(112)

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

IN RE 2011 REDISTRICTING CASES	**REPLY MEMORANDUM IN SUPPORT OF RILEY ET. AL. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT: CONTIGUITY HD 37**

Case No. 4FA-11-02209 CI.

The Alaska Redistricting Board ("Board") opposes the RileyPlaintiffs motion for **partial** summary judgment that Proclamation House District 37 violates the contiguity requirement of Article VI, section 6 of the Alaska Constitution as a matter of law. As in the earlier motion practice respecting the socioeconomic integration of Proc. HD 38, the Board does not address the actual motion before the Court. Specifically, the Board does not address the obvious violation of the Alaska Constitution. Rather the Board focuses upon its alleged justification for violating the Alaska Constitution: i.e. an alleged need arising out of the Voting Rights Act (VRA). Those arguments, however, are premature and do not address the substance of the partial summary judgment. Rather, as the Board opposition admits, the question respecting whether the VRA justifies a violation of Alaska's Constitution may be a genuine issue of material fact beyond the scope of this motion and must be resolved otherwise.

I. The Court Should Not Defer To The Board When Reviewing Whether The Board Complied With The Constitution.

The Board incorrectly asserts the rather absurd suggestion that this Court should defer to the Board in matters of constitutional interpretation.[1] The Board either

1 Def. Memo, at 3-4.

Michael J. Walleri
2518 Riverview Dr.
Fairbanks, Alaska 99709
(907) 378-6555

misunderstands the motion before the Court or it misunderstands basic principles of Constitutional law. The Board points to language in *Kenai Peninsula Borough v State,*[2] which holds that the Court's review of a redistricting plan is similar to review of "regulations" and "is meant to ensure that the reapportionment plan is not unreasonable and is constitutional."[3] From this language, the Board incorrectly concludes that the Court should defer to the Board in all matters, including interpretation of the Alaska Constitution.

The language in *Kenai* actually refers to three (3) different standards of review: one deferential and two others which are not. The Court in *Kenai* was quoting from *Groh v Egan*[4] and *Carpenter v Hammond.*[5] In *Groh* the Court stated

> we shall review such regulations first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.[6]

The reference to deference relates to the "sagacity" of the plan. The Court clearly must defer to the Board where the Board is not exceeding its authority and merely making a choice between two constitutional options. However, in construing the constitutionality of a district, no deference is made. These distinctions were clarified

2 743 P.2d 1352 (Alaska, 1987)
3 Id., at 1358
4 526 P.2d 863 (Alaska 1974)
5 667 P. 2d, at 1214
6 526 P.2d, at 866-867

by the Court in *Kenai* when the Court stated

> The state argues that this court's role in reviewing apportionment plans is not to choose among alternative plans but rather to insure that the governor's plan is not arbitrary or unreasonable. Carpenter asserts that the court must also review the "constitutionality of the plan." **We think there is merit in both positions**. In short, our review is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under the provisions of Article VI, section 6 of Alaska's Constitution.[7] (emphasis added)

The motion before the Court does not assert that the Board made the wrong choice between one or more constitutionally permissible options. Rather, it alleges that HD 37 violates the Constitution. As to that legal question, the Courts must exercise its independent judgment.

II. The Board Does Not Dispute That Proc. HD 37 Separates The Aleutian Islands Between Two Districts.

There is no genuine issue of material fact in dispute respecting the separation of the Aleutian Islands between two districts in the Proclamation Plan. As explained in Plaintiffs's initial memorandum, the Board admits that it separated the Aleutian Islands in its description of the plan's districts.[8] Nothing in its opposition suggests otherwise. Thus, there is no genuine issue of material fact in dispute.

7

8 Plt. Memo, at 3. Specifically, the Board stated that Proc. HD 37 includes "all islands of the Aleutian Chain west of Unimak Pass," and that Proc. HD 36 "Includes all islands of the Aleutian Chain east of Unimak Pass." See ARB 00006578 (District Descriptions)

Michael J. Walleri
2518 Riverview Dr.
Fairbanks, Alaska 99709
(907) 378-6555

III. The Board Does Not Dispute That Separating The Aleutian Islands Violates Alaska's Constitution As A Matter Of Law.

Equally, the Board does not seriously contest that splitting the Aleutians violates the Alaska Constitution. Of course, such an assertion is patently wrong as a matter of law. In 1990, the Board essentially did the same thing: i.e. separating the eastern and western Aleutians into different districts.[9] In that case, the Alaska Supreme Court raised the issue *sue sponte*. In *Hickel* the Court stated that "On its face this severance violates the contiguous territory requirement of article VI, section six of the Alaska Constitution."[10] Elsewhere, the Court stated that separation of the Aleutians was "plain error".[11] Nothing in the opposition suggests that separation of the Aleutians does not violate the Alaska Constitution. Given the failure of the Board to offer any argument to the contrary, there is little else this Court may do than to grant the motion, and hold that the separation of the Aleutians is a facial violation of the Alaska Constitution's requirement that districts be comprised of contiguous territory.

