

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Nick, et al.

Plaintiffs,

vs.

Bethel, et al.

Defendants.

Case No. 3:07-cv-0098 TMB

ORDER

**Re: State Defendants' Motion for Partial
Summary Judgment**

I. MOTION PRESENTED

Plaintiffs have sued the state of Alaska and a number of state officials, along with the city of Bethel and Lori Strickler, the municipal clerk of Bethel, (the "Bethel Defendants"), for allegedly violating provisions of the Voting Rights Act of 1965 ("VRA") governing bilingual language assistance. The State Defendants have moved for partial summary judgment on the issue of whether sections 203, 42 U.S.C. § 1973aa-1a(c), and 4(f)(4), 42 U.S.C. § 1973b(f)(4), of the VRA require the Defendants to provide written language assistance in the Yup'ik language for elections held in the Bethel census area. The Court on June 11, 2008 heard oral argument on the motion, which has been thoroughly briefed by both sides.

Because Plaintiffs have failed to raise a genuine issue of material fact as to whether Yup'ik was a historically written language, the Court GRANTS the State Defendants' motion and holds that the State need only provide oral assistance to Yup'ik speakers in the Bethel census area. This ruling does not, however, address or affect the Plaintiffs' argument that the Defendants may need to produce certain written materials in order to provide effective oral assistance to

Yup'ik voters.

II. BACKGROUND

In 1975, Congress amended the VRA to impose certain bilingual or multilingual election requirements on “covered” states and political subdivisions.¹ In enacting these amendments, Congress declared that “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process.”² Among the provisions enacted to counter this discrimination were sections 203(c) and 4(f)(4) of the Act, the measures at issue in the State Defendants’ partial summary judgment motion. Both sections bar “covered” states or political subdivisions from conducting English-only elections. It is undisputed that the state of Alaska and the Bethel census area, including the city of Bethel, are “covered” jurisdictions.³ Section 203(c), which is nearly identical to section 4(f)(4), states:

Whenever any State or political subdivision subject to the prohibitions of . . . this section 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 language minority group as well as in the English language: *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.⁴

The “applicable language minority group” at issue here is the Yup'ik-speaking population of

¹ *Northwest Austin Mun. Utility Dist. No. One v. Mukasey*, — F.Supp.2d —, 2008 WL 2221034 (D.D.C. 2008).

² 42 U.S.C. § 1973aa-1a.

³ *See* 28 C.F.R. Pt. 55, App.

⁴ 42 U.S.C. § 1973aa-1a(c) (emphasis added).

Alaskan Natives within the Bethel census area.⁵

Filed on June 11, 2007, the Plaintiffs' original complaint asserted two causes of action against the Defendants: violation of sections 4(f)(4) and 203 of the VRA; and violation of the voter-assistance requirement under section 208 of the VRA. The Plaintiffs later sought to amend their complaint by adding an individual and four tribal councils as Plaintiffs, and a section 5 "preclearance" claim, 42 U.S.C. § 1973c, which required the appointment of a three-judge panel. The Court approved the motion to amend and on June 6, 2008, a three-judge panel was appointed, in accord with 42 U.S.C. § 1973c and 28 U.S.C. § 2284, to hear the section 5 claim. The panel includes: the Hon. M. Margaret McKeown, the Hon. Timothy M. Burgess, and the Hon. James K. Singleton. Because the issues raised by the State Defendants' partial summary judgment motion are distinct from the section 5 claim, this motion was resolved solely by Judge Burgess.

Apart from this motion, the Court rules separately today on the Bethel Defendants' motion for summary judgment. The Court also notes that the Plaintiffs have filed two motions for preliminary injunctions against the Defendants in connection with upcoming fall elections.⁶ These motions are still pending before this Court and the three-judge panel.

III. LEGAL STANDARD

Summary judgment is appropriate under Rule 56(c) where the moving party demonstrates

⁵ The use of "Yup'ik" in this order refers to Central or Alaskan Yup'ik, which is part of the larger Eskimo-Aleut language family. Central Yup'ik is the most widely used form of Yup'ik and is spoken from Norton Sound through the Yukon and Kuskokwim deltas (including the Bethel census area) and out to the Alaska Peninsula. *See* Dkt. 136, Ex. E at 5.

