

To every elected official in the State of South Dakota,

Please find the following: ARGUMENTS IN SUPPORT OF ELECTRONIC VOTING MACHINE FREE COUNTIES

Please READ each and every very important point in the Federal and State Codes which support machine free voting systems.

https://eac.gov/sites/default/files/document_library/files/VVSG.1.0_Volume_1.PDF
<https://uscode.house.gov/view.xhtml?path=/prelim@title52/subtitle2&edition=prelim>

SUMMARY OF MAIN POINTS:

1. Voting System defined by HAVA = **Electronic**. The total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment)
2. HAVA is a Federal Grant Program. Grant programs are VOLUNTARY. HAVA FUNDS accepted by State = used to purchase electronics.
3. HAVA funds are distributed to the State. The State of South Dakota disbursed funds to the counties to purchase machines, or reimburse them for machines purchased.
4. Each County is an independent election jurisdiction. They are NOT required to take HAVA funds, and can discontinue use of election equipment purchased with HAVA funds at any time.
5. Counties using electronic tabulators, purchased with HAVA funds, then must have at least one electronic ADA device per polling station.
6. Counties not using an electronic “voting system” as defined in HAVA then are not required to adhere to the guidelines for electronic voting systems or provide at least one electronic ADA device per polling station.
 - a. Counties using a central count system to count the ballots at the courthouse do NOT have to comply with ADA accessible machines in each polling place, PER HAVA. See #8 below.
7. Nothing about a county going machine free will affect the State’s HAVA funding or compliance.
8. There are protections in the law for paper balloting and machine free counting:
 - (B) **A State or jurisdiction that uses a paper ballot voting system**, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), **may meet the requirements of subparagraph (A)(iii) by—**
 - i.) **Establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and**
 - ii.) **Providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the**

issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

(2) Protection of paper ballot voting systems

For purposes of subsection (a)(1)(A)(i), the term "verify" may not be defined in a manner that **makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.**

9. The EAC's VVSG 1.0 specify sections 3.1.1 through 3.1.7 **emphasis in these requirements is on the voter interface with the voting machine – ADA accessible electronic machines.**
10. 52 USC §10508 allows for disabled voters to have a person assisting them. It reads: **Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice,** other than the voter's employer or agent of that employer or officer or agent of the voter's union.
11. The State of South Dakota has not received any HAVA funds for equipment since 2020. **A State is eligible to receive a requirements payment for a fiscal year if the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, has filed with the Commission a statement certifying that the State is in compliance with the requirements referred to in subsection** <https://www.eac.gov/funding-levels-by-state>
12. **It is clear in Federal Law there is an allowance for a machine free option for voting and counting.** The Voting System described in HAVA is electronic in nature. **Electronic voting systems must allow for ADA compliant devices. Removing the electronic voting system then removes the requirement for ADA compliant electronic devices. 52 USC §10508 clearly allows for human assistance for those who need it. The argument that a machine free voting system is unconstitutional is blatantly false.**
13. A County governing body has the authority under the law to adopt, experiment with or abandon system. SDCL 12-17B-3 **Any governing body having supervision of elections within any political subdivision may adopt, experiment with, or abandon any automatic tabulating or electronic ballot marking system** approved for use by the State Board of Elections. Any governing body may use the system in all or some of the precincts within its jurisdiction or in combination with any other type of voting system approved for use by the State Board of Elections. **SDCL 12-17B-6.1. Electronic ballot marking system required where candidate for federal office on ballot.** If a candidate for federal office appears on the ballot at a polling place, such polling place is required to have an electronic ballot marking system present. **12-17B-6.1 would not apply if a county moved to a machine free voting system.**
14. Sara Frankenstein and many County State's Attorneys are claiming it is illegal to hand count paper ballots by referencing the following law: SDCL **12-6-14. Form of official primary ballot prescribed by state board.**

The form of the official primary election ballot shall be prescribed by the State Board of Elections.

