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OCT 24 2011

PATTON BOGGS LLP

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
FOURTH JUDICIAL DISTRICT

IN RE 2011 REDISTRICTING CASES

PLAINTIFF'S REPLY TO ARB'S  
OPPOSITION TO MOTION FOR  
PARTIAL SUMMARY JUDGEMENT  
UPON DEFENDANT'S ADMISSIONS

Case No. 4FA-11-1935 CI

**I. The Lack of Socio-economic Integration In HD 38 Is Not Disputed.** The Alaska Redistricting Board's opposition to the Riley Plaintiffs' motion for partial summary judgment contains a curious inconsistency that actually supports entry of the requested partial summary judgment. Riley's motion for partial summary judgment seeks to establish that Proclamation District 38 does not comprise a relatively integrated socio-economic area. In opposing the motion, however, the Board concedes that "the Board has never disputed that HD 38 'does not comprise a relatively integrated socio-economic area.'"<sup>1</sup> Accompanying the opposition is the Board's late response to Riley's request for admission, wherein the Board "admits that District 38 in the Board's Proclamation Plan 'does not comprise a relatively integrated socio-economic area.'"<sup>2</sup> Regardless of the Board's inferred claim of excusable neglect in

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1 See Def. Op., at 4-5

2 See Def. Op. Ex. A.

responding to Riley's request for admission,<sup>3</sup> the Board has unequivocally admitted the precise admission sought by Riley et. al. The Board's opposition to the motion for partial summary judgment is irreconcilably inconsistent with its express admission. Under Civ. R. 36(b) both the deemed admission and the late-filed express admission result in conclusively establishing the matter: i.e. "District 38 in the Board's Proclamation Plan 'does not comprise a relatively integrated socio-economic area."

The apparent reason for these inconsistencies seems to be that the Board merely wishes to preserve its position on issues outside the parameters of the requested partial summary judgment. The Board's opposition argues that the violation of the Alaska Constitutional requirement of socio-economic integration<sup>4</sup> is excused by the Board's need to comply with the VRA. However, Plaintiff's motion is for Partial Summary Judgment, which focuses on the threshold question as to whether District 38 complies with the Alaska Constitutional requirement of socio-economic integration. The Board confuses non-compliance with the State constitution (the subject of the admission and the motion) with its asserted excuse for such violation (i.e. necessity for

3 While the Board does not expressly argue that the admission should not be deemed admitted because of non-response by the Board to the request for admission, approximately one-third (1/3) of the Board's opposition, together with two-thirds (2/3) of the accompanying exhibits assert excuses as to why the Board didn't respond within the time lines ordered by the Court. These issues have been rendered irrelevant by the subsequent and late admission served by the Board and filed with the Court as Defendant's Exhibit A.

4 AK CONST. Article VI, Sec. 6

compliance with the VRA). The standard governing this dispute is relatively simple.

The Board may deviate from a State Constitutional mandate to enhance Native voting strength only to the extent necessary to avoid retrogression of Native voting strength and comply with the Voting Rights Act.<sup>5</sup> Kenai Peninsula Borough v State, 743 P.2d 1352, 1361 (Alaska, 1987) In such situations, the Board has the burden of proof that the enhancement was necessary to comply with the non-retrogression standard of the VRA. *Id.* In its opposition, the Board focuses upon the term “as nearly as practicable” contained in AK CONST Art. VI, Sec. 6. The Board's argument is merely a “rough-cut” analysis of the Board's duties in the regard. The Court in Kenai Peninsula Borough has provided this Court with clear guidance as to the meaning of “as nearly as practicable”, which is at substantial odds with the view put forth by the Board. As the Court in Kenai Peninsula Borough explained, when the Board deviates from State Constitutional requirements, it has the burden of proof to demonstrate that the deviation was necessary to comply with the requirements of the VRA. As the Court is aware, the parties disagree on this point: i.e. the Plaintiffs believe the VRA does not require not require violation of the State constitution's socioeconomic

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integration requirement; the Board believes it does. This disagreement, however, is not the subject of the motion for partial summary judgment pending before the Court. Rather, the Board's "VRA excuse defense", survives grant of the requested partial summary judgment and is the obvious subject of further proceedings.

**II. Partial Summary Judgment Is The Appropriate Procedure To Confirm A Deemed Admission & Preclude Litigation As To Fact Deemed Admitted.** The Board argues, without reference to legal citation,<sup>6</sup> that factual assertions are not a proper subject for summary judgment.<sup>7</sup> The Board's argument is contrary to the established law and practice. Admissions seek to establish factual matters or the application of facts to the law.<sup>8</sup> Partial summary judgment is the appropriate procedure to confirm a deemed admission & preclude litigation as to facts deemed admitted. *Molitor v ATZ Travel*, 550 P.2d 810 (Alaska, 1976) ("A deemed admission forecloses the litigation of the facts admitted, and summary judgment (on the admission) is appropriate.")

