Court for the District of Columbia pursuant to Section 5 of the Voting Rights Act (42 U.S.C. 1973(c)); and
- (6) the defendants’ insurance coverage.

Defendants did not raise any objections in the report to the areas of discovery Plaintiffs set forth. Based on the parties’ joint report, and despite the pendency of the state defendants’ motion to dismiss, this Court issued a scheduling order which required that all responses to discovery be submitted within thirty (30) days of service. [D.E. 57]. The scheduling order did not set any limits on the scope of discovery or allow for a stay of discovery pending any current or future motions to dismiss. *Id.*

Defendant Ganje waited a month after the Court issued its scheduling order to file her Fed. R. Civ. P. 12(b)(6) motion to dismiss on standing and mootness grounds, and an additional two months before moving to dismiss Plaintiffs' claims under Sections 2 and 5 of the Voting Rights Act. [D.E. 62, 75]. Because this Court has not issued a stay of discovery, the scheduling order, which incorporates the discovery issues presented in the parties' joint report, remains in effect. See D.E. 57 ("The schedule herein may be modified by the court only upon a formal motion and upon a showing of good cause."). Consequently, Defendant Ganje is required under Fed. R. Civ. P. 26, 33, and 34 to produce the requested discovery documents. The fact that there are motions pending before this Court does not mitigate her responsibilities under the federal rules and this Court's scheduling order. See Minnesota Mining & Mfg. Co., Inc. v. Nippon Carbide Indus. Co., 171 F.R.D. 246, 249-51 (D. Minn. 1997) (refusing to stay discovery despite defendants' pending motion to dismiss). Moreover, Defendant Ganje does not cite any legal authority to support her position. Absent this Court's express permission, she cannot willfully disregard the Court's mandate with respect to the conduct of discovery and abuse the discovery process. She remains legally required to comply with her discovery obligations.

II. THE DISCOVERY PLAINTIFFS SEEK IS RELEVANT FOR PURPOSES OF PROPERLY ADJUDICATING THE CLAIMS RAISED IN THE AMENDED COMPLAINT.

Although Defendant Ganje addresses each challenged discovery request separately, she repeatedly asserts that the requests are irrelevant to the federal and state

law claims Plaintiffs raise in their amended complaint¹, and are outside the scope of this litigation. Def. Ganje's Br. at 2-9. She completely disregards the explicit language of the Federal Rules of Civil Procedure which promote liberal discovery and permit parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The Federal Rules further provide that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id.

The Supreme Court clearly has stated that "discovery provisions are to be applied as broadly and liberally as possible," Hickman v. Taylor, 329 U.S. 495, 506 (1947), and the Eighth Circuit specifically has recognized the liberal spirit of the Federal Rules. Bradford v. DANA Corp., 249 F.3d 807, 809 (8th Cir. 2001). Moreover, any doubts over relevance should be resolved in favor of discovery, particularly when civil rights claims are at issue. See Lineen v. Metcalf & Eddy, Inc., 1997 WL 73763, at *1 (S.D.N.Y. Feb. 21, 1997) ("[D]iscovery in cases involving civil rights claims . . . is to be given particularly liberal parameters.").

Pursuant to Section 5 of the Voting Rights Act, Shannon County, as a covered jurisdiction, is required to seek preclearance from the Department of Justice or United States District Court for the District of Columbia prior to implementing any change to its voting standards, practices, or procedures. 42 U.S.C. § 1973c. As Plaintiffs lay out in their opposition to Defendant Ganje's second motion to dismiss [D.E. 79], a court must

¹ On October 2, 2009, this Court granted Plaintiffs' motion to amend the complaint. [D.E. 80]. Although Defendant Ganje filed her opposition to Plaintiffs' motion to compel prior to this Court's ruling, she referred to both the original and amended complaints in her motions to dismiss the complaint. [D.E. 62 at 1; D.E. 75 at 9]. Plaintiffs, therefore, will refer only to the amended complaint.

evaluate whether a voting change has occurred based on “whether a [covered jurisdiction] has enacted or is seeking to administer a practice or procedure that is different enough from the baseline to qualify as a change.” Riley v. Kennedy, 128 S.Ct. 1970, 1982 (2008) (emphasis added) (internal quotations and citations omitted). “Statutory provisions constituting changes in election practices are not ‘effective as laws until and unless they are cleared pursuant to § 5.’” McCain v. Lybrand, 465 U.S. 236, 245 (1984) (quoting Conner v. Waller, 421 U.S. 656, 656 (1975)).