Associated Administrative Rule:

5:02:06:10. Primary ballot. The primary election ballot must have a blue indicator for the Democratic Party, white for the Republican Party, and a different color as certified by the Secretary of State for any other party. The ballot must be in one of the following forms, as applicable:

Hand counted paper ballots may only be used if there is no federal race on the ballot and must be in the following form, as applicable:

This Law and Rule being quoted refers the FORM OF THE BALLOT only. This does not reference how the ballots shall be COUNTED, TABULATED or TALLIED.

However, the South Dakota election code in Chapter 12 has an extensive amount of laws and rules that dictate hand counting in the precinct which are being completely ignored statewide. See reference to a listing here:

https://www.sdcanvassing.com/files/ugd/944eb0_b30611a93d2e40e5a475ebd697395edb.pdf

In particular, SDCL:

12-20-5. Count of votes for candidates--Scrutiny of ballots by precinct deputies--Decisions on disputed ballots. The votes for the several candidates shall be counted in the order in which the candidates occur upon the ballots. At least two precinct deputies, of opposite political parties, shall scrutinize each ballot with the precinct superintendent acting to break any tie vote of the two precinct deputies ruling on a ballot. As the vote is announced two precinct deputies shall make the mark required on the tally sheets.

12-20-8. Precinct superintendent and precinct deputies to record intention of voter. The precinct superintendent and precinct deputies, in counting the votes, shall endeavor to record the intention of the voter. The precinct superintendent and precinct deputies shall then hold the intention of the voter to be to vote for the candidate or candidates before whose name the voter has placed a mark.

ES&S tabulator machines cannot determine voter intent. ES&S has stated this publicly, as well as the SD Board of Elections.

12-20-11. Entry of precinct vote on unofficial return list--Return with election returns. When the vote count is complete, the members of the precinct election board shall enter upon the blank list the true number of votes cast in the precinct for each person, measure, law, or amendment which appears upon the official ballot, and shall enclose the completed list in the envelope described in § 12-20-10. The precinct superintendent or precinct deputy chosen to deliver the election returns to the officer in charge of the election shall return the completed list separate from any other envelopes or wrappers returned at the time the election returns are delivered.

12-20-21. Return of ballot boxes, returns, records and supplies to officer in charge-- Tampering prohibited--Violation as felony. The sealed ballot box, together with the pollbook and duplicate tally sheet, registration lists, and the envelope containing the unofficial returns and all supplies and returns required, shall be returned by the precinct superintendent or a precinct deputy designated by the precinct superintendent, to the officer in charge of the election immediately after completion of the vote count. No person may deface, destroy, or tamper with the ballot box, envelope, pollbook, duplicate tally sheet, or registration lists or remove any seals. A violation of this section is a Class 6 felony.

15. Many a county in South Dakota send the auditor or a representative of the auditor's office to assist the nursing home vote. They do not bring Express Vote machines to the nursing home for the elderly or blind to vote with. There are poll watchers or county employees that assist the voters with voting on a paper ballot. Each nursing home can and should be considered a polling place. With this argument of removing ADA devices from polling places as an unconstitutional event, would each prior election conducted in the state of South Dakota then be considered unconstitutional and a violation of HAVA because of the lack of electronic ballot marking devices in the nursing homes or hospitals?
16. The so-called legal experts in the state, such as Ms. Frankenstein and the State's Attorneys have produced less than reliable or accurate legal interpretation of election related public records related to CVR's and audit logs. Their argument is still "CVR's don't exist." Every one of the legal arguments put forth by the State's Attorneys has proven to be false. They now have an ethical obligation to advise their clients of the new evidence and to admit their argument was incorrect. However, to date, this has not happened.

Last year Ms. Frankenstein was touring the state of South Dakota promoting the failed voter registration verification system known as ERIC. Up to a dozen states have cancelled their contracts with ERIC due to the massive breach of contract and failure to clean the voter rolls in multiple states. Yet, Ms. Frankenstein has not publicly reversed her opinion and promotion of ERIC.

