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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

In Re 2011 Redistricting Cases.	) **CONSOLIDATED CASE NO.:**) **4FA-11-2209-CI**) 4FA-11-2213 CI) 1JU-11-782 CI

TRIAL BRIEF OF
DEFENDANT ALASKA REDISTRICTING BOARD

I. INTRODUCTION

The Alaska Constitution vests in a statutorily created redistricting board the authority and responsibility to reapportion the House and Senate districts immediately following the official reporting of each decennial census of the United States. This board, known as the Alaska Redistricting Board ("Board"), faces the leviathanic task of creating a statewide plan that balances multiple and conflicting federal and state requirements while attempting to ensure each Alaskan voter has an equally effective vote.

The 2011 Redistricting Board faced an especially challenging redistricting process for several reasons, particularly because of the requirements of the federal Voting Rights Act. Population shifts over the last decade created a "perfect storm" of problems that required the Board to think outside the box in fulfilling its monstrous task. A slower growth rate in rural Alaska combined an out-migration of Alaska Natives from rural areas to urban areas resulted in severely under-populated Alaska Native districts. This severely hampered the Board's ability to meet the benchmark and obtain preclearance under Section 5 of the federal Voting Rights Act caused by the lack of Alaska Native population concentrations adjacent to Benchmark Alaska Native districts, and the inability to create Alaska Native districts in urban areas.

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Despite these daunting challenges, the Board was able to create a redistricting plan that not only obtained preclearance from the Department of Justice, but that also took into consideration the wants and needs of the people, and still complied as nearly as practicable with the Alaska Constitution and its often-times conflicting requirements.

After extensive motion practice, the issues in the case have been somewhat narrowed by the Court's rulings. The Board's understanding as to the issues remaining to be decided are as follows:

1. Whether the configuration of House District 1 was necessitated by the Board's need to create a non-retrogressive plan that complied with Section 5 of the federal Voting Right Act.

2. Whether the configuration of House District 37 was necessitated by the Board's need to create a non-retrogressive plan that complied with Section 5 of the federal Voting Right Act.

3. Whether the configuration of House District 38 was necessitated by the Board's need to create a non-retrogressive plan that complied with Section 5 of the federal Voting Right Act.[1]

4. Geographic Proportionality re the Fairbanks North Star Borough ("FNSB"): Whether the Board had legitimate non-discriminatory reasons for splitting the excess population of the FNSB.

5. Geographic Proportionality re City of Fairbanks: Whether the City of Fairbanks has a constitutional right to be placed in a single Senate seat.

6. Compactness of House District 5. The Riley Plaintiffs' Complaint makes a compactness challenge to House District 5. As they did not seek summary judgment on that issue, it may still be an issue at trial.

[1] Issues 1-3 can be otherwise stated as: Whether the Board has demonstrated that compliance with the Alaska Constitution in the configuration of House District 1, 37 and 38, would have been impracticable in light of the competing requirements imposed by federal law (i.e., the federal Voting Rights Act.) *E.g., In re 2001 Redistricting Cases,* 44 P.3d 141, 146 (Alaska 2002).

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As the Board will demonstrate at trial, the allegations of Plaintiffs George Riley and Ronald Dearborn ("Riley Plaintiffs") identified above are all without merit. The deviations from the state constitutional requirements for compactness, contiguity, and socio-economic integration in House Districts 1, 37, and 38 were necessary in order to avoid retrogression and to comply with the federal Voting Rights Act. Likewise, splitting the excess population of the FNSB was also necessitated by the VRA, which is a legitimate non-discriminatory reason for the Board's actions. The Riley Plaintiffs' claim that the City of Fairbanks is legally entitled to a Senate district under the concept of geographic proportionality is wrong as a matter of law because it does not have sufficient population to constitute a full Senate district. Finally, House District 5 is "relatively compact" and therefore meets the compactness requirements of the Alaska Constitution.

II.
FACTUAL BACKGROUND[2]

A. The Redistricting Process in Alaska

The five members of the 2011 Redistricting Board were appointed pursuant to Article VI, Section 8(b) of the Alaska Constitution. Governor Sean Parnell appointed John Torgerson of Soldotna, Executive Director of the Kenai Peninsula Economic Development District and former State Senator, and Albert Clough of Juneau, a retired commercial pilot on June 25, 2010. Albert Clough resigned on February 23, 2011, when he accepted full-time employment with the State of Alaska. Governor Parnell appointed PeggyAnn McConnochie, a real estate

[2] This section is based upon the undisputed facts in the Board Record [ARB00006019-ARB00006025. ARB00013475-ARB00013492] as supplemented by the undisputed factual information provided to the Court in motion practice. The Board addressed at length its VRA justification for a number of the remaining issues in its briefing on the Riley Plaintiffs' six summary judgment motions. The Board's briefing on those issues, which contain references to the Board Record as well as other evidence, is incorporated by reference as though fully set forth herein.

