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

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IN RE: 2011 REDISTRICTING CASES:)
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Case No. 4FA-11-2209CI

Order on the Contiguity of House District 37

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for partial summary judgment on 5 December 2011 that House District 37 is not contiguous under the Alaska Constitution. The Board opposed the motion on 13 December 2011. The Plaintiffs replied on 15 December 2011. Oral argument, requested by the Plaintiffs, was held on 22 December 2011.

B. Preliminary Comments on the Case

Interestingly the Aleutians were “settled”¹ from east to west,² specifically from the Siberian coast. From a North American perspective, the Aleutian Islands stretch westward from the Alaska Peninsula towards the Kamchatka Peninsula, demarking the

¹ “Settle” is used in this context solely to describe western contact with the Aleutian Islands. It in no wise suggests the people who inhabited this land for thousands of years were “discovered” by the Russians.

² “East” and “west” become confused where the 180th degree of longitude intersects the subject area.

Bering Sea and the Gulf of Alaska. The uniqueness of the area is reflected in the observations of early Russians:

As you sail eastward from the shallow, often ice-locked, reef-enclosed Sea of Okhotsk on the Siberian coast and first sight the Aleutian Islands you are struck at once by the fantastic desolation of the seascape. The westernmost Aleutians rise from the restless, repellent, slate-gray seas like crags in Doré etchings, twisted and tortured beyond belief in testimony of their violent volcanic origin, and warning the mariner to keep his distance from their concealed sawlike teeth, white with the droppings of the millions of seabirds that forever wheel and cry in the surrounding mists like lost children. You realized then, that this is of a pattern with the Asiatic coast; Japan has its earthquakes and Kamchatka its smoking peaks, but here the process of formation seems to go on still.

Then, in spite of the fact that the drift ice from the Arctic lies but a few miles to the north, you notice the warmth. On one side of the Aleutians lies the Bering Sea, on the other the Pacific – or- rather *Kuro Siwa*, the Japan Current. The Aleutians are a gigantic boom that keeps them apart. The Current sweeps up from near the Equator on a slow, cosmic swirl past the Japanese Empire, turns along these Aleutians and warms them, turns again along the mainland to California, where it makes its last turn to gather warmth to carry north.

As you continue to sail eastward, the impression of terrible newness passes somewhat as larger and larger islands appear with green and russet lichens covering the highlands, which soon assume the aspect of mountains. Then, the forefront of Alaska Peninsula, the beginning of the mainland, comes slowly into view. Here are some of the most awesome heights of the world, mountains and glaciers fronting the sea and giving way to gigantic bays and inlets, fringed by incredible forests and filled with the thunder of cataracts that forever drain the snows fields in the distance. However, the familiar fogs and mists remain, and the rain continues to fall.³

The above quote certainly is the most beautiful piece of prose to grace the several orders in this case. It is quoted not only for its beauty, but also to establish a point of

³ *Lord of Alaska*, Hector Chevigny, Foreward (Viking Press, 1943).

reference for the analysis that follows. The point of the motion is whether House District 37 passes or fails constitutional muster under the single issue of contiguity.

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.⁴ 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.”⁵ “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 material issue of fact exists.”⁶ Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.⁷

Proclamation House District 37 separates the Western Aleutians from the Eastern Aleutians. It also severs the Western Aleutians from its ancient and intimate connection with a northern rain forest that continues past a barren glacier region on the mainland, from the Bay of Yakutat south to the Columbia River. Yet the Western Aleutians are included in a House District with Bethel on the Kuskokwim delta. The Aleutian Islands

⁴ Alaska R. Civ. P. 56.

⁵ *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)).

⁶ *Philbin v. Matanuska-Susitna Borough*, 991 P.2d 1263, 1265--66 (Alaska 1999) (quotations omitted).

⁷ *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).

are a rare geographic instance where the Alaska Supreme Court took *sua sponte* notice of contiguity.⁸ For reasons noted below, Proclamation House District 37 does not pass Alaska constitutional muster regarding contiguity. 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.⁹

C. General Arguments

The Plaintiffs contend House District 37 is not contiguous under the Alaska Constitution.¹⁰ The Board argues that House District 37 is contiguous under the Alaska Constitution. The Board also argues the Voting Rights Act required it to split the Aleutian Chain.

D. Standard of Review

*Groh v. Egan*¹¹ established, and *Carpenter*¹² reaffirmed, the standard of review that we apply in exercising our jurisdiction to review reapportionment decisions under Alaska Constitution article VI, section 11:¹³

⁸ *Hickel v. Southeast Conference*, 846 P.2d 38, 54, 61 (Alaska, 1992).

⁹ Alaska R. Civ. P. 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

¹⁰ The court notes that Plaintiffs also filed a motion for partial summary judgment that House District 37 is not compact on 5 December 2011.

¹¹ *Groh v. Egan*, 526 P.2d 863 (Alaska, 1974).

¹² *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska, 1983).

¹³ Alaska Const. art. VI, § 11, provides in pertinent part: Application to compel correction of any error in redistricting must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes 'error' which would invoke the jurisdiction of the courts.

