(149)

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

IN RE 2011 REDISTRICTING CASES

PLAINTIFFS' TRIAL BRIEF

Case No. 4FA-11-02209 CI.

Plaintiffs Ronald Dearborn and George Riley, by and through their undersigned attorney, hereby submit the following trial brief:

I. STATUS OF PARTIES. Originally, three (3) sets of plaintiffs brought claims against the Alaska Redistricting Board (i.e. Board) : i.e. the Riley et. al.,[1] the FNSB et. al.,[2] and Petersburg et. al..[3] The Court has granted the Board summary judgment against the Petersburg claims, which have been dismissed.[4] The FNSB complaint has been dismissed, but leave has been granted for the FNSB to continue to participate as *amicus curiae*.[5] The Ketchikan Gateway Borough, Aleutians East Borough and Bristol Bay Native Corporation also participate as *amicus curiae*. Thus, the remaining parties in interest at trial are the Riley Plaintiffs and the Board Defendant.

II. CLAIMS PRESENTED/DISTRICTS CHALLENGED. The remaining Plaintiffs' complaints[6] in this matter challenge a eight (8) House Districts (HD 1-6, 37 and 38) and four (4) Senate Districts (SD A-C and S) associated with Fairbanks under

1 George Riley and Ron Dearborn
2 The Fairbanks North Star Borough and Tim Beck
3 The City of Petersburg, Mark Jensen, Nancy Strand, and Brenda Norheim
4 Order Granting Motion (12/12/11)
5 Order Granting Motion (11/03/11)
6 The Court has allowed the Riley Plaintiffs to present any claim that the Fairbanks North Star Borough could have brought. See Order Granting Motion (11/03/11)

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the 2011 Proclamation Redistricting Plan. Plaintiffs' claims allege violation of the compact, contiguous and socioeconomic integration requirements of the Alaska Constitution.[7] Additionally, Plaintiffs' claims include allegations of violation of Alaska's Equal Protection Clause guarantee to fair and effective representation.[8]

III. PRIOR MOTIONS/ ORDERS: POSTURE OF CASE

a) Pending Motions. At the current time, there are three (3) pending pre-trial motions : 1) Plaintiffs' Motion In Limine: Hearsay (extrajudicial statements of DOJ officials); 2) Plaintiffs Request to Take Judicial Notice (Order in *Nick v Bethel*); and 3) Defendant's Motion in Limine to Preclude Evidence of Any Issue Not Raised in the Complaint.[9] The Court has not set a briefing schedule on these motions.

b) Decided Motions. The Board has not filed any motions for summary judgement/law of the case against the Riley Plaintiffs, while the Riley Plaintiffs have filed seven (7) motions for summary judgment and/or law of the case.

The Court has denied three (3) of these motions regarding 1) Benchmark Standard, 2) Invalidity of HD 38 (i.e. VRA excuse), and 3) Invalid Process.[10] The Board did not file any cross-motions respecting these claims. Thus, these claims remain unresolved.

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7 Art. VI, Sec. 6 AK CON; See *Hickel v Southeast Conference,* 846 P.2d 38, 44- 47 (Alaska 1993)
8 Art. I, Sec. 1 AK CON See *Hickel v Southeast Conference,* 846 P.2d 38, 48 (Alaska 1993)
9 All motions filed on December 12, 2011.
10 Orders of 12/23/11

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The Court has granted four (4) of summary judgment motions regarding 1) Socio-economic Integration of HD 38,[11] 2) Splitting Excess Population of the FNSB;[12] 3) Contiguity of House District 37,[13] and 4) Compactness of Districts 1, 2 and 37.[14] The chart below summarizes the relevant dispositive orders as they relate to the various districts:

11 Order Granting the Riley Plaintiff's Motion for Summary Judgment in Part (10/25/11)
12 Order of 12/23/11
13 Order of 12/23/11
14 Order of 12/27/11

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Claims	Challenged Districts	Sum. Judgment
Contiguity	HD 6, 37& 38[15]	HD 37[16]
Compactness	HD 1, 2, 6, 37 & 38 [17]	HD 1, 2, & 37[18]
Relative socio-economic integration	HD 6, 37, & 38[19]	HD 38[20]
EQUAL PROTECTION: *(Fair and Effective Representation.)*	HD 1-6 & 38 & SD A-C & S [21]	HD 6 & 38[22]

The summary judgment orders affect claims relating to five (5) districts. The order respecting HD 2 resolves all issues related to that district and will require the remand of the plan to the Board to correct the errors respecting that district.[23] Of course, that will necessarily have a "ripple effect" on the other Fairbanks Districts.

