

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

NOV - 3 2009

**NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT**

NORTHWEST AUSTIN MUNICIPAL)
 UTILITY DISTRICT NUMBER ONE,)
)
 Plaintiff,)
)
 v.)
)
 ERIC H. HOLDER JR,)
 Attorney General of the United States, *et al.*)
)
 Defendants.)

Civil Action No. 1:06-cv-1384

Three-judge court (PLF, EGS, DST)

CONSENT JUDGMENT AND DECREE

1. This action was initiated on August 4, 2006 by the Plaintiff Northwest Austin Municipal Utility District Number One (“the District”), against the Defendant Attorney General of the United States (“the Attorney General”).

2. The District is a governmental entity organized under the constitution and laws of the State of Texas. The State of Texas became covered as a whole by certain special provisions of the Voting Rights Act, based on a coverage determination under the third sentence of Section 4(b) made by the Attorney General and the Director of the Census, and published in the Federal Register on September 23, 1975. *See* 40 Fed. Reg. 43746. By virtue of this coverage determination, the State of Texas and all of its political subunits (including the District) must receive preclearance under Section 5 of the Act for all changes enacted or implemented after November 1, 1972, that affect voting.

3. The District asserts two claims. The first claim seeks a declaratory judgment pursuant to the second sentence of the “bailout” provisions of Section 4(a)(1) of the Voting

Rights Act, 42 U.S.C. § 1973b(a)(1), declaring it exempt from the preclearance provisions of Section 5 of the Act, 42 U.S.C. § 1973c. The second claim, in the alternative, seeks a declaration that Section 5 of the Voting Rights Act is unconstitutional. Docket #1, 83.

4. This three-judge district Court has been convened as provided in 42 U.S.C. § 1973b(a)(5) and 28 U.S.C. § 2284 and has jurisdiction over this matter.

5. A number of parties moved to intervene pursuant to Sections 4(a)(4) and 4(a)(9) of the Voting Rights Act, and the Court granted those motions. These intervenors are: Austin Branch of the NAACP and Texas State Conference of NAACP Branches, Nicole Louis, Rodney Louis, Yvonne Graham, Winthrop Graham, Wendy Richardson, Jamal Richardson, Marisa Richardson, David Diaz, Lisa Diaz, Gabriel Diaz, Nathaniel Lesane, Jovita Casarez, Angie Garcia, and Ofelia Zapata, People for the American Way and Travis County, Texas (collectively “the Defendant-Intervenors”). Docket #33, 40, 46, 84.

6. The parties exchanged a significant number of documents related to the District, including available background information, minutes of the meetings of its board of directors, records of elections, and records of preclearance submissions. The Attorney General also reviewed records of the District available at the Texas Commission on Environmental Quality in Austin, Texas. The parties took depositions of representatives of the District in Austin, Texas, as well as depositions of Defendant-Intervenors. The parties also engaged in written discovery.

7. The parties filed cross-motions for summary judgment, Docket # 96, 98, 99, 100, 101, and this Court held oral argument on those motions on September 17, 2007.

8. On May 30, 2008, this Court granted the motions for summary judgment filed by the Attorney General and the Defendant-Intervenors, and denied the motion for summary judgment filed by the District. Docket # 133, 134, 142, 143.

9. The District appealed to the United States Supreme Court. Docket # 140. The Supreme Court noted probable jurisdiction in the case, Docket # 145, and considered the case on full briefing and oral argument. On June 22, 2009, the Supreme Court reversed and remanded, concluding that the District is a political subdivision eligible to seek bailout under Section 4(a) of the Voting Rights Act. 557 U.S. ___, 129 S. Ct. 2504 (2009). On July 24, 2009, the Supreme Court entered its judgment. Docket # 169.

10. On remand, the Attorney General and the Defendant-Intervenors have agreed that the District has fulfilled the conditions required by Section 4(a) and is entitled to the requested declaratory judgment allowing it to bail out of Section 5 coverage. The parties also have agreed that the District's alternative claim challenging the constitutionality of Section 5 should be dismissed without prejudice, pursuant to Rule 41(a), Fed. R. Civ. P. Accordingly, the District, the Attorney General and the Defendant-Intervenors have filed a joint motion for entry of this Consent Judgment and Decree.

