IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

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Case No. 4FA-11-2209CI

Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness

A. Motion Practice Background

Petersburg filed a motion for partial summary judgment on 18 October 2011 that House District 32 is not compact. The Board opposed the motion and filed a cross motion for summary judgment on 4 November 2011 that House District 32 is compact.

Petersburg filed their combined opposition to the Board's cross-motion for summary judgment and reply to the Board's opposition to Petersburg's motion for summary judgment on 18 November 2011. The Board filed their reply to Petersburg's opposition to the Board's cross-motion for summary judgment on 30 November 2011. Neither party requested oral argument.

B. Preliminary Comments on the Case

The court commends the Board for its hard work. All of the previous courts have referred to the task of redistricting as "Herculean." This court refers to it as leviathanic. This description is consistent not only with the vastness of the task of proclaiming Alaskan districts consistent with state and federal mandates, but also recognizes the geographic uniqueness of Southeast Alaska.[1] Southeast is home to a large population of whales that plunge in its vasty deeps throughout the warmer months of the year. The whales are in Southeast for the very reason that makes drawing compact and contiguous house districts problematic: it is an archipelago rich in waterways by, between, and around a wealth of islands of widely varying size.[2] The unprincipled harvesting of resources from Southeast was a motive force for statehood. Indeed, the abolition of fish traps was one of the three ordinances submitted to the territorial voters along with the ratification of the constitution and ratification of the Alaska-Tennessee Plan.

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[1] What we know as Southeast Alaska is the result of the Anglo-Russian Convention of 1825 between Russia and Britain to define the borders of their respective colonial possessions. For our purposes it said: "the said line shall ascend to the north along the channel called Portland Channel as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude." The vagueness of the reference to coastal mountains was qualified as follows" "Whenever the summit of the mountains . . . shall prove to be at the distance of more than ten marine leagues from the ocean, the limit . . . shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom". *Political Geography*, Norman Pounds, 1972, p. 82. The United States purchased Alaska from Russia in 1867. Disputes about the vague border, and port access for Canada, remained unresolved until the current boundaries were finalized in 1903 by arbitration pursuant to the Hay-Herbert Treaty.

[2] A common term for the area is the Alexander Archipelago.

Referring to the task before the Board as leviathanic is also consistent with the court's *leitmotif* expressed at the very first hearing in this case. At that time the court noted it learned more than it ever wanted to know about whales after reading *Moby Dick* and it expected it would learn more than it ever wanted to know about redistricting as the case progressed. That has turned out to be more true that could have been foreseen at the time.

The issue before the court in this motion focuses on whether Proclamation House District 32 complies with the compactness requirements of the Alaska Constitution. The legal issues will be discussed below. For introductory purposes, it bears note that there are at least *eight* tests that can be applied to determine compactness. As Judge Weeks previously noted in a motion for reconsideration, "Obviously the court did not know enough." [3] The parties have done yeoman work to assist this court on these various tests, but the poignancy of Judge Weeks' remark is sobering.

Melville devotes an entire chapter of *Moby Dick* to discussing the classification of whales because it never had been properly addressed.[4] This literary construct does not bear much more labor, other than to note Melville divided the whales in three primary books subdivisible in chapters. Yet Melville himself admits of the difficulty of that approach:

> Next: how shall we define the whale, by his obvious externals, so as conspicuously to label him for all time to come. To be short, then, a whale is a

[3] Correction Order by Judge Weeks Granting a Motion for Reconsideration (part of the Appendix of Hickel 1).

[4] *Moby Dick*, Chapter 32, Cetology.

> spouting fish with a horizontal tail. There you have him. However contracted, that definition is the result of expanded meditation. A walrus spouts much like a whale, but the walrus is not a fish, because he is amphibious. But the last term of the definition is still more cogent, as coupled with the first. Almost any one must have noticed that all the fish familiar to landsmen have not a flat, but a vertical, or up-and-down tail. Whereas, among spouting fish that tail, though it may be similarly shaped, invariably assumes a horizontal position.