⁶ Dkt. Nos. 202 and 292.

the absence of a genuine issue of material fact and entitlement to judgment as a matter of law.⁷ A dispute about a material fact is genuine if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”⁸ A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact.⁹ The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party’s case on which that party will bear the burden of proof at trial.¹⁰

“The district court may limit its review to the documents submitted for the purpose of summary judgment and those parts of the record specifically referenced therein.”¹¹ Therefore, the court is not obligated “to scour the record in search of a genuine issue of triable fact.”¹² If the moving party meets this initial burden, the nonmoving party cannot defeat summary judgment merely by demonstrating “that there is some metaphysical doubt as to the material facts.”¹³ When

⁷ See Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

⁹ *Celotex*, 477 U.S. at 323.

¹⁰ *Id.* at 322-23.

¹¹ *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030 (9th Cir. 2001).

¹² *Keenan v. Allen*, 91 F.3d 1275, 1279 (9th Cir. 1996) (citing *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)).

¹³ *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995) (citing *Anderson*, 477 U.S. at 252) (“The mere existence of a scintilla of evidence in support of the nonmoving party’s position is not sufficient.”).

making this determination, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party.¹⁴

IV. DISCUSSION

The Plaintiffs' language assistance claims under sections 203 and 4(f)(4) of the VRA present two overarching issues. The first is whether the state of Alaska and city of Bethel are providing effective oral language assistance to Yup'ik speakers; the second is whether they are required to provide written assistance, including translated ballots. The Court notes that the State Defendants' summary judgment motion is strictly limited to the issue of written assistance under the VRA, and does not address the Plaintiffs' claims regarding oral language assistance, voter assistance under section 208, or the section 5 preclearance claim.

On the issue of written assistance, the State Defendants argue that they are entitled to summary judgment for two reasons: 1) the legislative history of the 1975 bilingual provisions of the VRA shows that the exception for "historically unwritten" languages was explicitly designed to exempt Alaska from the written language assistance requirements, and 2) the evidence shows that Yup'ik is a "historically unwritten" language with a "long oral tradition, extending back centuries before the arrival of Europeans."¹⁵ The Plaintiffs respond that the Court should not consider legislative history because the plain language of the relevant provisions is unambiguous and requires the Court to make a factual determination as to whether Yup'ik is "historically unwritten." In other words, they argue that the statute does not provide a blanket exemption for all Alaska Native languages. In addition, they contend that genuine issues of material fact

¹⁴ See *Matsushita*, 475 U.S. at 587.

¹⁵ Dkt. 136, Defs.' Mot. for Summ. J. at 5.

preclude summary judgment stage at this stage on the issue of written assistance. Alternatively, the Plaintiffs argue that written election materials are necessary to provide effective oral language assistance, and that even if the Court should rule Yup'ik is a “historically unwritten” language, the Defendants may still be obligated to provide printed versions of ballots and other materials.

The first rule of statutory interpretation is that the Court must look to the language of the statute itself. “Where the statute’s language is plain, the sole function of the courts is to enforce it according to its terms . . . for courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹⁶ It is also well established that courts must look at the overall statutory context, and not simply at words in isolation. “Only if this organic approach leaves ambiguity – or, indeed, if it reveals it – may we turn to extrinsic indicia of legislative intent, like legislative history.”¹⁷

As noted above, this motion requires the Court to determine whether the phrase “historically unwritten,” as used in the VRA, applies to Yup'ik:

[W]here the language of the applicable minority group is oral or unwritten *or in the case of Alaska 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.¹⁸

¹⁶ *Int'l. Ass'n of Mach. & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Group*, 387 F.3d 1046, 1051 (9th Cir. 2004) (citation and internal quotations marks omitted); *Nuclear Info. & Res. Serv. v. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 960 (9th Cir. 2006) (“It is well established that [t]he plain meaning of the statute controls, and courts will look no further, unless its application leads to unreasonable or impracticable results.”) (citation and internal quotations omitted).

¹⁷ *Int'l. Ass'n of Mach. & Aerospace Workers*, 387 F.3d at 1051.

¹⁸ 42 U.S.C. § 1973aa-1a(c) (emphasis added).

The first question is thus whether the statute creates a single exception for all Alaska Native languages, or whether the exception applies on a language-by-language basis. The Plaintiffs correctly point out that the portion of the text regarding Alaska Native languages is conditional; the exemption applies only “. . . *if* the predominant language is historically unwritten . . . ”¹⁹ If Congress had intended to carve out an exception for *all* Alaska Native and American Indian language, there would have been no reason to include the clause beginning with “if.” Therefore, the plain language of the statute precludes a finding of any blanket exemption from the written assistance requirements of the VRA for all Alaska Native languages. To do so would violate the rule against reading statutory language in a way that renders words or phrases superfluous.²⁰ As a result, the Court finds that the exemption from the VRA’s written assistance requirement must be applied on a language-by-language basis. In other words, a language is only exempt if found to be “historically unwritten,” whatever that term may mean in the context of the VRA.