THE REQUIREMENTS OF SECTION 4(a)

11. Section 4(a) of the Voting Rights Act provides that a state or political subdivision subject to the special provisions of the Act may be exempted or "bailed out" from those provisions, through an action for a declaratory judgment before this Court, if it can demonstrate fulfillment of the specific statutory conditions in Section 4(a), for the time period "during the ten

years preceding the filing of the action” and “during the pendency of such action”, as described

below:

no such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section (42 U.S.C. § 1973b(a)(1)(A));

no final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) of this section have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote (42 U.S.C. § 1973b(a)(1)(B));

no Federal examiners or observers under subchapters I-A to I-C of this chapter have been assigned to such State or political subdivision (42 U.S.C. § 1973b(a)(1)(C));

such State or political subdivision and all governmental units within its territory have complied with section 1973c of this title, including compliance with the requirement that no change covered by section 1973c of this title has been enforced without preclearance under section 1973c of this title, and have repealed all changes covered by section 1973c of this title to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment (42 U.S.C. § 1973b(a)(1)(D));

the Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 1973c of this title, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 1973c of this title, and no such submissions or declaratory judgment actions are pending (42 U.S.C. § 1973b(a)(1)(E)); and

such State or political subdivision and all governmental units within its territory - (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process; (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under subchapters I-A to I-C of this chapter; and (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process (42 U.S.C. § 1973b(a)(1)(F)(i-iii)).

12. Section 4(a) provides the following additional requirements to obtain bailout:

To assist the court in determining whether to issue a declaratory judgment under this subsection, the plaintiff shall present evidence of minority participation, including evidence of the levels of minority group registration and voting, changes in such levels over time, and disparities between minority-group and non-minority-group participation. (42 U.S.C. § 1973b(a)(2));

No declaratory judgment shall issue under this subsection with respect to such State or political subdivision if such plaintiff and governmental units within its territory have, during the period beginning ten years before the date the judgment is issued, engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2) of this section unless the plaintiff establishes that any such violations were trivial, were promptly corrected, and were not repeated. (42 U.S.C. § 1973b(a)(3));

The State or political subdivision bringing such action shall publicize the intended commencement and any proposed settlement of such action in the media serving such State or political subdivision and in appropriate United States post offices (42 U.S.C. § 1973b(a)(4)).

13. Sections 4(a)(4) and 4(a)(9) also provide that “[a]ny aggrieved party may as of right intervene at any stage” in a bailout action such as this one.

14. Finally, Section 4(a)(9) provides that the Attorney General can consent to entry of a declaratory judgment granting bailout “if based upon a showing of objective and compelling evidence by the plaintiff, and upon investigation, he is satisfied that the State or political subdivision has complied with the requirements of [Section 4(a)(1)]”

THE DISTRICT

15. The District is located entirely within the boundaries of Travis County, Texas, and entirely within the boundaries of the City of Austin, Texas. The District presently includes some 709.7 acres in the Canyon Creek neighborhood.

16. On April 18, 1986, based on a petition from a developer, the Texas Water Commission created the District. On December 13, 1986, the District held its first election, which confirmed the creation of the District and elected directors. The District’s election history during the ten years preceding this action and during the pendency of this action is as follows. The District cancelled its May 2, 1998 director election and its May 6, 2000 director election pursuant to state law because the candidates were unopposed. In the District’s May 4, 2002, director election, there were a total of 253 ballots cast, with 824 total votes spread among six candidates, running at large for three positions. The 2002 election was the District’s first contested election, *i.e.*, in which more candidates ran for office than there were open positions.

In the District's May 15, 2004, director election (the first conducted by Travis County), there were a total of 439 ballots cast, with 695 total votes distributed among three candidates running at large for two director positions. As of the 2004 election, there were a total of 2,276 registered voters in the District. In the District's May 13, 2006 director election, there were a total of 495 ballots cast, with 883 votes distributed among five candidates running at large for three director positions. As of the 2006 election, there were a total of 3,129 registered voters in the District. In the District's May 10, 2008 director election, there were a total of 352 ballots cast, with 469 votes distributed among three candidates running at large for two director positions. As of the 2008 election, there were a total of 3,356 registered voters in the District.

17. The demographer for the City of Austin has estimated that under the 1990 Census, the District had a total population of 12 persons, of whom all were white, and that under the 2000 Census, the District had a total population of 3,586 persons, of whom 2,872 (80.1%) were white, 54 (1.5%) were black, 197 were Hispanic (5.5%), 416 were Asian (11.6%), and 47 (1.3%) were "other".