The archipelago of Southeast is unique and demands scrutiny of compactness with the candid acknowledgement that although it may possess some characteristics shared with other parts of Alaska, it, like Hawaii, is unique because of the concentration of islands separated by water.[5] The task is further complicated by the uneven distribution of population; quotidian requirements militate that the Board consider boundaries that are not otherwise grossly obvious. Finally the Voting Rights Act requirements add yet another level of complexity to this already difficult task, including the consideration of preserving the seat of an incumbent Native legislator.

The Board and Petersburg[6] have each done extraordinary work in navigating these shoals. Neither has fetched up hard a reef like Captain Hazelwood. Yet one argument is more persuasive as explained below.

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[5] When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it is well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states. The situation is more analogous to that of the State of Hawaii, whose unusual difficulties were recognized as potentially requiring special remedies by the United State Supreme Court in *Burns v. Richardson*. Egan v. Hammond, 502 P.2d 856, 866 (Alaska 1972).

[6] The court is sensitive to include the citizens of Petersburg as completely as possible in this litigation, including having testimony taken in Petersburg if needed. In the instant motion the court offered to sit in Petersburg for oral argument on this motion but was advised it was not necessary. No oral argument was requested by any party. The court also acknowledges the historical richness of Petersburg and its significant contributions to the state. Tlingit peoples have used the area around present day Petersburg for thousand of years and constitute a significant part of the population today. The arrival of Peter Buschman at the close of the 19th Century was the beginning of a Norwegian population that grew the city and was

Leaving statehood and whaling issues completely aside now, the Court recognizes that this redistricting process was particularly difficult because of the requirements of the Voting Rights Act and the following factors cited by the Board: (1) under-population of Benchmark Alaska Native Districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native Districts; and (3) the inability to create minority districts in urban Alaska.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[7] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[8] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a

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instrumental in all aspects of Alaska's fishing industry. Petersburg is properly and vigorously asserting what it contends to be in its best interests regarding its political alignment. Its citizens need to know their concerns are being carefully considered and, despite the distance from Petersburg to Fairbanks, are always afforded every opportunity to participate in the litigation process.

[7] Alaska R. Civ. P. 56.

[8] Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1222 (Alaska 1992) (quoting Sea Lion Corp. v. Air Logistics of Alaska, 787 P.2d 109, 116 (Alaska 1990)).

material issue of fact exists."[9] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[10]

The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[11]

C. General Arguments

Petersburg contends that House District 32 in Southeast Alaska is not compact under the Alaska Constitution.[12] Petersburg argues that greater compactness can be achieved under the Modified RIGHTS plan.[13] Petersburg also argues that no deviations from the compactness standard were required under the Federal Voting Rights Act.

The Board contends that House District 32 is compact under the Alaska Constitution. The Board argues that to the extent there is any question whether House District 32 is relatively compact, the Board's departure from strict adherence to that

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[9] Philbin v. Matanuska-Susitna Borough, 991 P.2d 1263, 1265–66 (Alaska 1999) (quotations omitted).

[10] Lord v. Wilcox, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing State, Dep't of Highways v. Green, 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See* Jennings v. State, 566 P.2d 1304, 1309-10 (Alaska 1977).

[11] CR 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

[12] Petersburg's First Amended Complaint filed on 22 August 2011 contained claims that House District 32 was not socio-economically integrated and that Senate District P was improperly paired. Petersburg abandoned those claims on 19 October 2011.

[13] The Modified RIGHTS Plan is one of many private plans submitted to the Board during the redistricting process. The court notes that many of these plans went through several drafts. The court is aware that the Modified Rights Plan was altered for the purposes of this motion by retracting Yakutak to better compare it to the Board's Plan and that the modified version is entitled the Demonstrative Plan. The court refers to both versions of the plan as the Modified RIGHTS plan.

requirement is justified by its need to draw a redistricting plan that avoids retrogression and complies with the Voting Rights Act.

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> "The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible."