17. The so-called legal experts now claiming that a county going to machine free voting and vote tabulating is somehow unconstitutional or in violation of law is yet another example of less than a less than truthful and ethical application of the law. The protections allowed for a paper balloting system in the Federal Law are being ignored by Ms. Frankenstein in her publicly circulated legal opinion, and are not being revealed to those who are relying on her professional opinion. The public officials, legislators, and petitioners deserve to know the full application of HAVA rather than the one-line version of Ms. Frankenstein's opinion, which is clearly taken out of context to intentionally confuse and intimidate citizens and county officials who have every legal right to petition to make their county free of any and all electronic voting systems.

Any public official voting on a legislative bill or a county ordinance, with the intent of stopping a fully legal and constitutionally protected citizen led movement to petition their government, with less than factual information is unethical at best. It would behoove any elected official to reflect on their oath sworn to the United States and South Dakota Constitutions, and remind themselves of exactly what their elected position is instituted for. Any elected public official is

there by the will of the people, to represent the people, with the power given them by the people. In a Republic, the people ARE the government. All officials would benefit from reminding themselves of this and then make FULLY EDUCATED decisions with all of the facts and evidence in front of them.

There is absolutely nothing unlawful for a county to move to abandon the system of electronic voting systems. There is absolutely nothing unlawful for a county petition to require machine free elections. The Federal and State Laws CLEARLY have protections for machine free voting and counting. HOWEVER, it is clear that transporting the ballots from the precinct prior to counting the VOTES is violation of the law and our superintendents have been put at risk of committing FELONY VIOLATIONS due to poor training and lack of legal enforcement of election law in the State of South Dakota. Any lawyer who is promoting an opinion to the opposite, is unethically and immorally weaponizing the law to fit a politically motivated agenda, and is in clear violation of the code of conduct of lawyer per the State Bar Association rules.

Here is a link to the Constitutions for your review.

<https://sdlegislature.gov/Constitution>

<https://constitution.congress.gov/browse/>

Pursuant to 52 USC §20107. Definitions

As used in this chapter, the term—

- (1) "accessible" means accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved;
- (2) "elderly" means 65 years of age or older;
- (3) "Federal election" means a general, special, primary, or runoff election for the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
- (4) "handicapped" means having a temporary or permanent physical disability; and
- (5) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession 1 of the United States.

Pursuant to 52 USC SUBCHAPTER I—PAYMENTS TO STATES FOR ELECTION ADMINISTRATION IMPROVEMENTS AND REPLACEMENT OF PUNCH CARD AND LEVER VOTING MACHINES §20901. Payments to States for activities to improve administration of elections

(a) In general

Not later than 45 days after October 29, 2002, the Administrator of General Services (in this subchapter referred to as the "Administrator") shall establish a program under which the Administrator shall make a payment to each State in which the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, notifies the Administrator not later than 6 months after October 29, 2002, that the State intends to use the payment in accordance with this section.

(b) Use of payment

(1) In general

A State shall use the funds provided under a payment made under this section to carry out one or more of the following activities:

- (A) Complying with the requirements under subchapter III.
- (B) Improving the administration of elections for Federal office.
- (C) Educating voters concerning voting procedures, voting rights, and voting technology.
- (D) Training election officials, poll workers, and election volunteers.
- (E) Developing the State plan for requirements payments to be submitted under subpart 1 of part D of subchapter II.
- (F) Improving, acquiring, leasing, modifying, or replacing voting systems and technology and methods for casting and counting votes.
- (G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.
- (H) Establishing toll-free telephone hotlines that voters may use to report possible voting fraud and voting rights violations, to obtain general election information, and to access detailed automated information on their own voter registration status, specific polling place locations, and other relevant information.

(c) Use of funds to be consistent with other laws and requirements

In order to receive a payment under the program under this section, the State shall provide the Administrator with certifications that—

- (1) the State will use the funds provided under the payment in a manner that is consistent with each of the laws described in section 21145 of this title, as such laws relate to the provisions of this chapter; and
- (2) the proposed uses of the funds are not inconsistent with the requirements of subchapter III.