Partial summary judgment as to HD 1, 6, 37, and 38 establishes that these districts violate requirements of the Alaska Constitution, however, the Court has reserved a possible excuse defense related to these districts: i.e. the claim that the deviation from the Alaska Constitution relating to these districts was necessary to comply with the federal Voting Rights Act. Under the orders, the Board has the burden of proof on this excuse defense, which is discussed in detail below.

15 FNSB @ para 12-13, 33 and 44
16 Partial Summary Judgment Granted; VRA excuse reserved for trial.
17 Riley @ para 21; FNSB @ para 12-13, 33, and 44
18 Summary Judgment Granted as to HD 2; Partial Summary Judgment Granted as to HD 1 & 37, VRA excuse reserved for trial.
19 Riley @ para 20; FNSB para. 12-13 (excess pop); FNSB para 44
20 Granted Summary Judgment Motion; VRA excuse reserved for trial.
21 Riley @ para 15-19 (proportionality); See also FNSB @ para 23 – 27 (Senate Pairing); FNSB para. 12-13 (excess pop)
22 Granted Summary Judgment Motion; VRA excuse reserved for trial.
23 Art. 6, Sec. 11 AK CON

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Neither the Plaintiffs nor the Defendant filed dispostive motions relating to Plaintiffs's Fair And Effective Representation – Proportionality claims. As a result, these claims (relating to HD 1-6 & SD A-C & S) will be presented at trial.

IV. STANDARD OF REVIEW/ BURDENS OF PROOF.

a) Standard of Review. The law of this case respecting the standard of review was set out by this Court in its order of December 23, 2011.[24] Specifically, the review of the Board action utilizes a somewhat modified standard of review employed by the Court in reviewing administrative agency actions.[25] The Court has held that the standard of review is to ensure that the reapportionment plan under review if not unreasonable and is constitutional under Art. VI, § 6 of Alaska's Constitution.[26] In this regard, the Court will face questions of fact, law and mixed questions of law and fact.

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24 Order on Contiguity of House District 37, at 4 (12/23/11

25 Id.

26 Id., citing *Groh v Eagan,* 526 P. 2d 863 (Alaska, 1974) and *Carpenter v Hammond,* 665 P.2d 1204 (Alaska 1983) The entire quoted portion of the relevant opinions is as follows:

> 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 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.
>
> 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.

Conclusions of law are subject to de novo review by the Court.[27] In regard to mixed questions of law and fact, the Court should employ the reasonable basis test: i.e. "determine whether the agency's decision is supported by the facts and has a reasonable basis in the law".[28]

As to the contested facts, in the absence of sufficient findings of fact by the Board, the Court has the discretion to exercise *de novo* review of the record or to remand for further findings of fact.[29] Where the Board has made specific findings of fact that are disputed, the "substantial evidence" test applies: i.e. there must be substantial evidence in the record that support the findings that are disputed.[30]

b) Burden of Proof Re HD 1, 6, 37, and 38. As previously noted, HD 1, 37 and 38 have been found to have violated the provisions of Art. VI, § 6 of the Alaska Constitution. The Board never asserted any affirmative defense in its pleadings and has made no effort to amend its pleadings to assert such a defense. As a consequence, the Court should not allow the Board to assert any affirmative defense.[31]

Notwithstanding this defect,[32] this Court has held that the Board shall have the