Compactness in terms of redistricting has been defined by the Alaska Supreme Court as follows: "'Compact' in the sense used here means having a small perimeter in relation to the area encompassed."[14] "'Compact districting should not yield 'bizarre designs'."[15] The compactness inquiry looks to the shape of a district, "Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridor" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact redistricting."[16] The

[14] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[15] Davenport v. Apportionment Comm'n of New Jersey, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div.1973), quoted in Carpenter v. Hammond, 667 P.2d 1204, 1218-19 (Alaska, 1983). (Matthews, J., concurring).

[16] Hickel v. Southeast Conference, 846 P.2d 38, 45-46 (Alaska, 1992).

court looks to the "relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[17]

D. Issues of Greater Compactness

Petersburg argues that at least one other private plan, the Modified RIGHTS Plan, has achieved greater compactness in Southeast Alaska. Mr. Lawson, a witness for Petersburg, performed eight mathematical tests for determining compactness on Maptitude Redistricting software. Petersburg specifically points to the Reock Test where the Modified Rights Plan scored higher then the Board's Plan in the Southeast House Districts. 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. Petersburg argues that of the eight tests, the Reock test is the best test for Alaska because it compares districts to circles and – quoting the Alaska Supreme Court - "The most compact shape is a circle."[18]

The Board contends that the eight mathematical tests for compactness are inappropriate for determining compactness in Alaska and in fact point out that House District 32 scored higher than the RIGHTS Plan in three of the eight tests, specifically the Perimeter Test, the Population Polygon test and the Population Circle Test. The Board argues a visual test is more appropriate to use in Alaska.[19]

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[17] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[18] Kenai Peninsula Borough v. State, 743 P.2d 1352, 1361 n. 13 (Alaska, 1987), quoting Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[19] The court does not rule on whether a visual test or mathematical test is best for Alaska, as it is not necessary to decide under this plan. The court found Judge Rindner's discussion on the two methods

The Board also argues that the correct standard for compactness is relative compactness. The Court agrees. "Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness."[20] While it is appropriate to compare the Board's districts to proposed and possible districts when determining compactness, the most compact district does not automatically trump another relatively compact district. There are other concerns to take into account, particularly the Voting Rights Act.

E. Voting Rights Act Considerations

The Voting Rights Act justifies a deviation from the Alaska Constitution's compactness requirement only to the extent that the deviation is necessary for Voting Rights Act compliance.[21]

Petersburg agues that the Voting Rights Act has no bearing on the redistricting of Southeast Alaska, as none of the "effective districts" that provide Alaska Natives with the opportunity to elect Alaska Native preferred candidates are located in Southeast Alaska.

However, Petersburg acknowledges that the Board's Voting Rights Act Expert, Dr. Handley, also discussed the fact that in the benchmark plan, there was a district in Southeast Alaska (House District 5) that is approximately 1/3 Alaska Native.

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informative and notes that historically Alaska has relied on the visual test, but this is not to say that mathematical compactness tests could not be helpful in the future.

[20] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[21] Hickel v. Southeast Conference, 846 P.2d 38, 52 n. 22 (Alaska, 1992).

In order not to be retrogressive,[22] the Board was advised by Dr. Handley to create an "influence district"[23] in Southeast Alaska. The Board therefore created House District 34 in Southeast Alaska which has 35.14% Alaska Native VAP.[24] While Petersburg's contentions are about House District 32, the court notes that the structure of House District 34 has an impact on the other districts in Southeast Alaska.

Petersburg argues that House District 34 is not the only way to create an "influence district" in Southeast Alaska. Petersburg points out that the Modified RIGHTS Plan also has an influence district in Southeast that is 32.45% Alaska Native VAP, varying by only a de minimis (00.45%) from the Board's 32.85%.[25]

F. Pairing of Minority Incumbents

The Board acknowledges that the influence district could be located in another area in Southeast Alaska and that other private plans had even slightly higher percentages

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[22] The Department of Justice measures retrogression by comparing minority voting strength under the new plan in comparison to their position under the existing plan. Beer v. United States, 425 U.S. 130, 141, 145 (1976).

