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OCT 18 2011

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA PATTON BOGGS LLP

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES. ) [ ]

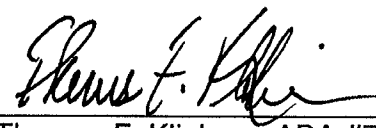
CASE NO. 4FA-11-2209CI

**MOTION BY PETERSBURG PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF COMPACTNESS**

Plaintiffs City of Petersburg, Mark L. Jensen, Nancy C. Strand, and Brenda L. Norheim ("Petersburg Plaintiffs"), pursuant to the provisions of Rule 56 of the Alaska Rules of Civil Procedure, hereby move for partial summary judgment that the Redistricting Board ("Board") committed an error in redistricting, in that Proclamation Plan House District 32 does not meet the compactness standard in Alaska Const. art. VI, §6, and nothing in the Voting Rights Act justifies any deviation from that compactness standard in the districting of Southeast Alaska. The motion is supported by the accompanying memorandum, exhibits, and Affidavit of Leonard Lawson.

DATED this 18<sup>th</sup> day of October 2011.

BIRCH HORTON BITTNER & CHEROT  
Attorneys for Petersburg Plaintiffs

By:   
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18<sup>th</sup> day of October, 2011 at 4:00 p.m. a true and correct copy of the foregoing was served on the following in the manner indicated:

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FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES. ) [ ]

CASE NO. 4FA-11-2209CI

**MEMORANDUM IN SUPPORT OF MOTION BY PETERSBURG  
PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT  
ON THE ISSUE OF COMPACTNESS**

**I. Introduction and Summary.**

Plaintiffs City of Petersburg, Mark L. Jensen, Nancy C. Strand, and Brenda L. Norheim ("Petersburg Plaintiffs") move for partial summary judgment that the Redistricting Board ("Board") committed an error in redistricting. Contrary to Alaska Const. art. VI, §6, the redistricting plan adopted by the Board ("Proclamation Plan") established house districts in Southeast Alaska which are not compact, as demonstrated by the greater compactness achieved in the alternative redistricting plan for Southeast Alaska that is presented herewith ("Modified RIGHTS Coalition Plan").<sup>1</sup> In particular, all of the Southeast Alaska districts in the Modified RIGHTS

<sup>1</sup> This alternative plan is identical to the redistricting plan presented to the Board by the RIGHTS Coalition, which appears on the Board's website at [http://www.akredistricting.org/Files/Submitted%20Plans/RightsCoalition\\_FairandBalanced.pdf](http://www.akredistricting.org/Files/Submitted%20Plans/RightsCoalition_FairandBalanced.pdf), except for the removal of the City and Borough of Yakutat ("Yakutat") from House District 4 proposed in the RIGHTS Coalition Plan. As will be demonstrated below, removing Yakutat from the RIGHTS Coalition Plan's House District 4 does not substantially change the demographics of that district. However, the districting of Southeast Alaska in the resulting Modified RIGHTS Coalition Plan is precisely coextensive with the districting of Southeast Alaska in the Proclamation Plan, and thus does not affect any Proclamation Plan house district outside Southeast Alaska.

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Coalition Plan are substantially more compact than Proclamation Plan House District 32, in which the City of Petersburg is located. In Southeast Alaska, no deviation from the compactness standard of Alaska Const. art. VI, §6 is required to comply with the federal Voting Rights Act. Therefore, the Board committed an error in redistricting by deviating from the compactness standard in Alaska Const. art. VI, §6 in its districting of Southeast Alaska.

## II. The Article VI, §6 Compactness Standard.

Article VI, §6 of the Alaska Constitution provides in relevant part that “[e]ach house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area.” Compactness and contiguousness are the most important criteria for redistricting under Article VI, §6 of the Alaska Constitution:

Priority [in redistricting] must be given first to the Federal Constitution, second to the federal voting rights act, and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of Article VI, section 6 shall receive priority *inter se* in the following order: (1) contiguousness and compactness, (2) relative socioeconomic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries.<sup>2</sup>

Thus, where neither the Federal Constitution nor the Voting Rights Act requires the Board to deviate from the Alaska Constitution’s compactness standard, compactness is the first standard with which the Plan of Redistricting must comply.

<sup>2</sup> *In re 2001 Redistricting Cases*, 44 P.3d 141, 143 n. 2 (Alaska 2002), quoting *Hickel v. Southeast Conference*, 846 P.2d 38, 62 (Alaska 1992).