The Court’s interpretation is supported not only by the plain language of the statute, but also by the Department of Justice regulations implementing the VRA. For example, 28 C.F.R. § 55.12(c) states: “Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten.” The use of “many” and “some” indicates that covered jurisdictions are expected to assess whether each American Indian or Alaska Native language is “unwritten” on a language-by-language basis.

Having concluded that the VRA does not include a blanket exemption for all Alaskan

¹⁹ 42 U.S.C. § 1973aa-1a(c); 42 U.S.C. § 1973b(f)(4) (emphasis added).

²⁰ *U.S. v. Ramirez-Sanchez*, 338 F.3d 977, 979 (9th Cir. 2003) (“As a rule, statutory language should not be read in such a way as to render words or phrases as mere surplusage.”).

Native languages, the Court turns to the question of what “historically unwritten” means and whether it applies to the Yup’ik language. As noted above, neither the VRA nor the regulations interpreting the statute’s bilingual election provisions define “historically unwritten.” Nor have federal courts interpreted or even focused on the term, beyond quoting the statutory language or mentioning it in passing.²¹ Indeed, in searching common legal databases for the term “historically unwritten,” the Court discovered only two cases, neither of which is particularly relevant to the issues raised here.

The State Defendants contend that, based on the language of the statute, the “plain-language meaning” of “historically unwritten” is “traditionally oral.”²² They argue that the VRA equates unwritten with oral, as suggested by the phrase “where the language of the applicable minority group is *oral or unwritten* or in the case of Alaskan Natives and American Indians . . . ,”²³ which appears in both sections 203 and 4(f)(4). They argue further that a “reasonable interpretation of the phrase ‘historically unwritten’ . . . would seem to be languages with an oral history,”²⁴ and that Yup’ik fits this description due to its “rich oral tradition of myths, stories, histories, and songs passed from generation to generation.”²⁵ The State also argues that because

²¹ See *U.S. v. McKinley County, N.M.*, 941 F.Supp. 1062, 1066-67 (“In the case of historically unwritten languages, such as Navajo and Zuni, the covered jurisdiction ‘is only required to furnish oral instructions, assistance, or other information relating to registration and voting.’”)

²² Dkt. 136, Defs.’ Mot. for Summ. J. at 4.

²³ 42 U.S.C. § 1973aa-1a(c); 42 U.S.C. § 1973b(f)(4).

²⁴ Dkt. 136, Defs.’ Mot. for Summ. J. at 5.

²⁵ *Id.*

the term is not defined by any statute or regulation, the Court should look to legislative history to resolve any uncertainty about its meaning. The legislative history, they assert, shows that Congress intended to exclude Yup'ik and other Alaskan Native languages from the written assistance requirement.

The Plaintiffs respond that genuine issues of material fact preclude the Court, at this point in the case, from declaring Yup'ik to be “historically unwritten.” They assert that “[t]he touchstone of whether a language is considered unwritten is whether it is commonly used in a written form, and that, by this measure, Yup'ik is a *written* language since it *is* commonly used in written form.”²⁶ As evidence of this, they cite statistics showing that a high percentage of village residents within the Bethel census area speak and read Yup'ik. They also point to materials produced and distributed by the State in Yup'ik, including pamphlets on domestic violence and information on fishing regulations. In addition, the Plaintiffs rely on a declaration from their expert, Steven A. Jacobson, a University of Alaska professor and member of the Alaska Native Language Center faculty who has published a Yup'ik dictionary and guide to Yup'ik grammar. In an affidavit, Jacobson traces the development of written Yup'ik by 19th century religious missionaries to the creation of the modern version in the late 1960s.²⁷

Because there are no statutes or regulations that explicitly define “historically unwritten,” the Court looks for guidance to the federal regulations interpreting the VRA and, specifically, to the regulation on “unwritten languages.” As noted, 28 C.F.R. § 55.12 states that “a language may be considered unwritten if it is not commonly used in a written form.” The Court assumes the

²⁶ Dkt. 177, Pls.’ Resp. at 4 (quoting 28 C.F.R. § 55.12(c)).