Section 2 of the Voting Rights Act provides: “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,” or membership in a language minority group.” 42 U.S.C. § 1973. In Thornburg v. Gingles, 478 U.S. 30, 47 (1986), the Court interpreted “[t]he essence of a [Section] 2 claim” to be “that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives.” As Plaintiffs also set forth in their response to Defendant Ganje’s motion to dismiss [D.E. 79], Section 2 does not require an allegation or even proof of discriminatory intent as Defendant Ganje argues, but rather allows Plaintiffs to seek and present evidence regarding the disproportionate representation of minorities in South Dakota’s criminal justice system for purposes of proving their Section 2 claim. See Def. Ganje’s Br. at 15.

Both Sections 2 and 5 are concerned with changes to voting standards, practices, and procedures. Black’s Law Dictionary defines a “pattern-or-practice case” as a lawsuit

“in which the plaintiff attempts to show that the defendant has systematically engaged in discriminatory activities, [especially] by means of policies and procedures. A plaintiff must [usually] show that a defendant's behavior forms a pattern of actions or is embedded in routine practices but that inferences of executive or official complicity may be drawn from a consistent failure to respond to complaints or implement corrective measures.” Black’s Law Dictionary, 8th Ed. (emphasis added).

Defendant Ganje bears the burden of proving Plaintiffs’ discovery requests could not reasonably lead “to any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case,” regardless of whether some discovery has been provided. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978). Despite this clear legal standard and her inability to satisfy this burden, Defendant Ganje continues to withhold discoverable documents that fall into the following three subject matter areas: (1) the distribution, counting, and rejection of provisional ballots; (2) information related to the felony convictions of Shannon County residents over the last seven years, which is how long South Dakota’s current felon disfranchisement laws have been in effect; and (3) racial statistics of Shannon County residents.

Plaintiffs allege in the amended complaint that Defendant Ganje’s disfranchisement of anyone convicted of a felony, regardless of the sentence imposed, constitutes such a change in South Dakota’s felon disfranchisement laws. The discovery requests at issue in Plaintiffs’ motion to compel (Interrogatories Nos. 16-21 and Requests for Production of Documents Nos. 6-10), all focus on the manner in which Shannon County has been implementing voting rights laws, with a particular emphasis on the

county's enforcement of the state's felon disfranchisement laws. Defendant Ganje has argued the removal of Plaintiffs' names from the state county voter registration rolls was an isolated incident. [D.E. 75 at 3, 8]. However, two of the letters she produced pursuant to Plaintiffs' discovery requests are form letters sent to Plaintiffs which misstate the law. See Exs. A and B. The letters acknowledge that Plaintiffs were only sentenced to probation, but inform Plaintiffs that "[s]tate law requires removal of your voter registration. You will need to register again upon completion of your sentence to restore your voter rights." Therefore, it is highly likely that Shannon County misinformed other people with felony convictions of their right to vote following their felony convictions. Plaintiffs will only be able to establish whether that indeed was the case if they are provided with the information they seek.

To prove their Section 2 and Section 5 claims, Plaintiffs must establish a pattern and/or practice of systematically removing eligible felons from the voter rolls, and the only way they can do that is if Defendant Ganje fully and completely responds to Plaintiffs' discovery requests. The fact that she has not done so, and has been so adamant about not doing so, strongly suggests that such evidence will further support Plaintiffs' claims. Given the liberal manner in which discovery rules should be applied and the fact that Plaintiffs may seek discovery which reasonably may lead to admissible evidence, Defendant Ganje's objections to Plaintiffs' discovery requests are untenable. While the foregoing arguments apply to all discovery requests at issue in Plaintiffs' motion to compel, Plaintiffs also will address each challenged discovery request individually.