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PURSUANT TO §21003. Condition for receipt of funds

(a) In general

A State is eligible to receive a requirements payment for a fiscal year if the chief executive officer of the State, or designee, in consultation and coordination with the chief State election official, has filed with the Commission a statement certifying that the State is in compliance with the requirements referred to in subsection (b). A State may meet the requirement of the previous sentence by filing with the Commission a statement which reads as follows: "_____ hereby certifies that it is in compliance with the requirements referred to in section 253(b) of the Help America Vote Act of 2002." (with the blank to be filled in with the name of the State involved).

(b) State plan requirement; certification of compliance with applicable laws and requirements

The requirements referred to in this subsection are as follows:

- (1) The State has filed with the Commission a State plan covering the fiscal year which the State certifies—
 - (A) contains each of the elements described in section 21004(a) of this title (or, for purposes of determining the eligibility of a State to receive a requirements payment appropriated pursuant to the authorization provided under section 21007(a)(4) of this

title, contains the element described in paragraph (14) of such section) with respect to the fiscal year;

(B) is developed in accordance with section 21005 of this title; and

(C) meets the public notice and comment requirements of section 21006 of this title.

(2)(A) Subject to subparagraph (B), the State has filed with the Commission a plan for the implementation of the uniform, nondiscriminatory administrative complaint procedures required under section 21112 of this title (or has included such a plan in the State plan filed under paragraph (1)), and has such procedures in place for purposes of meeting the requirements of such section. If the State does not include such an implementation plan in the State plan filed under paragraph (1), the requirements of sections 21005(b) and 21006 of this title shall apply to the implementation plan in the same manner as such requirements apply to the State plan.

(B) Subparagraph (A) shall not apply for purposes of determining the eligibility of a State to receive a requirements payment appropriated pursuant to the authorization provided under section 21007(a)(4) of this title.

(3) The State is in compliance with each of the laws described in section 21145 of this title, as such laws apply with respect to this chapter.

(4) To the extent that any portion of the requirements payment is used for activities other than meeting the requirements of subchapter III—

(A) the State's proposed uses of the requirements payment are not inconsistent with the requirements of subchapter III; and

(B) the use of the funds under this paragraph is consistent with the requirements of section 21001(b) of this title.

(5)(A) Subject to subparagraph (B), the State has appropriated funds for carrying out the activities for which the requirements payment is made in an amount equal to 5 percent of the total amount to be spent for such activities (taking into account the requirements payment and the amount spent by the State) and, in the case of a State that uses a requirements payment as a reimbursement under section 21001(c)(2) of this title, an additional amount equal to the amount of such reimbursement.

(B) Subparagraph (A) shall not apply for purposes of determining the eligibility of a State to receive a requirements payment appropriated pursuant to the authorization provided under section 21007(a)(4) of this title for fiscal year 2010, except that if the State does not appropriate funds in accordance with subparagraph (A) prior to the last day of fiscal year 2011, the State shall repay to the Commission the requirements payment which is appropriated pursuant to such authorization.

(c) **Methods of compliance left to discretion of State**

The specific choices on the methods of complying with the elements of a State plan shall be left to the discretion of the State.

(d) **Timing for filing of certification**

A State may not file a statement of certification under subsection (a) until the expiration of the 45-day period (or, in the case of a fiscal year other than the first fiscal year for which a requirements payment is made to the State under this part, the 30-day period) which begins on the date notice of the State plan under this part is published in the Federal Register pursuant to section 21005(b) of this title.

(e) **Chief State election official defined**

In this part, the "chief State election official" of a State is the individual designated by the State under section 10 of the National Voter Registration Act of 1993 (42 U.S.C. 1973gg-8) [now 52 U.S.C. 20509] to be responsible for coordination of the State's responsibilities under such Act.

PURSUANT TO 52 USC §21021. Payments to States and units of local government to assure access for individuals with disabilities

(a) **In general**

The Secretary of Health and Human Services shall make a payment to each eligible State and each eligible unit of local government (as described in section 21023 of this title).