²⁷ See Dkt. 87.

reverse is also true: a language may be considered “written” if it is commonly used in a written form. Yet common usage cannot be the sole measure of “historically unwritten.” By including “historically” in the statutory language, Congress explicitly added a temporal element to the written-assistance exemption; under the statute, an Alaskan Native or American Indian language is exempt from the written assistance requirement only if it was *historically* unwritten.

*Webster’s II New College Dictionary*²⁸ supplies the following definitions of “historical”: “1. Of, pertaining to, or of the character of history. 2. Based on or concerned with events in history. 3. Having importance or influence in history.” The dictionary, in turn, defines “history” as “[a] narrative of past events,” or “[a] chronological, often explanatory or commentarial record of events, as of the life or development of a people or institution.”²⁹ Given this, it is difficult for the Court to pinpoint a precise date or year for dividing “historically unwritten” from simply “unwritten,” or “historically written” from “written.” Yet the emphasis on history strongly suggests that it is not enough for Yup’ik to be commonly written in modern times; if the written-assistance requirement is to apply, Yup’ik must also have been written during some earlier era. And if “history” refers to a chronology of the “the life or development of a people or institution,” the Court concludes that the dividing line between “historically unwritten” and simply “unwritten” must extend at least several generations into the past. The Court therefore uses this lens, imprecise as it may be, in analyzing the parties’ arguments and evidence.³⁰

²⁸ *Webster’s II New College Dictionary* 525 (Houghton Mifflin Co. 2001) (1995).

²⁹ *Id.*

³⁰ In accord with the statutory language, the Court’s analysis is strictly limited to whether Yup’ik is a “historically unwritten” language, and thus the Court does not examine or draw any conclusions on the extent to which written Yup’ik is commonly used today.

Based on the Court’s review of the voluminous exhibits submitted by both sides, several themes emerge. The first is that Yup’ik was an exclusively oral language until the 19th century, when Russian Orthodox, Protestant Moravian, and Roman Catholic missionaries began developing a number of written versions.³¹ However, these versions never coalesced into a single, unified system of writing, and they failed to accurately represent certain sounds that are crucial to determining the meaning of a word, but which are difficult for non-Native speakers to discern.³² Second, these early versions of Yup’ik, eventually gave rise to a “modest tradition” of literacy.³³ But the extent of this literacy is unknown or has not been well documented; none of the evidence submitted in this case quantifies or describes in detail the extent to which the written versions created by missionaries were adapted or adopted by native speakers to secular uses. The third theme is that the modern version of Yup’ik, the only one to have been taught in public schools, did not emerge until University of Alaska professors collaborated with native speakers in the late 1960s.³⁴ In sum, the evidence, when viewed in the light most favorable to the Plaintiffs, depicts a language that was primarily, if not wholly, oral until the 19th century, when missionaries made fractured attempts to reduce it to writing. That some Alaska Natives learned to read and write Yup’ik from the missionaries’ work is not in dispute.³⁵ But isolated and occasional efforts to

³¹ Dkt. 136, Ex. G (Excerpts from Steven A. Jacobson, *A Practical Grammar of the Central Alaskan Yup’ik Eskimo Language* 447 (Alaska Native Language Center 1995)).

³² *Id.*

³³ Dkt. 136, Ex. E (Steven A. Jacobson, *Central Yup’ik and the Schools: Literacy and Education in Central Yup’ik* 6 (1984)).

³⁴ *Id.*

³⁵ *See Id.*; Dkt. 87, Ex. 148 at 7; Dkt. 87, Ex. 149 at 2; Dkt. 87, Ex. 150 at 3.

reduce the Yup'ik language to writing do not show that the language as a whole was historically written, and the evidence that the Defendants have presented shows only that written Yup'ik became common or routine after the modern version was developed in the late 1960s.

Jacobson, the Plaintiffs' expert and Yup'ik scholar, disagrees. His affidavit refers to the "longstanding and widespread use of Yup'ik as a written language" and contends that there was a "significant tradition of literacy within the Yup'ik community for both religious and secular purposes before I and my colleagues began to work on developing the modern orthography."³⁶ But Jacobson offers little to back up these statements. The evidence he points to consists of: a description of the volume of Yup'ik archival material in the Alaska Native Language Center's Central Alaskan Yup'ik Language Collection; a description of a writing system developed by a 19th century Yup'ik-speaking shaman; and his own and other researchers' statements about the purported spread of literacy in connection with the Moravians' publication of hymnals and the New Testament in Yup'ik.³⁷

None of the exhibits on which Jacobson relies support an inference that Yup'ik was commonly written by Alaska Natives before the mid-20th century. The sheer volume of archival material says nothing about the actual contents, or the extent to which written Yup'ik was used outside of the religious context. The writing system developed by the shaman, Uyaquq (Helper Neck), was never adopted by other writers.³⁸ And the published statements to which Jacobson refers lack the specificity of the declarations in his affidavit. Specifically, his affidavit cites class

³⁶ Dkt. 87 at 2, 5.