We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulation 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.

In short, our review is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under article VI, section 6 of Alaska's constitution.¹⁴

E. Contiguity

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

¹⁴ *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska, 1987). The Plaintiffs argue that because this is a constitutional issue, the court should exercise its independent judgment rather than deferring to the Board. The court finds that this is a misreading of the standard. The court determines the constitutionality of the districts, but does not get to substitute its independent judgment for that of the Board. As a practical matter this means the court does *not* redraw the offending district. Rather, if the Supreme Court agrees or finds some proclamation districts to be unconstitutional, then the matter is remanded to the Board to draw districts consistent with the court's findings. See Judge Rindner's 1 February 2002 Order.

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.

Contiguity has been defined by the Alaska Supreme Court as follows:

Contiguous territory is territory which is bordering or touching. As one commentator has noted, “[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces).”¹⁵ Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain *some* [emphasis added] amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.¹⁶

The Alaska Supreme Court previously addressed a plan that split the Aleutian Islands in the 1990 redistricting process. The 1990 plan separated Adak, Shemya and Attu from the rest of the Aleutian Islands and paired it with the Wade Hampton Census area.¹⁷ The Alaska Supreme Court held,

The Board's plan divides the Aleutian Islands between two districts. The eastern Aleutians are in District 39, and the western Aleutians in District 37. On its face this severance violates the contiguous territory requirement of article VI, section six of the Alaska Constitution.¹⁸ Although the parties did not raise this issue, the separation of the Aleutian Islands is so plainly erroneous that we address the issue *sua sponte*. Thus, in exercise of our authority under article IV, section two of the Alaska

¹⁵ Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985).

¹⁶ *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska, 1992).

¹⁷ *Id.* at 70.

¹⁸ The Alaska Supreme Court in their order of remand, noted that the Aleutians must be joined together in one district unless their separation is mandated by federal law. Since the federal law did not mandate their separation, the contiguous territory requirement of the Alaska Constitution controlled.

Constitution, we hold that the separation of the Aleutian Islands into two districts violates article VI, section six of the Alaska Constitution.¹⁹

The Alaska Supreme Court ordered: “Thus unless the severance of the Western Aleutians from the Eastern Aleutians is mandated by federal law, the areas must be joined in one district.”²⁰

The plan was remanded back to the trial court, who appointed three masters to redraw the plan based on the Supreme Court’s mandates and guidelines.²¹ The masters rejoined Adak with Attu, since it was possible to keep the Aleutians together and still comply with the Voting Rights Act.²²

F. House District 37

House District 37 includes Bethel, the Kuskokwim delta, Nunivak Island, Saint Matthew Island, the Pribilof Islands, and all the western Aleutian Islands.

The Plaintiffs argue House District 37 violates the contiguity requirement in two ways. First, the Proclamation Plan separates the Aleutian Islands between two districts. House District 37 includes all islands of the Aleutian Chain west of Unimak Pass and House District 36 includes all islands of the Aleutian Chain east of Unimak Pass. Second, there is no contiguity via land between the western Aleutians and the remainder of the district. Rather, the contiguity between the two parts of the district is hundreds of

¹⁹ *Hickel v. Southeast Conference*, 846 P.2d 38, 54 (Alaska, 1992).

²⁰ *Id.* at 38, 61.

²¹ *Id.* at 38, 62.

²² *Id.* at 38, 71.

miles of open water across the Bering Sea. The Plaintiffs point out that the *Hickel Court* cautioned, “The potential to include open sea in an election district is not without limits.”²³ The court agrees there is a limit to the inclusion of open sea in a district. Here Bethel is the commercial, governmental, and political center of the proposed district. Without gainsaying its vibrant connection to the sea by the Kuskokwim River, the fact is Bethel is over 1,000 miles away from Attu. By any measure, this is more than “some amount of open sea.”

The Board argues the split of the Aleutians is necessary to comply with the Voting Rights Act. The Board argues it took a “hard look” at other options that did not split the Aleutian Chain. The Board points to two alternative plans it considered, the “TB Plan”²⁴ and the “PAME Plan”²⁵ that would have kept the Aleutian Chain together, but failed for other reasons.²⁶ The Board states it ultimately split the Aleutian Chain in order

²³ *Id.* at 54.

²⁴ The “TB Plan” changed the historical makeup of House District 40 and divided the North Slope Borough and the Northwest Arctic Borough into separate districts. This plan was ultimately abandoned by the Board due to concerns raised by the Alaska Native community that some of the districts, particularly the newly configured North Slope district would not offer the ability to elect Alaska Native-preferred candidates of choice due to the Alaska Native VAP percentage, the lack of registered Alaska Native voters and low voter turnout in the area. The court has already determined that the Board may take into account whether minority incumbents are paired with other incumbents under the Voting Rights Act. *See* the court’s 12 December 2011 Order Denying Petersburg’s Motion for Partial Summary Judgment on Compactness and Granting the Board’s Cross Motion for Summary Judgment on Compactness.