(b) **Use of funds**

An eligible State and eligible unit of local government shall use the payment received under this subpart for—

(1) making polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, including the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters; and

(2) providing individuals with disabilities and the other individuals described in paragraph (1) with information about the accessibility of polling places, including outreach programs to inform the individuals about the availability of accessible polling places and training election officials, poll workers, and election volunteers on how best to promote the access and participation of individuals with disabilities in elections for Federal office.

(c) **Schedule of payments**

As soon as practicable after October 29, 2002 (but in no event later than 6 months thereafter), and not less frequently than once each calendar year thereafter, the Secretary shall make payments under this subpart.

PURSUANT TO §21081. Voting systems standards

(a) **Requirements**

Each voting system used in an election for Federal office shall meet the following requirements:

(1) **In general**

(A) Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall—

(i) permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted;

(ii) provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted (including the opportunity to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error); and

(iii) if the voter selects votes for more than one candidate for a single office—

(I) notify the voter that the voter has selected more than one candidate for a single office on the ballot;

(II) notify the voter before the ballot is cast and counted of the effect of casting multiple votes for the office; and

(III) provide the voter with the opportunity to correct the ballot before the ballot is cast and counted.

(B) A State or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet the requirements of subparagraph (A)(iii) by—

(i) establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

(ii) providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

(C) The voting system shall ensure that any notification required under this paragraph preserves the privacy of the voter and the confidentiality of the ballot.

(2) Audit capacity

(A) In general

The voting system shall produce a record with an audit capacity for such system.

(B) Manual audit capacity

(i) The voting system shall produce a permanent paper record with a manual audit capacity for such system.

(ii) The voting system shall provide the voter with an opportunity to change the ballot or correct any error before the permanent paper record is produced.

(iii) The paper record produced under subparagraph (A) shall be available as an official record for any recount conducted with respect to any election in which the system is used.

(3) Accessibility for individuals with disabilities

The voting system shall—

(A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;

(B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and

(C) if purchased with funds made available under subchapter II on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).

Paper ballots and hand counted elections are not purchased with HAVA funds and do not fit the definition of "voting system" as defined in HAVA.

(4) Alternative language accessibility

The voting system shall provide alternative language accessibility pursuant to the requirements of section 10503 of this title.

(5) Error rates

The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

(6) Uniform definition of what constitutes a vote

Each State shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.

(b) Voting system defined

In this section, the term "voting system" means—

(1) the total combination of mechanical, electromechanical, or electronic equipment (including the software, firmware, and documentation required to program, control, and support the equipment) that is used—

(A) to define ballots;

(B) to cast and count votes;

(C) to report or display election results; and

(D) to maintain and produce any audit trail information; and

(2) the practices and associated documentation used—

(A) to identify system components and versions of such components;

(B) to test the system during its development and maintenance;

(C) to maintain records of system errors and defects;

(D) to determine specific system changes to be made to a system after the initial qualification of the system; and

(E) to make available any materials to the voter (such as notices, instructions, forms, or paper ballots).

(c) Construction

(1) In general

Nothing in this section shall be construed to prohibit a State or jurisdiction which used a particular type of voting system in the elections for Federal office held in November 2000 from using the same type of system after the effective date of this section, so long as the system meets or is modified to meet the requirements of this section.

(2) Protection of paper ballot voting systems

For purposes of subsection (a)(1)(A)(i), the term "verify" may not be defined in a manner that makes it impossible for a paper ballot voting system to meet the requirements of such subsection or to be modified to meet such requirements.

(d) Effective date

Each State and jurisdiction shall be required to comply with the requirements of this section on and after January 1, 2006.

(Pub. L. 107–252, title III, §301, Oct. 29, 2002, 116 Stat. 1704.)

PURSUANT TO §10508. Voting assistance for blind, disabled or illiterate persons

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

(Pub. L. 89–110, title II, §208, as added Pub. L. 97–205, §5, June 29, 1982, 96 Stat. 135.)