18. Elections for the District are conducted under the Texas Election Code, except as otherwise provided in the Texas Water Code. State law defines nearly all features of the District's method of conducting elections. The District is governed by a board of five directors, who are elected for four-year staggered terms. Director elections are held on the second Saturday in May of each even-numbered year, on a uniform election date. Such elections are conducted at-large, do not use numbered places, and allow single-shot voting. There are no primary elections, only non-partisan general elections for directors, which are determined by plurality vote, and there are no runoff elections, unless a tie occurs. Vacancies are filled through

appointment by the remaining directors, not by special election. Qualifications for directors are set by state law, and candidates for director file an application with the secretary of the governing body.

19. Registration for voting is not conducted under the supervision of the District. Instead, the District uses Travis County's voter registration list for its elections, since state law provides that registration for voting is conducted by Texas's 254 counties. Texas uses a unitary voter registration system under which a citizen may register to vote once, in order to be able to vote in elections for federal, state, county, and municipal offices, as well as for special district offices, such as the District. The determination of who is a qualified voter and eligible to vote in the District's elections is made by Travis County, according to state law, including the determination of which registered voters reside in the District.

20. At present, Travis County conducts the District's elections under contract with the District. On May 7, 2004, the District entered into a joint election agreement for Travis County to conduct the District's 2004 director election. The District entered into similar agreements for the 2006 and 2008 elections. The Travis County clerk has contracted to conduct the elections for virtually all of the local governmental units in the county that hold elections. Such agreements allow entities holding elections on the same dates to use common ballots and voting systems, common polling places, common early voting procedures, common poll officials, etc. In the case of the District, the joint election agreement has allowed voters to avoid traveling to a separate polling place on election day to vote in the District's elections, and has allowed voters to vote early in the District's elections at the same time as they vote early in other elections being held at the same time.

21. The District has made eight submissions under Section 5 to the Attorney General over its history since 1986. The Attorney General has not interposed an objection to any of these eight submissions. Of these eight submissions, three were submitted by the District in the ten years preceding this action, and none were submitted during the pendency of this action. Other submissions of voting changes relevant to the conduct of elections in the District have been made by the State of Texas, Travis County, the City of Austin, and the Austin Community College District, and the Attorney General has likewise interposed no objection to those submissions, as they relate to the conduct of elections in the District, in the ten years preceding this action or during the pendency of this action. There have been no voting changes enforced with respect to the District's elections in the ten years preceding this action or during the pendency of this action requiring preclearance that have not been precleared.

AGREED FINDINGS ON STATUTORY BAILOUT CRITERIA

22. There are no other governmental units within the territory of the District, as that term is used in Section 4(a) of the Voting Rights Act. 42 U.S.C. § 1973b(a).

23. During the ten years preceding the filing of this action and during the pendency of this action, there has been no test or device as defined in Sections 4(c) and 4(f)(3) of the Voting Rights Act used within the District for the purpose or with the effect of denying or abridging the right to vote on account of race or color or in contravention of the guarantees of Section 4(f)(2). 42 U.S.C. § 1973b(a)(1)(A).

24. During the ten years preceding the filing of this action, and during the pendency of this action, no final judgment of any court of the United States has determined that denials or abridgements of the right to vote on account of race or color or in contravention of the

guarantees of Section 4(f)(2) have occurred anywhere in the territory of the District. Further, no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds. No action is presently pending alleging such denials or abridgements of the right to vote. 42 U.S.C. § 1973b(a)(1)(B).

25. During the ten years preceding the filing of this action, and during the pendency of this action, no Federal examiners or observers have been assigned to the District. 42 U.S.C. § 1973b(a)(1)(C).

26. During the ten years preceding the filing of this action, and during the pendency of this action, the District has complied with Section 5, including compliance with the requirement that no change covered by Section 5 has been enforced without preclearance under Section 5. There has been no need for the District to repeal any voting changes to which the Attorney General has objected, or to which this Court has denied a declaratory judgment, since no such objection or denials have occurred. 42 U.S.C. § 1973b(a)(1)(D).

27. The Attorney General has never interposed any objection to voting changes submitted by or on behalf of the District for administrative review under Section 5. No such administrative submissions by or on behalf of the District are presently pending before the Attorney General. The District has never sought judicial preclearance from this Court under Section 5. Thus, this Court has never denied the District a declaratory judgment under Section 5, nor are any such declaratory judgment actions now pending. 42 U.S.C. § 1973b(a)(1)(E).

28. During the ten years preceding the filing of this action, and during the pendency of this action, the District has not employed voting procedures or methods of election which inhibit or dilute equal access to the electoral process. 42 U.S.C. § 1973b(a)(1)(F)(i).