27 *Ben Lomond Inc. v Fairbanks North Star Borough Board of Equalization,* 760 P.2d 508 (Alaska, 1988)
28 *Gunderson v University of Alaska,* 922 P.2d 229, 233 (Alaska, 1996) quoting *Tesoro Alaska v Kenai Pipeline Co., 746 P.2d 896 (Alaska, 1987)*
29 See *City of Nome v Catholic Bishop of Northern Alaska,* 707 P.2d 870, 875 n. 2&3, and 876 (Alaska, 1985)
30 Id.
31 Civ. R. 8(c); The failure to plead an affirmative defense constitutes a waiver. *Rollins v Linbold,* 512 P.2d 937, 940 (Alaska, 1973); *Kupka v Morey*, 541 P.2d 740 (Alaska, 1975); *Barrett v Byrnes*, 556 P.2d 1254 (Alaska 1976);
32 This issue was raised in the dispostive motion practice, but this Court did not clearly rule on this question. The Plaintiff's would request that the Court rule on this issue, and/or preserves the issue for review.

burden of proof to show that "the geographic configuration of (each of these districts) is necessary under the Voting Rights Act."[33] This Court's holding on the burden of proof is in accord with well established precedence.[34]

This burden requires that the Board 1) show that the each district configuration was necessarily required by the VRA, 2) that the Board made findings to that effect, and 3) that the record contains sufficient evidence to support such findings.

First, the Board must show that each district configuration was necessarily required by the VRA.[35] The VRA is not a wholesale justification to suspend the Alaska Constitutional standards. Its is not enough to simply show that the plan was not retrogressive under the VRA in order to carry the Board's burden of proof. At a minimum, the Board has the burden to produce evidence that there was no alternative that avoided the Constitutional violation and complied with §5 non-retrogression standard.[36] The VRA does not excuse all constitutional violations so that attempts to comply with the VRA cannot justify overall plan population deviations in excess of ten percent.[37] Additionally, there must be a close fit with the purpose of the VRA. For example in *Kenai,* the Court observed that "a reapportionment plan is invalid (under

33 See Order on Contiguity of House District 37, at 9 (12/23/11) (regarding HD 37 & 38); See also, Order on the Plaintiffs' Motion for Summary Judgment: Invalidity of House District 38, at 3 (12/23/11) (regarding HD 38); See also Order on Riley/Dearborn Plaintiffs Motion for Summary Judgment on the Compactness of Districts 1,2 and 37. (12/23/11) (regarding HD 1, 2 and 37);

34 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)

35 See footnote 26, *surpa.*

36 *Hickel v Southeast Conference,* 846 P.2d 38, 51-52 (Alaska 1993)

37 In *re 2001 Redistricting Cases, 44* P. 3d 141, 146 (Alaska 2002);

the VRA) if it would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[38] The Court held that the Board did not meet its burden of proof to assert a viable VRA excuse to a Constitutional violation where the Board increased Native VAP in a district from 27.5% (Benchmark district) to 41.9% (Proclamation District).[39] Similarly, in *Hickel,* a district that raised Native VAP by 2% over the benchmark was not justification for violation of the compactness requirement.[40] Thus, increasing Native VAP in excess of the minimum benchmark standard needed to achieve preclearance fails to meet the Board's burden of proof under a VRA excuse defense.

Second, the law of this case requires the Board show that it made findings of fact for each such district configuration was necessarily required by the VRA.[41] The findings must be sufficient to support the configuration of the relevant district.[42] "(I)t 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."[43] Such findings must be adequate and capable of meaningful judicial review.[44] In answering that question, "[t]he test of sufficiency is . . . a functional one: do the [board's] findings facilitate this court's review, assist the parties and restrain the

38 *Kenai Peninsula Borough v State,* 743 P.2d at, 1361. As Court also observed, §5 of the VRA " "aims to preserve the voting prerogatives of minoirty voters." id., at 1356 n 2
39 743 P.2d at, 1361.
40 *Hickel v Southeast Conference,* 846 P.2d,, at 51-52
41 Order on Plaintiff's Motion for Summary Judgement: Invalidity of House District 38, at 3 (12/23/11)
42 Id.: See In *re 2001 Redistricting Cases, 44* P. 3d 141, 143 (Alaska 2002)
43 *Alaska Fish Spotters Ass'n v. State, Dep't of Fish and Game,* 838 P.2d 798, 801 (Alaska 1992)
44*Faulk v. Board of Equalization,* 934 P.2d 750, 751 Alaska 1997)