Of course, the Court in *Hickel* did not explain exactly what aspect of the 1990's plan separating the Aleutians was so offensive to Alaska's contiguity requirement. However, as noted by the Board, the Aleutian Islands extend beyond the Alaska Peninsula about 1,200 miles.[12] Placing the Western Aleutians into any district other than a district shared with the Eastern Aleutians means that the Western Aleutians

9 846 P.2d, at 54
10 846 P.2d, at 54
11 Id., at 61
12 Def. Memo. At 13; See also Def. Ex. J accompanying Def. Memo.

will be separated from the other portion of the district by hundreds of miles of open sea. Of course that is the situation presented by the Proclamation Plan under review in this matter. The Board suggests that under these circumstances there is no limit to using open sea as a medium for contiguity. But the *Hickel* Court clearly stated that use of open sea as a medium of contiguity was "not without limitation". And the Board admits that "this area does pose the most extreme example."[13] Simple logic would require that if there is a limit to use of open sea as a medium of contiguity, and the presenting example of use of open sea as a medium of contiguity is the "most extreme example," it necessarily follows that the presenting example is, in fact, the limit beyond which such use of open sea is impermissible, since no greater example would be more extreme. Thus, the Board's admission that Proc. HD 37 is an the "most extreme example" of the use of open sea as a medium of contiguity is also an admission that the Proc. HD 37 exceeds the limitation on the use of open sea as a medium of contiguity, and is unconstitutional.

IV. Any Alleged Justification Of The VRA Is Outside The Scope of This Motion And Presents Genuine Issues of Material Dispute.

The Board has not filed a cross motion for summary judgment that the VRA justified the violation of the Alaska Constitution. Nonetheless, the Board argues that such is the case. The argument is premature and presents genuine issues of material dispute.

---

13 Def. Memo. At 13.

It is true that the Court in *Hickel* held that the Aleutians may be split if it is mandated by federal law."[14] Clearly, the Court's use of the language "mandated" implies more than mere convenience, possibility, or likilihood. Rather, the Court's use of the term mandate means exactly that: no other possible alternative. Moreover, once the configuration of a district has been determined to violate the Alaska Constitution, the burden of proof shifts. In such cases, the Board has the burden of proof to demonstrate that compliance with the Alaska Constitution "would have been impracticable in light of competing requirements imposed under either federal or state law."[15] In making this argument, the Board must "make findings justifying the district on this basis."[16] In particular to any specific district, the findings must specifically find that the district's current configuration is required by the Voting Rights Act..[17]

The Board cannot actually meet this burden of proof with regard to Proc. HD 37. This is because the Board cannot prove what the lowest level of Native VAP needed in HD 37 to make the District effective for Native voters. As Dr. Handley noted, the Aleutians is an area of the State that does not experience racially polarized voting.[18] Thus, Dr. Handley is unable to say what is the minimum level of Native VAP that would be effective in the area. When Dr. Handley was asked, she stated as follows:

---

14 846 P.2d, at 61

15 In *re 2001 Redistricting Cases, 44* P. 3d 141, 146 (Alaska 2002); See also, *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987)

16 In *re 2001 Redistricting Cases, 44* P. 3d 141, 143 (Alaska 2002)

17 Id.

18 Ex. 1 (Handley Depo) 66:22-67:2

Q. At what point would voting in District 37 or the percentage of Native VAP, how low would it have to go in order for it not to be effective?

A. I don't know. I know that at 37.79 percent it is effective. What I can't tell you is how low you could go and have it retain its effectiveness.[19]

The Board argues that it had to put the Western Aleutians together with Bethal in order to avoid placing Kodiak and Bethal together. But that is somewhat of a straw-man argument. As detailed in the pending motion on process, the Board made the same mistakes made in *Hickel:* i.e. the Board simply didn't attempt to initially draw a plan that complied with the Alaska Constitution.[20] Indeed, as noted in that motion, both Chairman Torgerson and Boardmember Holm admitted that the Board failed to make an initial attempt to comply with the Alaska Constitution.[21] As the Court in *Hickel* stated, the

> 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.[22]

Given that the Board failed to follow the process outlined by the Court in *Hickel,* it is now faced with the inability to demonstrate that the mandate of the VRA required the configuration of HD 37 as contained in the Proclamation Plan.

The Board makes a great deal out of Dr. Arrington's opinion that the

---

19 Id., at 67:13-20
20 See Riley Et. Al. Plaintiff's Motion For Summary Judgment: Invalid Process (pending)
21 Memorandum in Support of Riley Et. Al. Plaintiff's Motion For Summary Judgment: Invalid Process (pending) at 3-4
22 *Hickel v Southeast Conference,* 846 P.2d at, 51-52 n 22

Demonstration Plan is "retrogressive". However, Dr. Arrington clearly stated that he didn't offer opinions about "retrogression" because "Retrogression is a legal term. I can only tell you whether a plan offers Native Alaskans less representation than some other plan. Thats a political science decision. Whether the Court thinks that's retrogression or not, that's up to the court or the Justice Department."[23]