29. During the ten years preceding the filing of this action, and during the pendency of this action, no one in the District's elections has been subject to intimidation or harassment in the course of exercising their right to participate in the political process. The District has engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under the Voting Rights Act, *e.g.*, through the District's contract for Travis County to conduct its elections jointly with other entities in the county (as described further in Paragraph 30 below). 42 U.S.C. § 1973b(a)(1)(F)(ii).

30. During the ten years preceding the filing of this action, and during the pendency of this action, the District has engaged in other constructive efforts to expand the opportunity for voting for every person of voting age, *e.g.*, through the District's contract for Travis County to conduct its elections jointly with other entities in the county, which has allowed voters in the District's director elections to participate in the county's one-stop early and election day voting, as well the county's minority language election procedures, and the county's efforts to recruit a diverse pool of poll officials. The District's contract with Travis County also had the effect of moving the District's director elections from a garage in a private home to a local elementary school and a local apartment building, to be in the same polling place and on the same ballot where other local elections are conducted. The District utilizes the voter registration list generated by the county, and there have been expanded opportunities for convenient voter registration in Travis County. 42 U.S.C. § 1973b(a)(1)(F)(iii).

31. The District is unable to present evidence directly measuring minority voter participation rates over time, because the District does not engage in voter registration, and while Travis County does maintain voter registration records, it does not record the race of its

registered voters. However, the voter registration and turnout data for the District described above (in paragraph 16) suggest that the voter registration rates in the District have increased over time along with its increasing population, and that participation in the District's elections by both voters and candidates has increased over time as well. Likewise, available data covering recent years from the Texas Secretary of State suggest that there have been increases over time in the total number of registered voters and the total number of Hispanic-surnamed registered voters in Travis County Precincts 333 and 343, encompassing the area of the District. 42 U.S.C. § 1973b(a)(2).

32. During the preceding ten year period, the District has not engaged in violations of any provision of the Constitution or laws of the United States or any State or political subdivision with respect to discrimination in voting on account of race or color or in contravention of the guarantees of Section 4(f)(2). 42 U.S.C. § 1973b(a)(3).

33. The District will publicize, simultaneously with the filing of the joint motion for entry of consent judgment and decree, a notice of the proposed settlement of this action in the media serving the District (e.g., through the Austin American-Statesman, the website of the District (<http://www.nwamud.texas.gov/>), and the Canyon Creek Homeowners Association) and in appropriate United States post offices, as required by Section 4(a)(4). The parties request that this Court wait 30 days after filing of the joint motion for entry of this consent judgment and decree, before approving this settlement, while this notice of proposed settlement is advertised. While the District did not publicize the intended commencement of this action in the manner required by Section 4(a)(4) prior to its being filed, the pendency of this action has received

significant publicity since its commencement, and a number of parties have been granted intervention in this action. 42 U.S.C. § 1973b(a)(4).

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED:

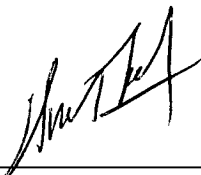
1. The Plaintiff Northwest Austin Municipal Utility District Number One is entitled to a declaratory judgment in accordance with the second sentence of Section 4(a)(1) of the Voting Rights Act, 42 U.S.C. § 1973b(a)(1).

2. The parties' Joint Motion for Entry of Consent Judgment and Decree is GRANTED, and the Plaintiff Northwest Austin Municipal Utility District Number One is exempted from coverage pursuant to the third sentence of Section 4(b) of the Voting Rights Act, 42 U.S.C. § 1973b(b), provided that this Court shall retain jurisdiction over this matter for a period of ten years pursuant to Section 4(a)(5), 42 U.S.C. § 1973b(a)(5). This action shall be closed and placed on this Court's inactive docket, subject to being reactivated upon application by either the Attorney General or any aggrieved person in accordance with the procedures set forth in Section 4(a)(5), 42 U.S.C. § 1973b(a)(5).

3. The motions for summary judgment filed by all parties are denied as moot.

4. The alternative claim by the Plaintiff Northwest Austin Municipal Utility District Number One challenging the constitutionality of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is dismissed without prejudice pursuant to Rule 41(a), Fed. R. Civ. P.

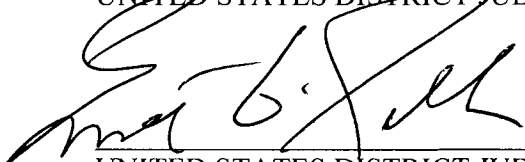
Entered this 3rd day of November, 2009.



UNITED STATES CIRCUIT JUDGE



UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT JUDGE

Agreed and Consented To:

/s/ Gregory S. Coleman

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