PURSUANT TO THE UNITED STATES ELECTION ASSISTANCE COMMISSION VOLUNTARY VOTING SYSTEM GUIDELINES 1.0 Section 3 Usability and Accessibility Requirements, page 46:

Section 3.1 Usability Requirements:

The voting process shall provide a high level of usability for voters. Accordingly, voters shall be able to negotiate the process effectively, efficiently, and comfortably. The mandatory voting system standards mandated in HAVA Section 301 relate to the interaction between the voter and the voting system:

a. Requirements.--Each voting system used in an election for federal office shall meet the following requirements:

1. In general.--

A. Except as provided in subparagraph (B), the voting system (including any lever voting system, optical scanning voting system, or direct recording electronic system) shall--

B. A state or jurisdiction that uses a paper ballot voting system, a punch card voting system, or a central count voting system (including mail-in absentee ballots and mail-in ballots), may meet

iii.) the requirements of subparagraph (A)(iii) by— Establishing a voter education program specific to that voting system that notifies each voter of the effect of casting multiple votes for an office; and

iv.) Providing the voter with instructions on how to correct the ballot before it is cast and counted (including instructions on how to correct the error through the issuance of a replacement ballot if the voter was otherwise unable to change the ballot or correct any error).

While the scope of usability applies to the entire voting process, the emphasis in these requirements is on the voter interface with the voting machine, which is assumed to be a visual-tactile interface.

The outline for this subsection is:

3.1.1 Usability Testing

3.1.2 Functional Capabilities

3.1.3 Alternative Languages

3.1.4 Cognitive Issues

3.1.5 Perceptual Issues

3.1.6 Interaction Issues

3.1.7 Privacy

PURSUANT TO SDCL 12-17-B3 Authority of governing body to adopt, experiment with or abandon system.

Any governing body having supervision of elections within any political subdivision may adopt, experiment with, or abandon any automatic tabulating or electronic ballot marking system approved for use by the State Board of Elections. Any governing body may use the system in all or some of the precincts within its jurisdiction or in combination with any other type of voting system approved for use by the State Board of Elections.

Source: SL 1994, ch 110, § 7; SL 2005, ch 92, § 4; SL 2018, ch 81, § 4, eff. Feb. 5, 2018.

12-20-5. Count of votes for candidates--Scrutiny of ballots by precinct deputies--Decisions on disputed ballots. The votes for the several candidates shall be counted in the order in which the candidates occur upon the ballots. At least two precinct deputies, of opposite political parties, shall scrutinize each ballot with the precinct superintendent acting to break any tie vote of the two precinct deputies ruling on a ballot. As the vote is announced two precinct deputies shall make the mark required on the tally sheets.

12-20-8. Precinct superintendent and precinct deputies to record intention of voter. The precinct superintendent and precinct deputies, in counting the votes, shall endeavor to record the intention of the voter. The precinct superintendent and precinct deputies shall then hold the intention of the voter to be to vote for the candidate or candidates before whose name the voter has placed a mark.

ES&S tabulator machines cannot determine voter intent. ES&S has stated this publicly, as well as the SD Board of Elections.

12-20-11. Entry of precinct vote on unofficial return list--Return with election returns. When the vote count is complete, the members of the precinct election board shall enter upon the blank list the true number of votes cast in the precinct for each person, measure, law, or amendment which appears upon the official ballot, and shall enclose the completed list in the envelope described in § 12-20-10. The precinct superintendent or precinct deputy chosen to deliver the election returns to the officer in charge of the election shall return the completed list separate from any other envelopes or wrappers returned at the time the election returns are delivered.

12-20-21. Return of ballot boxes, returns, records and supplies to officer in charge--Tampering prohibited--Violation as felony. The sealed ballot box, together with the pollbook and duplicate tally sheet, registration lists, and the envelope containing the unofficial returns and all supplies and returns required, shall be returned by the precinct superintendent or a precinct deputy designated by the precinct superintendent, to the officer in charge of the election immediately after completion of the vote count. No person may deface, destroy, or tamper with the ballot box, envelope, pollbook, duplicate tally sheet, or registration lists or remove any seals. A violation of this section is a Class 6 felony.