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The term “compact,” as used in the Alaska Constitution means, “...having a small perimeter in relation to the area encompassed.”<sup>3</sup> The Alaska Court has further determined that:

The most compact shape is a circle. Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness.<sup>4</sup>

When analyzing compactness, the court should “look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact.”<sup>5</sup> The following example of compactness analysis appears in the opinion reviewing the 2001 redistricting plan:

House District 16 violates the compactness requirement of article VI, section 6 of the Alaska Constitution. House District 16 contains a bizarrely-shaped appendage in the southwestern portion of the district. The inclusion of this appendage is unnecessary to further any other requirement of article VI, section 6, and **alternative plans considered by the board contained more compact and otherwise constitutional versions of House District 16.**<sup>6</sup>

As the Petersburg Plaintiffs will demonstrate below, the Southeast Alaska house districts in at least one alternative redistricting plan—the Modified RIGHTS Coalition Plan—are significantly more compact than Proclamation Plan House District 32, and the less compact Proclamation Plan House District 32 is unnecessary to further any other redistricting requirement that has precedence over compactness. Therefore,

<sup>3</sup> See Alaska Const. art. VI, section 6; *Hickel*, 846 P.2d at 45, quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983) (Matthews, J., concurring).

<sup>4</sup> *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 n. 13 (Alaska 1987), quoting *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).

<sup>5</sup> *Hickel*, 846 P.2d at 45, quoting *Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).

<sup>6</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143 (footnote omitted, emphasis added).

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the Proclamation Plan House District 32 violates the compactness requirement of article IV, §6 of the Alaska Constitution.

**III. Proclamation Plan House District 32 Does Not Meet the Compactness Standard in Article VI, §6 of the Alaska Constitution.**

Each of the four house districts for Southeast Alaska in the Modified RIGHTS Coalition Plan is substantially more compact than Proclamation Plan House District 32.<sup>7</sup> Moreover, Proclamation Plan House District 32 surrounds three sides of House District 31, which contains a portion of the City and Borough of Juneau, and contains odd appendages that reach across bodies of water to incorporate the communities of Gustavus and Tenakee Springs.<sup>8</sup> To make a clearer, apples-to-apples comparison of the compactness of the RIGHTS Coalition Plan's districting of Southeast Alaska with that of the Proclamation Plan, for purposes of this memorandum the RIGHTS Coalition Plan was modified to exclude Yakutat from RIGHTS Coalition Plan House District 4.<sup>9</sup> The Modified RIGHTS Coalition Plan and the Proclamation Plan each divide the same area constituting Southeast Alaska into four house districts—the two plans differ only in the manner of that division. As the table below demonstrates, each Southeast Alaska house district in the Modified RIGHTS Coalition Plan also meets the one person, one vote standard under the United States and Alaska Constitutions, and one of those districts, House District 2, has substantially the same percentage Native voting age population as Proclamation

<sup>7</sup> See the Modified RIGHTS Coalition Plan, Attachment 2 to the Affidavit of Leonard S. Lawson attached hereto.

<sup>8</sup> See Map of Southeast Alaska under Proclamation Plan, Exhibit A.

<sup>9</sup> See the Modified RIGHTS Coalition Plan, Attachment 2 to the Affidavit of Lawson, and the Affidavit of Lawson, ¶ 2.

Plan House District 34. Thus, the Modified RIGHTS Coalition Plan's districting of Southeast Alaska may be substituted for that of the Proclamation Plan without affecting any other district in the Proclamation Plan.

Leonard S. Lawson computed the compactness of each Southeast Alaska house district in the Proclamation Plan and each Southeast Alaska house district in the Modified RIGHTS Coalition Plan using the Reock Compactness Test ("Reock Test").<sup>10</sup> The Reock Test quantifies the compactness of a district by determining the ratio of the area of the district to the area of the smallest circle that contains the district.<sup>11</sup> Thus, a perfectly circular area would have Reock Test measurement of 1.00, and the more the shape of an area deviates from a circle the lower its Reock Test measurement will be, with measurement of 0.00 indicating the greatest deviation from perfect compactness.<sup>12</sup> The test's use of a circle as the standard for compactness is consistent with the Alaska Supreme Court's adoption of the circle as the ideal for compactness under Alaska Const. art VI, §6.<sup>13</sup>

Southeast Alaska is composed of Districts 31, 32, 33, and 34 in the Proclamation Plan,<sup>14</sup> and Districts 1, 2, 3 and 4 in the Modified RIGHTS Coalition Plan.<sup>15</sup> The following table displays total population, deviation from ideal district population, percentage Native voting age population, and compactness measured by

<sup>10</sup> Affidavit of Lawson, ¶ 8.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Kenai Peninsula Borough*, 743 P.2d at 1361, n. 13.

<sup>14</sup> See Proclamation House Districts Map for Southeast Alaska (ARB00006107), attached hereto as Exhibit A.