[23] "Influence Districts" are districts that have enough Native Alaskan population that they would likely be able, with the combination of enough non-Native cross-over vote, to elect candidates of their choice. This number is less than what is required for "effective districts." "Effective Districts" are districts that provide minority voters with the ability to elect candidates of their choice to office. Dr. Handley advised the Board that an "influence district" in Southeast needed at least 30% Alaska Native Voting Age Population in the plan. [ARB00003896-ARB00003899].

[24] VAP stands for voting age population.

[25] In Petersburg's combined opposition and reply brief, they suggest for the first time that it was not necessary to establish an influence district in Southeast Alaska. The court finds this argument to be conclusory because it is not supported by any facts, or an affidavit by a Voting Rights Act expert. To the contrary, there is overwhelming support that an "influence district" was required in Southeast, including the fact that House District 5 in the benchmark plan 10 years ago was approximately 1/3 Native, the Board's Voting Rights Act Expert said it was necessary, every private plan also created an influence district in Southeast Alaska, and even the Modified Rights Plan created an "influence district" in Southeast Alaska."

of Alaska Native VAP in the Southeast Alaska Native District in question. However, the Board determined that it was more important to keep the incumbent Alaska Native Legislator (Bill Thomas) from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent. The Board argues that it did this for several of reasons, including the public testimony received from the Alaska Native Community; because it was impossible to create benchmark Senate District C; because it was impossible to create an Alaska Native effective or influence senate district in Southeast Alaska; and because it was forced to pair Alaska Native Senator Kookesh with another incumbent. The Board also notes that the only question they were asked by the Department of Justice at the preclearance meeting was how the Alaska Native Incumbents were treated.[26]

Petersburg argues the Voting Rights Act does not protect minority incumbents, it protects minority *voters*, and there is no requirement that minority incumbents be protected.

While the court agrees the Voting Rights Act does not protect minority incumbents, Alaska case law acknowledges that the Department of Justice looks at whether the plan has a pattern of pairing minority incumbents and whether the Board sought and applied the input from the Alaska Native Community.

"In evaluating a reapportionment plan for preclearance, the Justice Department might view the treatment of minority incumbents as part of the totality of the

[26] Affidavit of Chairman of the Board, John Torgerson; Affidavit of Board Member Marie Greene; and Affidavit of Executive Director Taylor Bickford.

circumstances. For example, the Department of Justice might view as suspect a pattern of pairing minority incumbents in districts with other incumbents."[27]

"...the Department of Justice considers other factors that are relevant to whether the plan will have a retrogressive effect on minority voting strength, including whether minority incumbents were paired against each other or paired against non-Native incumbents, whether the percentage of minority voters in an effective Native District has declined significantly, whether minorities favor or disapprove of the plan, and whether minorities had inadequate opportunity to participate in development and comment on the plan."[28]

The court therefore finds that the Board's choice to not pair Representative Thomas with a non-Alaskan Native Incumbent was justified.

G. Odd Appendages

Petersburg also argues House District 32 contains odd appendages that reach across bodies of water to incorporate the communities of Gustavas and Tenakee Springs.

The Board states that they included Tenakee Springs and Gustavus in House District 32 for equal population purposes. The Board claims that without these two communities House District 32 had a total population only of 17,309, which would have resulted in a deviation of -2.98% below the ideal district. The addition of the two communities brought the total population of House District 32 to 17,801, which is a deviation of .26% from the ideal district which has a population of 17,755.

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[27] Hickel v. Southeast Conference, 846 P.2d 38, 67 (Alaska,1992)(Appendix E, Judge Weeks' 18 June 1992 Order nt. 16).

[28] Board's Exhibit I, Judge Rindner's 1 February 2002 Order.