³⁷ Dkt. 87.

³⁸ See Dkt. 87, Ex. 148 at 7.

materials prepared by University of Alaska Professor Michael Krauss, which state that, “Very many Yupiks, Catholics and Russian Orthodox as well as Moravians, have learned to read this book, in fact have learned to read their language from this book.”³⁹ The book referred to is a version of the New Testament published in Yup’ik in 1956 by the Rev. Ferdinand Drebert, a Moravian missionary working in Bethel.⁴⁰ Apart from the vagueness of “[v]ery many,” the publication of the New Testament in the mid-1950s – only a decade before the development of the modern orthography – does little to bolster the Plaintiffs’ assertion that Yup’ik is “historically written.” Likewise, Jacobson’s affidavit points to a 1963 publication by Wendell Oswald, entitled “Napaskiak: An Alaskan Eskimo Community.”⁴¹ The brief excerpt contained in the record describes the “Yuk dialect of Eskimo” as the first language of the villagers studied by Oswald.⁴² It further states that most of the older villagers were illiterate, although “many other adults are literate only in Eskimo.”⁴³ Oswald’s work further states that “[t]here are not other books written in Eskimo; however, between villagers, letters are commonly written in Yuk. The laws of the community and some of the council minutes are recorded in Eskimo.”⁴⁴ According to Jacobson, Oswald’s book was researched in the 1950s and published in 1963.⁴⁵ As with Krauss’s course

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Dkt. 87, Ex. 149.

⁴² *Id.* at 2.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Dkt. 87 at 4.

materials, the mid-19th century timing of Oswalt's research fails to establish that Yup'ik was historically written. And even if it did, the book's apparent focus on a single village is too narrow to raise a genuine issue of material fact as to whether Yup'ik was *commonly* written during the period in question. Finally, Jacobson points to his own Yup'ik grammar book published in 1995. In particular, he cites the reproduction of a personal letter written in Yup'ik, and the accompanying caption, which states: "Long before the introduction of the new Yup'ik orthography and bilingual education in the schools, many Yup'iks, even some with little or no formal schooling, learned to read and write their language from hymnals and the Bible."⁴⁶ Neither the excerpt from Jacobson's book nor his affidavit offer specifics as to the time period the statement refers to; nor do they attempt to quantify what is meant by "many Yup'iks." The letter itself is of little help; the caption next to it lacks a date, although the reproduction appears to include a date of 1983 or 1988. Given the lack of detail and documentary evidence supporting Jacobson's assertions, the Court finds that his affidavit fails to raise a genuine issue of fact as to whether Yup'ik was commonly written prior to the mid-20th century. The Court also gives little credence to Jacobson's assertion that Yup'ik "is a historically written language;" apart from the lack evidence to support this, the affidavit fails to define what, if anything, "historically unwritten" means in the field of linguistics. This type of statement is not evidentiary support; it is a legal conclusion. As such, it is inappropriate matter for expert testimony,⁴⁷ and summary judgment must be made or resisted based on facts, not theories.

⁴⁶ Dkt. 87, Ex. 150 at 3.

⁴⁷ See *U.S. v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (citing *Aguilar v. Int'l. Longshoremen's Union*, 966 F.d 443, 447 (9th Cir. 1992) (noting matters of law are for the court's determination, not that of an expert witness)).

In conclusion, the Plaintiffs' evidence fails to rebut the Defendants evidence that Yup'ik was predominantly an oral language prior to the mid-20th century, and the Court thus determines that Yup'ik is a "historically unwritten" language for purposes of the VRA. As a result, the Court finds that the VRA's exception applies, and that the Defendants are not required to provide written election-related assistance to Yup'ik speakers in the Bethel census area.

V. CONCLUSION

The Court GRANTS the State Defendants' Motion for Partial Summary Judgment at Dkt. 136.

Dated at Anchorage, Alaska, this 23rd day of July 2008.

/s/ Timothy Burgess
TIMOTHY M. BURGESS
UNITED STATES DISTRICT JUDGE