²⁵ The “PAME” Plan was rejected due to concerns about the inclusion of a Senate District that combined Kodiak with Bethel. The major problem with this configuration is that it paired Alaska Native incumbent Senator Lyman Hoffman with the current Senate president Gary Stevens. The court has already determined that the DOJ looks at whether the Board took into account comments from the Alaska Native community when drawing the plan. *See* the Court’s 12 December 2011 Order Denying Petersburg’s Motion for Partial Summary Judgment on Compactness and Granting the Board’s Cross Motion for Summary Judgment on Compactness.

²⁶ The court notes that Board Options 1 and 2 do not split the Aleutian Chain.

to avoid a Bethel/Kodiak Senate District while at the same time creating a house district in Southwest with an Alaska Native VAP percentage high enough to exceed the VAP of Senate District C in the Benchmark Plan and maintain an “effective” senate district. The Board argues that it did not come up with the plan of splitting the Aleutians on their own and that a number of private party plans also did so.²⁷

The Board finally argues that Alaska’s unique geography is at play, as the Aleutian Islands occupy an area of 6,821 square miles and extend westward from the Alaska Peninsula about 1,200 miles. The area also includes the islands of Saint Paul and Saint George, which are essentially “suspended” almost halfway between the tip of the Aleutian Chain and the closest section of the mainland, which the Board states it included in House District 37 for the specific purpose of maintaining contiguity. The Board ultimately argues that House District 37 is contiguous.²⁸

The Alaska Supreme Court held without qualification in *Hickel* that the separation of the Aleutian Chain is so “plainly erroneous” that it must be joined unless the split is mandated by federal law. While contiguity by water is accepted in Alaska, the court agrees with the Plaintiffs that this pushes the limits. While the court agrees with the

²⁷ The Board points out that the FNSB, who raised the issue in their complaint, also submitted a plan that split the Aleutian Chain. The RIGHTS Coalition also submitted a plan with an Aleutian split. There was also a plan entitled the Begich Split Aleutian Plan.

²⁸ The Board also requested summary judgment, noting, “While the dispositive motion deadline in this case has passed, under Rule 56(c) summary judgment is can be granted against the ‘moving party’ without the need for a cross-motion ‘where appropriate’.”

Board that Alaska's unique geography is an issue here, this unique geography is not new and this court cannot ignore Alaska Supreme Court precedent.²⁹

However, the court recognizes that it is possible that a split in the Aleutian Chain is required by the Federal Voting Rights Act under the current population statistics. The Board has cited factors that made it particularly hard to comply with the Voting Rights Act.³⁰ Those factors may not have been at play twenty years ago when *Hickel* was decided. The court also understands that the Board needed to achieve certain Alaska Native population numbers in order to comply with the Voting Rights Act.³¹ The Board also is allowed to look at other factors for preclearance under the Voting Rights Act, such as the pairing of Alaska Native incumbents and the extent the Board took into account input from the Alaska Native community. The court also notes that the Board points to other private party plans that also split the Aleutian Islands, further demonstrating that an Aleutian Chain split might be the only solution.

²⁹ The Board argued at oral argument that a Kodiak/Southeast Senate Pairing was allowed in *Hickel*, however, there is no requirement that senate districts be contiguous. *Hickel v. Southeast Conference*, 846 P.2d 38, 73 (Alaska, 1992).

³⁰ The Board cited the following factors that made it particularly difficult to comply with the Voting Rights Act: (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.

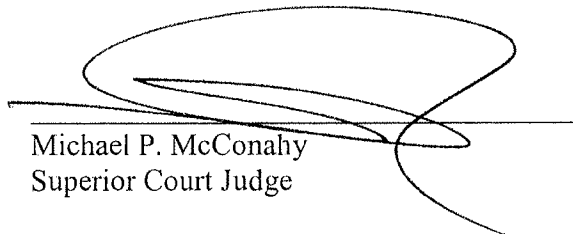
³¹ The court is concerned with the inference by the Plaintiffs that the Board's Voting Rights Act expert cannot determine what minimum percentage Alaska Native VAP is required to maintain District 37 as an "effective district."

The court is cognizant that while it looks at the constitutionality of each district individually, each district impacts the next. House District 37 is an “effective district”³² under the Proclamation Plan. It is also directly underneath House District 38, which is also an “effective district” under the Proclamation Plan. The court has previously ruled that District 38 is not socio-economically integrated, and the Board will have the burden of proving at trial that its composition was required in order to comply with the Voting Rights Act.³³

Conclusion

The court concludes that House District 37 is not contiguous under the Alaska Constitution. The burden will be on the Board at trial to show that the geographic configuration of House District 37 is necessary under the Voting Rights Act. The Plaintiff’s Motion for Partial Summary Judgment that House District 37 is not contiguous is GRANTED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.



Michael P. McConahy
Superior Court Judge

³² “Effective Districts” are districts that provide minority voters with the ability to elect candidates of their choice to office.

³³ House District 38 also is relatively close to House Districts 1 and 2 which have also been challenged by the Plaintiffs as being non-compact.

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.