The compactness inquiry looks to the shape of a district. Odd shaped districts may well be the natural result of Alaska's irregular geometry. Also, if the shape is necessitated by the need to create districts of equal population, then the district may be constitutional.[29] "Corridors" of land that extend to include a populated area, but not the less populated land around it, may run afoul of the compactness requirement.[30]

The court notes that the inclusion of Gustavus and Tenakee Springs in District 32 is not offensive. Much of the look is caused by water and the shape of the island. The court also notes that it does not have a "long slim suspicious corridor" of land going through a district to grab population. The court accepts the Board's justification that the inclusion of the communities is for equal population purposes and notes that it is a valid justification.[31]

The court concludes that there are no genuine issues of material fact and DENIES Petersburg's Motion for Summary Judgment that House District 32 is not compact as a matter of law.

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[29] Board's Exhibit B, Judge Rindner's 31 December 2001 Order Granting Ruedrich Plaintiff's Motion for Summary Judgment Re: Lack of Compactness of House District 16, citing Hickel v. Southeast Conference, 846 P.2d 38, 44-46 (Alaska,1992)

[30] The court is cognizant that similar arguments are pending by the Riley Plaintiffs. The instant decision is specifically limited to the facts of Petersburg's claims.

[31] The court also notes that the Medenhall Valley District [31] is one of the most consistent districts from plan to plan and the fact that District 32 embays it does not destroy compactness. Petersburg does not even so contend.

H. District 32 is Compact

District 32 consists of Petersburg, areas of Juneau, Skagway, Gustavus and Tenakee Springs.[32] As discussed above, much of the shape of the district is caused by Alaska's unique geography, particularly the shape and placement of the islands. At some point a district must be deemed "compact enough" to satisfy the requirements of the Alaska Constitution.[33]

"Compact enough" superficially rings hollow. Our belief in the empiricism of science suggests that certain subjects *are* capable of description and definition with precision. "Compact", on its face, would seem to lend itself to such preciseness. However, for the reasons noted above, such is not the case. The existence of eight tests for compactness in the context of redistricting litigation illustrates the lack of mathematical precision in defining districts that meet state and federal requirements. Courts historically and regularly apply standards that are consistent but not scientifically precise. In civil cases decisions are made based on a "more probably than not" basis; guilt or innocence is based on the government proving its case not with absolute certainty, for few things are capable of being proved with absolute certainty, but rather "beyond a reasonable doubt". Therefore, in this legal context of determining "compactness" for redistricting purposes, the finding that the subject House district is

[32] The metes and bounds description is available on the Alaska Redistricting Board's website: http://www.akredistricting.org/

[33] Rindner's 13 December 2011 Order Granting Ruedrich Plaintiff's Motion for Summary Judgment Re: Lack of Compactness of House District 16

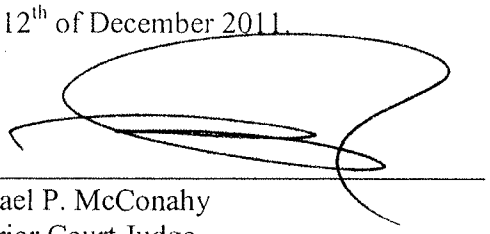
"compact enough" is consistent with our history of jurisprudence and legally sufficient for determining the instant motion.

The court therefore concludes that House District 32 is "compact enough" to satisfy the requirements of the Alaska Constitution.

G. Conclusion

Based on the foregoing facts and authorities, the court DENIES Petersburg's motion for summary judgment and GRANTS the Board's cross motion for summary judgment.

DATED at Fairbanks, Alaska, this 12th of December 2011.



Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration and CR 54(b)

Given the litigation ending consequence of this order, and the impending trial on the merits, expedited timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 16 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 19 December 2011. If no order is issued by this court by the close of business on 22 December 2011 then any motion for reconsideration shall be deemed denied.

In the event there is no motion for reconsideration by the date and time specified, or if the motion is explicitly denied or denied by lack of order by the date noted above, then this court certifies without further motion practice that there is no just reason for delay for the entry of judgment. Given the exigencies of this litigation the court will not require formal judgment to be entered at this time. Presumably this finding will be sufficient for any aggrieved party to seek appellate review. The court is sensible that expedited appellate review of this litigation ending order is necessary if the supreme court believes the issues disposed of in this motion should be decided by the trier of fact after a trial.