Interrogatory No. 16:

For each year since 2002, state, per year:

- a. **How many provisional ballots were cast in Shannon County;**

- b. How many provisional ballots were counted in Shannon County; and**
- c. For each provisional ballot which was rejected, the basis for that rejection.**

Plaintiff Eileen Janis maintains that she requested a provisional ballot and election officials denied her request based on her felony conviction. Plaintiffs also strongly suspect that other eligible voters with felony convictions were either denied the right to cast a provisional ballot or that, even if they cast such a ballot, their ballot was improperly rejected. The defendants' response to this interrogatory will either support or negate Plaintiffs' contention regarding a "pattern and practice" on the defendants' part of disfranchising eligible voters. In apparent recognition of the relevance of this information, the state defendants responded to this interrogatory and supplied information regarding the provisional ballots cast in Shannon County for each primary and general election from 2002 to 2008. The state defendants further stated Defendant Ganje, as the Shannon County auditor, maintains information regarding why any provisional ballot cast was rejected or otherwise not counted. Therefore, Defendant Ganje has no logical or reasonable excuse for not responding to this interrogatory.

Interrogatory No. 17:

For each year since 2002, state, per year, how many people in Shannon County have been convicted of a felony. In your answer, state how many individuals were convicted of a felony in:

- a. A federal court;**
- b. A South Dakota state court; and/or**
- c. A court of another state.**

This information speaks to the extent of Shannon County's disfranchisement of eligible voters. As an enforcer of the state's felon disfranchisement laws, Shannon County possesses the requested information. For Defendant Ganje to state otherwise

raises even more serious concerns regarding the manner in which the defendants have been implementing the state's felon disenfranchisement laws. Unless Defendant Ganje is admitting that she has not been performing her statutory responsibility of properly maintaining the county's voter rolls, there is no one else better suited to provide this information. Even if Plaintiffs were to file a request under the Freedom of Information Act, Shannon County would be the recipient of such a request. Furthermore, the state's felon disenfranchisement laws apply regardless of the court of conviction; the State receives information regarding felony convictions from all of these courts and, according to the state defendants, forwards the information along to the counties. Thus, Shannon County possesses this information and should provide it to Plaintiffs.

Interrogatory No. 18:

For each year since 2002, state, per year, how many people in Shannon County have been sentenced only to probation as a result of a felony conviction. In your answer, please state how many individuals have received this sentence as a result of:

- a. **A federal court conviction;**
- b. **A South Dakota court conviction; and/or**
- c. **A conviction in another state.**

The information this interrogatory seeks should be contained in the same documents Defendant Ganje would use to respond to Interrogatory No. 17. Therefore, for the same reasons that Defendant Ganje is required and able to respond to Interrogatory No. 17, she can properly respond to this interrogatory as well.

Interrogatory No. 19:

For each year since 2002, state, per year, how many Native Americans in Shannon County were convicted of a felony. In your answer, state how many individuals were convicted of a felony in:

- a. **A federal court;**
- b. **A South Dakota state court; and**
- c. **A court of another state.**

Because Defendant Ganje refuses to provide all of the information and documents she has regarding the felony convictions of Shannon County residents, it is impossible for Plaintiffs to determine whether Defendant Ganje can identify the race of those convicted. Many state election offices maintain records which provide a breakdown of voters by race. Therefore, it is more than reasonable for Plaintiffs to assume that Defendant Ganje possesses this information or could, at the very least, provide information regarding who in the county has been convicted of a crime and the racial composition of Shannon County voters. By putting these documents together, Defendant Ganje could answer this interrogatory; and Plaintiffs are more than willing to do the same if provided with the documents.

Interrogatory No. 20:

For each year since 2002, state, per year, how many Native Americans in Shannon County have been sentenced only to probation as a result of a felony conviction. In your answer, state how many individuals have received this sentence as a result of:

- a. **A federal court conviction;**
- b. **A South Dakota court conviction; and/or**
- c. **A conviction in another state.**

See Plaintiffs' response regarding Interrogatory Nos. 18 and 19.

Interrogatory No. 21:

For each year since 2002, state, per year, how many residents of Shannon County have had their voter registration terminated or denied, and state the reason for each termination and denial.

Defendant Ganje argues that the county's termination of voter registration for any reason other than a felony conviction is irrelevant to this case. However, she refuses even to provide Plaintiffs information regarding those purged from the voter rolls based on felony convictions. This interrogatory seeks information which will support

Plaintiffs' allegations regarding a pattern and routine practice on Defendant Ganje's part of purging eligible voters. By providing information regarding all purges, regardless of the reason, Plaintiffs will be able to verify the accuracy of any statistical data they present the Court regarding the merits of their legal claims.

Request for Production No. 6:

For each year since 2002, produce all correspondence between Shannon County officials and the Secretary of State's office and/or the State Board of Elections regarding the removal of individuals from state and county voter registration lists.