<sup>15</sup> Affidavit of Lawson, Attachment 1.

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the Reock Test for each of the Southeast Alaska house districts in the Proclamation Plan and in the Modified RIGHTS Coalition Plan:<sup>16</sup>

District	Population	Percent Deviation from Ideal (17,755)	Percent Alaska Native Voting Age Population	Compactness (Reock Test)
Proclamation District 31	18,251	2.79%	13.30%	0.43
Mod. RIGHTS District 3	17,992	1.33%	17.48%	0.50
Proclamation District 32	17,801	0.26%	14.89%	0.18
Mod. RIGHTS District 4	17,633	-0.69%	13.47%	0.53
Proclamation District 33	17,075	-3.83%	17.24%	0.56
Mod. RIGHTS District 1	18,412	3.69%	18.45%	0.51
Proclamation District 34	17,875	0.68%	32.85%	0.20
Mod. RIGHTS District 2	16,965	-4.45%	32.45%	0.26

Proclamation House District 32 has a Reock Test score of 0.18, and only one Southeast Alaska house district has a Reock Test score that exceeds 0.50.<sup>17</sup> In contrast, no Southeast Alaska house district in the Modified RIGHTS Coalition Plan has a Reock Test score less than 0.26, and three of the Southeast Alaska house districts in the Modified RIGHTS Coalition Plan have Reock Test scores of 0.50 or greater.<sup>18</sup> Thus, both because of its “bizarrely-shaped” appendages,<sup>19</sup> and based on

<sup>16</sup> See, Attachment 1 to Affidavit of Lawson; Affidavit of Lawson, ¶¶ 9 and 10; see also Proclamation District Population Analysis (ARB00006034), attached hereto as Exhibit B.

<sup>17</sup> Attachment 3 to Affidavit of Lawson; Affidavit of Lawson, ¶ 9.

<sup>18</sup> Attachment 3 to Affidavit of Lawson; Affidavit of Lawson, ¶ 10.

<sup>19</sup> *In re 2001 Redistricting Cases*, 44 P.3d at 143.



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comparison to the Southeast Alaska house districts in the Modified RIGHTS Coalition Plan,<sup>20</sup> Proclamation Plan House District 32 is not sufficiently compact to meet the compactness standard of Alaska Const. art. VI, §6.

#### IV. Redistricting in Southeast Alaska and the Voting Rights Act.

##### A. Introduction.

As stated above, the Voting Rights Act precedes the compactness requirement in the hierarchy of legal standards for reviewing a redistricting plan. Thus, a redistricting plan may deviate from the compactness requirement of Alaska Const. art. VI, §6 to the extent that the deviation is required for the redistricting plan to comply with the Voting Rights Act:

Article VI, cl. 2 of the United States Constitution provides that, "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land...." This mandates that provisions of state law, including state constitutional law, are void if they conflict with federal law. To the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way. However, to the extent that those requirements are not inconsistent, they must be given effect. The Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.

The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is **the only means available** to satisfy Voting Rights Act requirements.<sup>21</sup>

Thus, compliance with the Voting Rights Act justifies a deviation from the Alaska Constitution's compactness requirement only to the extent that the deviation is

<sup>20</sup> *Hickel*, 846 P.2d at 45.

<sup>21</sup> *Hickel*, 846 P.2d at 52 n. 22 (emphasis added).

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necessary for Voting Rights Act compliance. The deviation of Proclamation Plan House District 34 from the Alaska Constitution's compactness standard is not required for compliance with any Voting Rights Act requirement.

**B. Section 5 of the Voting Rights Act and the Proclamation Plan.**

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, requires Alaska, among other jurisdictions, to obtain a determination from either the Attorney General of the United States or the United States District Court for the District of Columbia that any change affecting voting, including a redistricting plan, which it seeks to enforce does not have a discriminatory purpose and will not have a discriminatory effect. A redistricting plan has such an effect if it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."<sup>22</sup>

Specifically, subsection (b) of Section 5 provides:

(b) Any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [regarding members of language minority groups], to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.