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[board] within proper bounds?"[45]

Third, the findings of the Board must be be supported by evidence in the Board's Administrative record.[46] In this regard, the where the Board has made specific findings of fact that are disputed, the "substantial evidence" test applies: i.e. there must be substantial evidence in the record that support the findings that are disputed.[47]

b) Burden of Proof: Fair And Effective Representation Claims. As to districts that have not already been determined to be violative of the Alaska Constitution, the Plaintiff has the burden of proof as to the unconstitutionality of a given district.[48] However, in the context of a Fair and Effective Representation claim that the proportional voting strength of municipality residents have been diluted, the Court should employ a "neutral factors" test.[49] As the Court in *Kenai* explained:

> Under such a test we look both to the process followed by the Board in formulating its decision and to the substance of the Board's decision in order to ascertain whether the Board intentionally discriminated against a particular geographic area. Wholesale exclusion of any geographic area from the reapportionment process and the use of any secretive procedures suggest an illegitimate purpose. District boundaries which meander and selectively ignore political subdivisions and communities of interest, and evidence of regional partisanship are also suggestive. The presentation of evidence that indicates,

45 Id.
46 *Earth Resources v State, Department of Revenue,* 665 P.2d 960, 965 (Alaska, 1983)
47 Id.
48 *Egan v Hammond,* 502 P.2d 856, 873 (Alaska, 1972)
49 *Kenai Borough v State,* 743 P.2d at, 1373

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> when considered with the totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a geographic area will serve to compel the Board to demonstrate that its acts aimed to effectuate proportional representation. That is, the Board will have the burden of proving that any intentional discrimination against voters of a particular area will lead to more proportional representation. Because our equal protection clause is more stringent than the federal equal protection clause, a showing of a consistent degradation of voting power in more than one election will not be required; rather once the Board's discriminatory intent is evident, its purpose in redistricting will be held illegitimate unless that redistricting effects a greater proportionality of representation. Moreover, because of our stricter constitutional standard, we will not consider any effect of disproportionality de minimus when determining the legitimacy of the Board's purpose.

Once a Plaintiff has established an inference of discriminatory intent of effect, the burden shift to the Board to demonstrate that the "plan resulted from legitimate nondiscriminatory policies such as the article VI, Section 6 requirements of the compactness, contiguity and socioeconomic integration."[50] made a prima facie case respecting the unconstitutionality of a district, the burden of proof shift to the Board to establish a legitimate non-discriminatory reason for the deviation.

V. FACTUAL ISSUES

a) Was The Configuration Of Hd 1, 6, 37, And 38 Required By The VRA. As noted above, this Court has already held that there is a genuine issue of disputed fact respecting whether the configuration of of HD 1, 6, 37, and 38 was required by the

50 *In re 2001 Redistricting Cases*, 44 P.3d, at 114

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VRA. Also as previously noted the burden of proof on this matter rests with the Board. [51]The Plaintiffs do not believe that the Board can meet this burden of proof. While this Court has held that the *"Hickel"* process[52] is not a mandated process, it is the best proof available for such a showing. Additionally, as the Plaintiff's have previously pointed out to the Court, the Board made only conclusionary findings. None of the Board members are able to explain why the Districts were configured in order to comply with the VRA, and the Board expert was unable to explain why the configuration of these districts were necessary for preclearance under the VRA. Absent such showings, the intended Board proofs are unclear to the Plaintiffs.