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6 Lack of legal citations to any authority may be construed as waiver of the argument allowing the Court to ignore the argument. *A.H. v W.P.*, 896 P.2d, 240, 243 (Alaska, 1995);

7 Def. Op. At 4

8 Of course, the entire purpose of Rule 36 is to establish the "truth of any matter within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact," (emphasis added). Civ. R. 36(a) A matter within the scope of Rule 26(b)(1) includes " any matter, not privileged which is relevant to the subject matter involved in the pending action".

### III. Partial Summary Judgment On Socio-economic Integration Of HD 38 Is A

**Proper** . On summary judgment, if the record presents no genuine issue of material fact the movant is entitled to judgment as a matter of law.<sup>9</sup> The moving party has the burden of proving the absence of issues of material fact.<sup>10</sup> The movant may rely upon admissions under Rule 36 (whether express or deemed) as well as the non-Rule 36 admissions of the non-movant party to establish a prima facie showing that he is entitled to summary judgment.<sup>11</sup> “If the movant makes a *prima facie* showing that he or she is entitled to judgment on the established facts as a matter of law, the opposing party must demonstrate that a genuine issue of fact exists to be litigated by showing that it can produce admissible evidence reasonably tending to dispute the movant's evidence.”<sup>12</sup> To determine whether the non-moving party can produce admissible evidence creating a genuine factual dispute, (the Court) will “consider the affidavits, depositions, admissions, answers to interrogatories and similar material.”<sup>13</sup>

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9 *Beegan v State, Dept. of Trans. & Pub. Facilities*, 195 P.3d 134, 138 (Alaska, 2008); *Matanuska Elec. Ass'n v Chugach Elec. Ass'n*, 152 P. 3d 460, 465 (Alaska 2007)

10 *Lincoln v Interior Reg. 'l Housing Auth.*, 30 P.3d 582, 586 (Alaska, 2001)

11 *Molitor v ATZ Travel*, 550 P.2d 810 (Alaska, 1976)

12 *French v Jadon, Inc.* 911 P.2d 20, 23 (Alaska 1996)

13 *Broderick v King's Way Assembly of God Church*, 808 P.2d 1211, 1215 (Alaska 1991)

As noted above, the Board's deemed admission, late filed express admission, and argument that the Board "never disputed that HD 38 'does not comprise a relatively integrated socio-economic area'" removes all ambiguities and clearly establish that there is no genuine issue of material fact in dispute relative to whether HD 38 comprises a relatively integrated socio-economic area. Consequently, the Board had the burden to produce produce admissible evidence creating a genuine factual dispute in its opposition. The Board failed in this regard.

The Board offers no evidence of socio-economic integration of District 38. The Board fails to reference any evidence in the record that would support a finding of socio-economic integration of District 38. Indeed, there does not appear to be any evidence in the record (or outside the record) that the Off-Road Yupik communities of Wade Hampton, the Off-Road Athabascan villages of Middle Yukon/Upper Kuskokwim, the rural road communities of the Denali Borough and the suburban communities of Ester/Goldstream are socio-economically integrated.<sup>14</sup> Moreover, the Board has not included any expert witness respecting socioeconomic integration

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<sup>14</sup> Proclamation District 38 includes the communities of Alakanuk City, Anderson City, Anvik City, Cantwell, Chevak City, Emmonak City, Ester, Ferry, Flat, Four Mile Road, Goldstream, Grayling City, Healy, Holy Cross City, Hooper Bay City, Kotlik City, Lake Minchumina, Manley Hot Springs, Marshall City, McGrath City, McKinley Park, Minto CDP, Mountain Village City, Nenana City, Nikolai City, Nunam Iqua City, Pilot Station City, Pitkas Point, Russian Mission City, Scammon Bay City, Shageluk City, St. Mary's City and Takotna.

respecting Dist. 38. The failure to identify an expert witness to prove matters that require such expert testimony permits entry of summary judgment.<sup>15</sup> The Court should grant the motion for partial summary judgment.

Date: October 24, 2011



Michael J. Walleri

Attorney for Plaintiffs  
Alaska Bar No. 7906060

Certificate of Service

I certify that a true and correct copy of the foregoing was served by e-mail on this October 24, 2011 to:

Mr. Michael D. White  
Patton Boggs, LLP  
601 5<sup>th</sup> Ave., Suite 700  
Anchorage, AK 99501

Ms. Jill Dolan  
Legal Department  
Fairbanks North Star Borough  
P.O. Box 71267  
Fairbanks, AK 99707

Mr. Thomas F. Klinker  
Birch, Horton, Bittner, & Cherot  
127 W. 7<sup>th</sup> Ave.  
Anchorage, AK 99501



Michael J. Walleri

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<sup>15</sup> *Zok v Collins*, 18 P.3d 39 (Alaska 2001)