In anticipation of the Section 5 preclearance requirement, the Board retained an expert on the Voting Rights Act to guide the Board in complying with Section 5. This expert, Dr. Lisa Handley, submitted her analysis of the Proclamation Plan under

<sup>22</sup> *Kenai Peninsula Borough*, 743 P.2d at 1361, quoting *Beer v. United States*, 425 U.S. 130, 141, 96 S.Ct. 1357, 1363-1364, 47 L.Ed.2d 629 (1976).

the Voting Rights Act, which is part of the Board record ("Handley Report").<sup>23</sup> Dr. Handley described the purpose of her analysis as follows:

The burden of proof rests with the state to demonstrate that the proposed plan will not result in a retrogression of minority voting strength relative to the current, or benchmark, redistricting plan.<sup>24</sup>

<sup>24</sup>In *Beer v. United States*, the US Supreme held that "the purpose of Section 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U.S. 130, 141 (1976). The benchmark redistricting plan against which a proposed plan is compared is the last legally enforceable plan (inevitably the redistricting plan currently in place) with the demographics of the 2010 census data associated with each of the districts.<sup>24</sup>

In the Proclamation Plan, Dr. Handley identified House Districts 36, 37, 38, 39, and 40 as "the same number of districts that provide Alaska Natives with the opportunity to elect Alaska Native-preferred candidates as the Benchmark Plan."<sup>25</sup> Dr. Handley also identified Proclamation Plan Senate Districts S and T as majority Alaska Native districts, and Senate District R as an "effective" district.<sup>26</sup> None of these districts is located in Southeast Alaska. Thus, this portion of Dr. Handley's Voting Rights Act analysis indicates that the Voting Rights Act has no bearing on the districting of Southeast Alaska.

However, after she identified five house districts in the Benchmark Plan that provided Alaska Natives with the opportunity to elect Alaska Native-preferred candidates, Dr. Handley continued as follows:

<sup>23</sup> Report of Dr. Lisa Handley (ARB00013329-00013369).

<sup>24</sup> Handley Report, 2 (ARB00013330).

<sup>25</sup> Handley Report, 28-29 (ARB00013356-00013357).

<sup>26</sup> Handley Report, 30-31 (ARB00013358-00013359).

In addition to these five house districts with substantial Alaska Native populations, there is a district in Southeast Alaska (House District 5) that is approximately one third Alaska Native and has elected an Alaska Native to legislative office throughout the decade—albeit not always the Alaska Native-preferred Alaska Native candidate.<sup>27</sup>

The Board's report accompanying its Redistricting Proclamation also took up this theme:

Another difficult challenge faced by the Board was caused by the significant population loss in Southeast Alaska. This required the region to lose one House district and half of a Senate district. It was also necessary to create an Alaska Native "influence" district in the region, House District 34, in order to comply with the federal Voting Rights Act.<sup>28</sup>

Finally, the Board's Preclearance Submission to the Department of Justice advances two arguments why the Proclamation Plan's redistricting of Southeast Alaska was required for compliance with the Voting Rights Act:

Southeast Alaska lost significant population (for example Benchmark District 5 was under populated by 22.02%) thus requiring the region to lose one House district and half of a Senate district. The Board was still able to maintain a district with a significant Alaska Native population which is likely an Alaska Native "influence" district. House District 34 has a total Alaska Native population of 36.96% and an Alaska Native VAP of 32.85%. While several of the alternative plans had a Southeast Alaska Native District with a slightly higher (0.5 to 2.5%) total Alaska Native and Alaska Native VAP, the Board determined that it was more important to keep the incumbent Alaska Native Legislator from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent.<sup>29</sup>

<sup>27</sup> *Id.*

<sup>28</sup> Report to Accompany Redistricting Proclamation of June 13, 2011, 7 (ARB00000581).

<sup>29</sup> Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board under Section 5 of the Voting Rights Act, August 9, 2011, 12 (ARB00006356-11791).

Neither of the Board's arguments has merit.

**C. The Voting Rights Act Does Not Require Protection of an Incumbent Legislator.**

Nothing in the Voting Rights Act requires that a redistricting plan protect an incumbent legislator, whether or not a minority group member, from pairing with another incumbent:

The Voting Rights Act does not protect minority incumbents; it protects minority voters. It is thus a dangerous business to conflate a politician's assessment of her own continued electoral prospects with the genuine protection of African American voting strength.<sup>30</sup>

Moreover, nothing in the Voting Rights Act requires the placement of a particular incumbent, minority or otherwise, in a "minority influence" district. "In sum, the Voting Rights Act protects the minority voters' opportunity to elect their candidate of choice, not just a minority incumbent and not just the minority's opportunity to elect an incumbent of any race."<sup>31</sup> Thus, nothing in the Voting Rights Act requires a deviation from the Alaska Constitution's compactness standard, "to keep the incumbent Alaska Native Legislator from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent."

**D. The Voting Rights Act Does Not Require the Creation of Proclamation District 34 as an "Influence District."**

None of the four benchmark districts (37, 38, 39, and 40) that Dr. Handley identifies as "effective" minority districts, which consistently elected minority-preferred candidates, is located in Southeast Alaska.<sup>32</sup> Neither is Benchmark District 6, which

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<sup>32</sup> Handley Report, 21 (ARB00013349).