This distinction between political science and the law is particularly critical in light of the present case. As outlined in Plaintiffs' pending motion respecting the benchmark standard, the standards used to evaluate "retrogression" are seriously at issue in this case. As explained by Dr. Arrington above, and more specifically in that motion, retrogression is a legal determination respecting whether a particular plan results in "a decrease in the absolute number of representatives which a minority group has a fair chance to elect."[24] That determination as to any particular plan is made by comparing the number of representatives a minority group could elect under the plan in question with the "benchmark" plan. Of course, this requires a determination of how many effective districts existed under the benchmark plan, which is the subject of that motion.[25] It also requires an evaluation of the effect of the 2006 Amendments to Sec. 5 of the VRA. With regard to the treatment of influence districts. It is not capable of resolution by a conclusionary statement by either expert

23 Ex. 2, (Arrington Depo) 20:23- 21:4

24 Citing *Hickel, supra, at 49*

25 It is asserted in that motion that the benchmark is four effective Native House Districts, (without reference to any influence districts) which is the number of districts in the Demonstration Plan, as well as under several other plans, according to Dr. Handley.

in this case.

V. CONCLUSION

The motion before the Court seeks partial summary judgment that Proclamation House District 37 is not contiguous and violates the Alaska Constitution as expressed in *Hickel v. Southeast Conference.* Thus, this Court should grant summary judgment that Proclamation District 37 violates the contiguity requirement of Article VI, section six of the Alaska Constitution.

This holding would preserve the Board's issues respecting whether such violation was mandated by the VRA, which remains a contested issue of mixed law and fact. That issue will be decided by a combination of pending motions and/or the trial, but should not preclude entry of partial summary judgment on the issue presented by this motion.

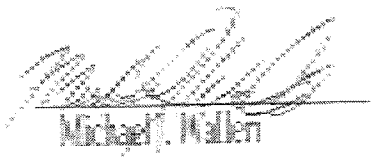
Date: December 15, 2011

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 December 15, 2011 to:

Mr. Michael D. White	Mr. Thomas F. Klinker
Patton Boggs, LLP	Birch, Horton, Bittner, & Cherot
601 5th Ave., Suite 700	127 W. 7th Ave.
Anchorage, AK 99501	Anchorage, AK 99501



number using population, but voting age population was what I used in this case.

Q. So for effectiveness purposes, when you round up, you get to 50 percent Native VAP?

A. What do you mean, for effectiveness purposes?

Q. You did an effectiveness analysis, right?

A. Yes.

Q. And you're saying that in your effectiveness analysis you determined that this was a majority minority district?

A. No, I didn't.

Q. Okay, great.

When you refer to it as a majority minority district in your report, what do you mean by that?

A. I mean that it's 53.64 percent in population and 49.97, almost 50 percent when you round it out, in voting age population.

Q. Well, when you're looking at Benchmark District 37, which I believe is the Aleutians, Lake and Pen area, parts of Bristol Bay region, you're saying that it's not particularly

polarized. And so that 41.8 percent Native VAP is not necessary to be effective, correct, in that particular area of the state?

A. That's correct.

Q. At this point, were you able to say at what level the area within former Benchmark District 37 would be effective?

MR. WHITE: By "at this point," you're talking when?

MR. WALLERI: May 17th.

MR. WHITE: Okay.

Q. At what point would voting in District 37 or the percentage of Native VAP, how low would it have to go in order for it not to be effective?

A. I don't know. I know that at 37.79 percent it is effective. What I can't tell you is how low you could go and have it retain its effectiveness. I can't give you an exact number.

Q. Thank you.

But when you're looking at District 6, on page 37 you talk about we're looking at some number that's consistently higher, like 41 or

T. ARRINGTON

Q. And that's what you told Ms. Dolan?

A. Yes. Or more specifically, that if you look at the numbers and just the numbers and you don't know more about Alaska than what's in the numbers, I didn't see a problem with it. It certainly is a big district, but all the districts in Alaska are big.

Q. There's a lot of big districts there. It's a big state. You're aware, obviously, it's the biggest state. The joke we Alaskans like to tell to our friends from Texas is: What would you get if you divide Texas in half? The two biggest states in the union.

So you said you had a few e-mails and telephone conversations. On these conversations was anybody else present that you're aware of?

A. What time period are we talking about?

Q. We're still talking about in this first initial period.

A. No, just with Jill.

Q. And at some point in time were other people involved in this?

A. Yes.

Q. When did that occur?

A. That occurred when we had a meeting in Albuquerque between Ms. Dolan and Mike Walleri. And someone else was there and I don't remember the name of the someone else.

Q. A man or a woman?

A. A man.

Q. A lawyer or nonlawyer? Do you know? Was it Tom Klinker?

A. I'm sorry, I don't know.

Q. That doesn't ring a bell?

A. No.

Q. So you actually had a meeting in Albuquerque?

A. We had a meeting in Albuquerque. Well, no. I'm sorry. There was an attorney present, the attorney in fact who had recommended me to Ms. Dolan.

Q. And who was that?

A. Oh, God. I'm sorry, I'm terrible about names.

Q. Do you remember where he was from?

A. Yeah. He's from the South. He was the attorney in the Charleston County case on the other side. And he lost that case, so I was very