

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
YELLOWSTONE COUNTY

<p>WESTERN NATIVE VOICE, Montana Native Vote, Blackfeet Nation, Confederated Salish and Kootenai Tribes, Fort Belknap Indian Community, and Northern Cheyenne Tribe</p> <p style="text-align: center;"><i>Plaintiffs,</i></p> <p style="text-align: center;">vs.</p> <p>CHRISTI JACOBSEN, in her official capacity as Montana Secretary of State,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p>Cause No: DV 2021-451 DV 2021-560</p> <p>Hon. Michael G. Moses Hon. Donald Harris</p> <p>ORDER GRANTING PLAINTIFFS' MOTION FOR CONSOLIDATION</p>
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Before the Court is the motion for consolidation submitted by Plaintiffs in Cause No. DV 2021-560 ("WNV Plaintiffs"). WNV Plaintiffs request to consolidate their matter into DV 2021-451. Plaintiffs in Cause No. DV 2021-451, the Montana Democratic Party and Mitch Bohn ("MDP"), do not object to consolidation. Defendant Secretary Christi Jacobsen ("the Secretary") objects to consolidation due to the motion being premature.

The motion for consolidation has been fully briefed and oral argument was not requested. The Court will grant the motion to consolidate, as discussed below.

I. Background

Both cases involve challenges to laws that were passed by the Montana Legislature in April 2021. In DV 2021-451, MDP has alleged that House Bill 176 (“HB 176”), Senate Bill 169 (“SB 169”), and House Bill 530 (“HB 530”) violate multiple provisions of the Montana Constitution. In DV 2021-560, WNV Plaintiffs have alleged that HB 176 and HB 530 violate multiple provisions of the Montana Constitution.

II. Legal Standard

Montana Rule of Civil Procedure 42(a) controls consolidation of actions:

(a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;
- (2) consolidate the actions; or
- (3) issue any other orders to avoid unnecessary cost or delay;

Consolidation under Rule 42 is not a right. District courts have broad discretion in deciding whether to consolidate cases. *Tindall v. Konitz Contracting* (1989), 240 Mont. 345, 352, 783 P.2d 1376, 1380. A district court’s determination on consolidation “will not be overturned absent a clear abuse of discretion.” *Tribby v. Nw. Bank of Great Falls* (1985), 217 Mont. 196, 208, 704 P.2d 409, 417.

a. Discussion

WNV Plaintiffs allege consolidation of DV 21-560 with DV 21-451 is appropriate because both matters are factually similar and involve legal challenges to recently passed voter suppression laws, specifically HB 176 and HB 530. Additionally, both cases name the Secretary as the sole Defendant. WNV also alleges the Secretary would not be prejudiced by consolidation because it would enable her to defend against all claims in one action.

The Secretary argues consolidation of DV 21-560 with DV 21-451 is premature. The Secretary's first argument supporting that consolidation is premature was due to the motion to dismiss pending in DV 21-451. Since the time of the filing of her objection, the Court has ruled on the motion to dismiss and therefore this argument is moot. The Secretary also described she anticipates filing a motion to dismiss in DV 21-560, however, since the filing of her response in July 2021 to the drafting of this order in December 2021, no such motion to dismiss has been filed. Additionally, the Secretary filed an answer in DV 21-560 on August 5, 2021. In sum, there are no dispositive motions pending such that consolidation would be inappropriate or premature at this time.

The Secretary's next contention in support of her argument that consolidation is premature is that further development is required to determine whether issues of law and fact support consolidation. Regarding the need for further development of facts

prior to consolidation, the Secretary describes that the two cases are distinct and contradictory. Specifically, she argues that because WNV Plaintiffs allege the laws at issue target and burden Native Americans that they are distinct and contradictory to MDP's allegations that the laws were enacted to target and discourage young voters.

WNV Plaintiffs point to the fact that, in its Complaint, MDP explicitly identified that, in addition to alleging harm to young Montanans, that group also included Indigenous communities. There is also factual overlap amongst college students, young Montanans, and Native Americans. Both cases will require a showing that the laws make it more difficult for Native Americans and young Montanans to vote. While there may be some separate factual issues, the Court finds that the factual similarities in these cases weigh in favor of consolidation.

The Secretary also argues these actions are fundamentally different as to the classification of the impacted group and the applicable level of scrutiny. Further, the Secretary describes that MDP has presented a facial challenge whereas WNV Plaintiffs have presented an as-applied challenge.

In both actions, it is alleged that the same laws violate the same constitutional provisions. Additionally in both actions, the same remedy is sought. The process for determining which level of scrutiny to be applied will be the same. The fact that different challenges to the laws have been presented does not render the legal issues so different that consolidation would be inappropriate.

Lastly, the Secretary asserts that consolidation is not necessary for the efficient completion of discovery. However, these cases involve essentially the same government actors such that consolidation of these cases would promote the efficient use of everyone's time when engaging in depositions and responding to discovery requests. This would also help to avoid unnecessary costs and duplicative litigation. Further supporting consolidation is the fact that the 2020 Ballot Interference Prevention Act cases, which were not consolidated, resulted in the inefficient use of resources through duplicative discovery, deposing of the same government actors, and testimony from the same witnesses at trial. *See Western Native Voice et al, v. Stapleton et al.*, Cause No. DV 20-0377 (Thirteenth Judicial District Court, Hon. Jessica Fehr); *Driscoll et al, v. Stapleton*, Cause No. DV 20-0408 (Thirteenth Judicial District Court, Hon. Donald Harris).

In conclusion, Rule 42(a) provides that when separate actions present common questions of law and fact, the court may consolidate the actions. Here, the necessary factual proof for both cases will be substantially the same. The necessary parties to determine whether those facts support the legal arguments are the same. The legal arguments are very similar. It does not appear that the Secretary will be prejudiced by consolidation. Consolidation of these matters will promote efficient use of time, permit trial convenience, and avoid unnecessary costs or delay.

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The Court has considered all the papers and briefs on file. The Court, being fully informed, makes the following decision:

IT IS HEREBY ORDERED that WNV Plaintiffs' Motion for Consolidation is **GRANTED**. The Clerk of this Court is directed to consolidate Cause No. DV 21-560 with Cause No. DV 21-451. All future documents shall be filed under Cause No. DV 21-451.

DATED December 10, 2021

/s/ Michael G. Moses
District Court Judge

cc: Hon. Donald Harris
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