See Plaintiffs' response regarding Interrogatory No. 21. Plaintiffs further maintain this request seeks information specifically related to those individuals removed from the state and Shannon County's voter registration lists, and the documents Defendant Ganje produced do not completely respond to this discovery, nor to they date back to 2002. The only information Defendant Ganje supplies regarding individual voters is dated from October 1, 2008 to December 31, 2008.

Request for Production No. 7:

For each year since 2002, produce all documents related to statewide and countywide policies, procedures, and/or practices regarding the removal of individuals with felony convictions from the state and county voter registration lists.

See Plaintiffs' responses regarding Interrogatory No. 21 and Request for Production No. 6.

Request for Production No. 8:

For each year since 2002, produce all documents related to criminal convictions of South Dakota residents received from:

- a. The U.S. Department of Justice;**
- b. Any and all South Dakota state courts; and**
- c. Any and all other state courts.**

See Plaintiffs' responses regarding Interrogatories Nos. 17 and 18.

Request for Production No. 9:

For each year since 2002, produce all documents related to statewide and countywide policies or procedures regarding persons whose names were removed from the county and/or state voter registration database.

See Plaintiffs' response regarding Interrogatory No. 21 and Request for Production No. 6.

Request for Production No. 10:

Produce copies of all submissions to the U.S. Department of Justice and/or the U.S. District Court for the District of Columbia regarding any proposed changes to voting practices, policies, or procedures related to the voting rights of people with felony convictions.

Defendant Ganje contends that Plaintiffs' counsel already possesses a copy of all Section 5 submissions from Shannon County. This statement is untrue. While the plaintiffs' attorneys did obtain copies of Section 5 submissions made by the Secretary of State between 2003 and 2006 as a result of the consent decree in Quiver v. Nelson, Civ. No. 02-5069 (D.S.D. Dec. 27, 2002), and they obtained submissions made by Charles Mix County between 2008 and the present as a result of the consent decree in Blackmoon v. Charles Mix County, Civ. No. 05-4017 (D.S.D. Dec. 4, 2007), the plaintiffs' attorneys do not have copies of any submissions made by Shannon County. The plaintiffs do not have a complete set of submissions made on behalf of Shannon County by the Secretary of State, nor do the plaintiffs' attorneys have any way of identifying which submissions are "related to the voting rights of people with felony convictions." More importantly, Plaintiffs have no way to identify which submissions Shannon County believes are related to the voting rights of people with felony convictions.

There may be no such documents. There is certainly no reason to believe that either Shannon County or the Secretary of State, acting on behalf of Shannon County, has ever made more than a handful of submissions related to the voting rights of people with felony convictions. The total number of pages of those potential submissions would be very small and not unduly burdensome. There would be no burden at all if, after investigation, Defendant Ganje concludes that no such submissions exist, in which case Plaintiffs are entitled to a binding discovery response to that effect.

III. DEFENDANT GANJE HAS NOT MET HER BURDEN UNDER THE FEDERAL RULES FOR ESTABLISHING THAT RESPONDING TO PLAINTIFFS' DISCOVERY REQUESTS WILL CAUSE HER ANY UNDUE BURDEN OR EXPENSE, AND SHE IS THE BEST SOURCE FOR PROVIDING THE INFORMATION PLAINTIFFS SEEK.

In addition to maintaining that responding to Plaintiffs' discovery requests will cause an undue burden and expense on her part and that the information is available from other sources, Defendant Ganje reiterates every single argument she raised in her two motions to dismiss. Specifically, she reasserts that: (1) Plaintiffs' claims are moot; (2) they lack standing; (3) they are seeking relief on behalf of non-parties; and (4) their discovery requests are not relevant to their claim under Section 2 of the Voting Rights Act. Def. Ganje's Br. at 11-18. In reply, Plaintiffs respectfully direct this Court to their responses to Defendant Ganje's motion to dismiss the complaint on mootness and standing grounds [D.E. 62, 67], their response to Defendant Ganje's motion to dismiss Plaintiffs' Section 2 and Section 5 claims [D.E. 74, 79], as well as their response in opposition to the state defendants' second motion to dismiss [D.E. 55, 60]; and they incorporate by reference the arguments contained in those responses.

As Plaintiffs already have stated in their brief in support of their motion to compel and in the instant brief, Defendant Ganje is the best and most reliable source for obtaining the information Plaintiffs seek. All of the knowledge and documents are within her possession, and she has not presented a single valid basis for why this Court should not require her to produce the requested information.