Upon information and belief, it is believed that the Board will assert that the Benchmark standard was five (5) effective Native House districts and three (3) effective Native Senate districts. The Plaintiff's believe that the issue is not strictly a pure factual dispute. If this is the standard, however, such evidence does not resolve the issues. It is clear that the Board did not know that this was the standard, because the VRA expert only discovered the matter after the Plan was adopted. It is therefore unlikely that the Board made the necessary findings nor that the record contains evidence supporting this conclusion. But assuming that Board can overcome these problems it is also likely that the Board unnecessarily strengthened Native voting

51 See Issues of Law discussed infra.

52 *Hickel v Southeast Conference,* 846 P.2d at, 51-52 n 22 The Court described the process as follows:

> 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

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strength in District 38. This may be shown on the following chart:

COMPARISON NATIVE VOTING STRENGTH HOUSE DISTRICTS
(Benchmark vs Proclamation)
(Ordered in Increasing Strength)

District (Benchmark)	Total Nat. Pop.	Nat. VAP	District (Proclamation)	Tot. Nat. Pop.	Nat. VAP
5 SE Islands	38.18	35.14	34 - SE Islands	36.96	32.85
37 Aleutians	45.04	37.79	38 – Wade Hampton/ Ester	53.38	46.36
6 -Interior Villages	53.64	49.97	37 – Bethel/ Aleutians (W)	56.18	46.63
40 N. Slope	71.95	63.6	40- Arctic	71.15	62.09
38- Bethel	86.94	82.67	39- Bering St/ Interior Villages	72.5	67.09
39 – Bering St.	87.74	83.44	36 - Bristol Bay/ Aleut (E)	78.26	71.45

The Southeastern Island District was counted as a Native influence district which is not counted for Benchmark purposes. Thus, Proc. HD 38 is the lowest Native VAP of the Districts counted as Native Effective Districts in the Proclamation Plan, with 46.37% Native VAP. By comparison, the lowest Native VAP of the Districts counted as Native Effective Districts in the Benchmark Plan, was 37.79 Native VAP. Thus, the Board actually increased Native voting strength the weakest of the 'Native Effective Districts" by 9%. Looking to localized areas, the Interior Villages, formally in an district with 49.97 Native VAP was placed in a District with 67.09% Native VAP, or a 18% increase. As noted above, in *Hickel* and *Kenai*, the Court held that increasing Native VAP in excess of the minimum benchmark standards fails to meet the Board's burden of proof under a VRA excuse defense. In this case, the increases are

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substantially above the increases rejected in those cases.

Additionally, it is understood that the Board's justification for breaching the Fairbanks borough boundary more than once was because of several assumptions, including 1) there was a need to move urban population into a rural district, 2) that all Native's vote Democratic, 3) the Board wanted to move an urban Democrats into a Native rural district to facilitate non-Native cross over voting by Democrats because Republicans won't cross over to vote for a Native preferred candidate,and 4) if the total surplus population of Fairbanks were moved to an urban district, it would destroy the effectiveness of the Native District. . These justifications are not legitimate because they amount to unsubstantiated racial stereotyping, and racial and partisan gerrymandering. Additionally, they target the proportional representation of Fairbanks voters, by diluting the proportional representation of Fairbanks from 5.5 districts to 5.

Finally, there is nothing in the record to explain why other areas of the State with urban Democratic voters could not be added to a rural district to make the desired "cross over" Native effective district, that would not destroy the proportional representation of the urban populations.

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b) Was the Equal Protection Rights of Fairbanks Voters To Fair And Effective Representation Violated? Plaintiffs are alleging the plan violates Fairbanks City and Borough residents' right to fair and effective representation. This was generally accomplished by splitting the two city house districts into separate Senate districts thereby depriving the Fairbanks City Voters of a Senate seat. The evidence will show that there are substantial difference between City and Borough residents related to various government services and political issues such as annexation and air quality issues. The Plaintiffs intend to show that the Borough proportional representation was diminished from 5.5 House Seats to 5 House seats. These effects were the result of deviation from traditional redistricting standards including the use of vacant land in HD 3 and 5 to create unnatural contiguity in SD B and C. The Plaintiffs also plan to submit direct and indirect evidence of partisan gerrymandering as rebuttal testimony to the Board's assertions that it used legitimate non-discriminatory reasons for the configuration of the Fairbanks Districts.

Date: December 28, 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 28,2011 to:

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