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PATTON BOGGS LLP

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

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI.

REPLY MEMORANDUM IN SUPPORT OF RILEY ET. AL. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT: INVALIDITY OF HD 38

The Board opposes Plaintiffs' motion for summary judgment that seeks an order holding that the 2011 Final Plan for the redistricting of Alaska's legislative districts is invalid because Proclamation House District 38 is not justified by the Voting Rights Act. In opposition, the Board argues that 1) Plaintiffs have not met their burden of proof, 2) the Board's Findings Were Sufficient 3) the Board record contains sufficient evidence.

1) **<u>The Board Has The Burden of Proof.</u>** The Board's position as to burden of proof is inconsistent. In the pending motion before the Court relating Excess Population and Burden of Proof, the Board did not object to entry of a "law of the case" order ruling that the Board has "the burden of proof to show a legitimate, nondiscriminatory reasons for its configuration of House District 38."[1] This Court has held "that House District 38 does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution."[2] That fact constitutes a *prima facie* showing that the District is invalid, which shifts to the burden of proof to the Board to demonstrate that compliance with the Alaska Constitution

1 See Def. Op Motion For Law Of The Case Regarding District 38, Splitting The Excess Population Of The Fairbanks North Star Borough, And Burden Of Proof

2 Order Granting the Riley Plaintiff's Motion for Summary Judgment in Part (October 25, 2011)

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"would have been impracticable in light of the competing requirements imposed under .... federal law."[3]

2) **The Board's Findings Were Not Sufficient.** The Board argues that it is free to adopt its own procedures and that there is no standard as to the sufficiency of the findings. The board is wrong in this regard. The findings of any agency must be sufficient to allow the Court to review.[4] Specifically, "it is vital that the agency clearly voice the grounds upon which the regulation was based in its discussions of the regulation or in a document articulating its decision."[5] As noted, the Board 'findings' in this regard are clearly deficient as to the critical issues subject to review in these proceedings. As previously noted there is no document that explains the Board's understanding as to the Benchmark standard (i.e. how many Native effective districts are required, whether they must be majority/minority districts and whether the Board believed that it was required to create Native influence districts as it was advised to do by Dr. Handley) and how many of the Proclamation districts were Native effective/influence districts. There is no document indicating why populations in Ester/Goldstream, rather than populations in Mat-Su, were included with a district reaching to the mouth of the Yukon River. While the Board indicated which districts would require deviation from the Alaska Constitution, the documents fail to address which Constitutional provisions (compactness, contiguity, or socioeconomic

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3 *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)

4 *Faulk v. Board of Equalization,* 934 P.2d 750, 751 Alaska 1997)

5 *Alaska Fish Spotters Ass'n v. State, Dep't of Fish and Game,* 838 P.2d 798, 801 (Alaska 1992)

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integration) were being relaxed relative to each district. Indeed, the Board's opposition demonstrates the problem faced by this Court. In the opposition the Board was unable to point to any document containing any of this information. Moreover, the Board could not point to any "finding" on any specific point it advanced in it opposition; rather in all respects the Board was reduced to pointing to the raw record and evidence in the record. While this may be sufficient to demonstrate evidence in the record capable of supporting a finding, the Board was incapable of actually pointing to the findings themselves.

The Board objects to the citation to *Faulk*[6] by the Plaintiffs. But the citation is appropriate given that the Board consistently argues that it should be treated like an administrative agency. But the Court is in the best position to judge whether there are any 'findings' sufficient to allow review as to whether there was evidence in the record to support the Board findings. The Board's opposition points to various evidence in the record to substantiate the Board counsel's understanding of the findings. But the Board's opposition simply fails to demonstrate where in the record the Court will find a document or documents that articulates such findings.

3) **The Board Cited Board Record Does Not Explain Why House District 38 Was Configured As It Was.** The Board opposition cites to serval parts of the record as evidence in the record supporting the configuration of Proc. HD 38. The problem is

6 *Faulk v. Board of Equalization,* 934 P.2d 750, 751 Alaska 1997)

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that the record citations do not do what the Board alleges they do. For example, the Board references ARB00004420-4422 as evidence respecting HD 38.[7] Nothing in that portion of the record discusses any part of HD 38. The reference to ARB00004503-8 is similarly off base.[8] That portion of the transcript talks about Kodiak. Similarly, ARB00013410[9] doesn't talk about Fairbanks historical, economic, cultural and social ties to rural Native Alaska as the Board characterizes that portion of the record. Rather, it talks about the Mat-Su. ARB00013407-13408[10] doesn't talk about Ester/Goldstream. Frankly, the numbers in the opposition appear to have been randomly selected and often have little to do with the Board's characterization in the opposition.

4) **Neither Board Members Nor Dr. Handley Are Able To Justify District 38.**

As previously stated, outside of the record neither Chairman Torgerson, Board member Jim Holm (who drew the Fairbanks Districts), Executive Director Taylor Bickford nor Dr. Handley were not able to explain why District 38 was configured in the manner it was configured.[11] But the most telling aspect of the statements outside of the record is Dr. Handley stating that she was unable to opine whether it was necessary to draw District 38 in the configuration used in the Proclamation Plan.[12] If Dr. Handley had no idea why the VRA would require HD 38 to be configured in the

7 Def. Op at 9
8 Id.
9 Referenced at Def. Op., at 15
10 Referenced at Def. Op. At 15
11 See Plt. Memo., at 7-9
12 Handley Depo. At 207: 3-23 Quoted at Plt. Memo., at 8-9

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manner used, it is pretty clear that no member of the Board had a greater ability.

CONCLUSION.

House District 38 does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution. As a consequence, the Board has the burden of proof to demonstrate that it made findings of facts justifying variance from the State Constitution, or that such variance may be justified in its Record or supplemental evidence. But the Board didn't make any findings specific as to HD 38 that might justify the deviation from Alaska's Constitution, the Board opposition fails to cite to any such finding in the record, nor to any evidence in the record that might justify such a finding, and the Board's expert admits that she is unable to explain why District 38 is so configured. The Court should grant the motion for summary judgment.

Date: December 21, 2011

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Certificate of Service

I certify that a true and correct copy of the foregoing was served by e-mail on this December 21, 2011 to:

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