Defendant Ganje also contends that the discovery Plaintiffs seek will cause her an undue burden and expense. To the extent Defendant Ganje wishes to withhold any responsive documents, the operating rule is that the party resisting production bears the responsibility of establishing that an undue burden or expense applies. See Alliance Communications Coop., Inc. v. Golden West Telecommunication Coop., Inc., 2009 WL 512023, at *6 (D.S.D. Feb. 27, 2009) (“Typically, the burden is on the party resisting discovery to explain why discovery should be limited given that the Federal Rules allow for broad discovery.”) (internal quotations and citations omitted); Oyen v. Land O’Lakes Inc., 2009 WL 349160, at *3 (D.S.D. Feb. 10, 2009) (accord). Other than these blanket assertions, Defendant Ganje does not present any detailed explanation, evidence, or affidavits to support these contentions. Thus, she has failed to meet her burden under Fed. R. Civ. P. 26(b)(2) or (c), and this Court should grant Plaintiffs’ motion to compel.²

² Federal Rule of Civil Procedure 26(b)(2)(C) provides, in part: “On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Federal Rule of Civil Procedure 26(c) states, in part: “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”

IV. CONCLUSION

For the reasons set forth in Plaintiffs' brief in support of their motion to compel and this reply brief, Plaintiffs ask this Court to: (1) enter an order compelling Defendant Ganje to produce responses to Interrogatory Nos. 16-21 and Requests for Production of Documents Nos. 6-10; (2) extend the time for Plaintiffs to identify and provide the reports of retained experts until thirty (30) days after Defendant Ganje complies with this Court's order; and (3) require Defendant Ganje to pay Plaintiffs' reasonable expenses in bringing this motion, and impose such other sanctions as are appropriate and just.

Respectfully submitted,

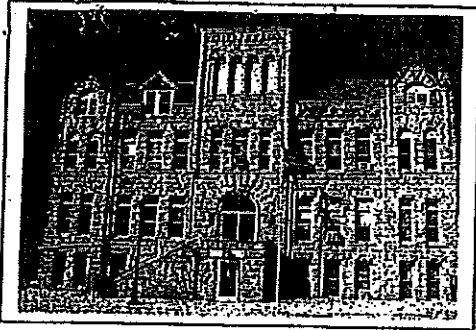
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**FALL RIVER & SHANNON COUNTIES
AUDITOR'S OFFICE**

**COURTHOUSE
906 NORTH RIVER ST
HOT SPRINGS, SOUTH DAKOTA 57747
PHONE: (605) 745-5130**

February 8, 2008

Eileen Janis
PO Box 525
Pine Ridge SD 57770.

Dear Eileen:

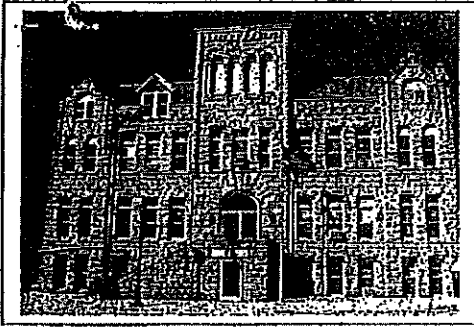
We have been notified by our State Electronic Voter Registration System that your voter registration has been flagged for a person that is currently serving a sentence or probation for a felony conviction.

State law requires removal of your voter registration. You will need to register again upon completion of your sentence to restore your voter rights.

If you have any questions please call me at 745-3996.

Sincerely,

Sue Ganje
County Auditor
Fall River/Shannon



**FALL RIVER & SHANNON COUNTIES
AUDITOR'S OFFICE**

**COURTHOUSE
906 NORTH RIVER ST
HOT SPRINGS, SOUTH DAKOTA 57747
PHONE: (605) 745-5130**

February 8, 2008

Kim Colhoff
General Delivery
Pine Ridge SD 57770

Dear Kim:

We have been notified by our State Electronic Voter Registration System that your voter registration has been flagged for a person that is currently serving a sentence or probation for a felony conviction.

State law requires removal of your voter registration. You will need to register again upon completion of your sentence to restore your voter rights.

If you have any questions please call me at 745-3996.

Sincerely,

Sue Ganje
County Auditor
Fall River/Shannon