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broker from Juneau, to replace Mr. Clough on the same day. Senate President Gary Stevens appointed Robert Brodie, a real estate broker and former mayor of Kodiak, on June 25, 2010. The Speaker of the House of Representatives, Mike Chenault, appointed Jim Holm of Fairbanks, a business owner and former state representative, on July 8, 2010. Alaska Supreme Court Chief Justice Carpeneti appointed Marie Greene of Kotzebue, CEO of Nana, Inc., and an Alaska Native (Inupiat), on August 31, 2010. Board member John Torgerson was elected Chair.

Article VI, Section 4 of the Alaska Constitution tasked the Board with establishing 40 single-member House districts and 20 single-member Senate districts, each composed of two House districts. The 2010 census data showed a total statewide population of 710,231 people. Therefore, the ideal size of a House district was 17,755, the number obtained by dividing the total population by 40. Article VI, Section 6 required the House districts be contiguous and compact and to contain, as nearly as practicable, a relatively integrated socio-economic area. Section 6 also required Senate districts be composed as nearly as practicable of two contiguous House districts.

The Board held its first meeting on September 13, 2010, and met regularly through June 14, 2011. Pursuant to Article VI, Section 10 of the Alaska Constitution, the Board was required to adopt a draft plan or plans 30 days after the reporting of the decennial census of the United States, and a final plan and proclamation no later than 90 days after the reporting of the census. The Board received block level census data from the U. S. Bureau of the Census on March 15, 2011. Thus, the Board had until April 14, 2011, to adopt a draft plan, and until June 13, 2011, to adopt a final plan.

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On March 16, 2011, the Board published its "Alaska Redistricting Board 2011 Redistricting Guidelines." These guidelines set forth, in order of priority, the criteria the Board used when adopting its Proclamation Plan so as to comply with federal and state constitutional and statutory requirements. The Board listed compliance with federal law first, beginning with the one-person, one-vote mandate, and then the federal Voting Rights Act. The Board next listed the state constitutional requirements of compactness, contiguity, and relative socio-economic integration. The Board encouraged all third parties who submitted plans to the Board to follow these same guidelines.

The Board scheduled a series of eight "pre-plan" public hearings in the state's population centers from March 22 to March 31. The purpose of these "pre-plan" hearings was to solicit public testimony on existing election district boundaries, and to receive general advice, ideas, and comments from the public about redistricting issues to assist the Board in developing draft plans. At these hearings, the Board also provided interested groups and individuals with the opportunity to submit proposed plans. The Board held these public hearings in Anchorage on March 22, in Wasilla on March 23, in Juneau on March 25, in Ketchikan on March 26, in Fairbanks on March 28, in Kotzebue on March 29, in Bethel on March 30, and via statewide teleconference at the Legislative Information Office in Anchorage on March 31.

Prior to the start of the March 31 statewide teleconference, the Board received scheduled plan presentations from a number of groups. The RIGHTS Coalition, Alaskans for Fair and Equitable Redistricting ("AFFER"), and Alaskans for Fair Redistricting ("AFFR") all submitted statewide plans. Several local government entities, including the City and Borough of Juneau, Bristol Bay Borough, and the City of Valdez, submitted regional or single district

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plans. On April 8, 2011, the Alaska Bush Caucus, a group made up of rural, primarily Alaska Native state legislators submitted four alternative plans for the Alaska Native districts.

The Board began deliberating on draft plans on April 4, 2011. Board members and staff continued working, in formal public meetings and in work sessions of no more than two Board members, until April 13, 2011. The Board reported and discussed the products of these work sessions at each meeting. During the meeting on April 13, 2011, the Board adopted a total of five statewide plans to be submitted for public comment plus a number of regional and single district plans.

Two of the five draft statewide plans were prepared by the Board and staff. These plans were designated Board Option 1 and Board Option 2, and included regional alternatives for the Mat-Su Borough and Southeast Alaska. AFFR, AFFER, and the RIGHTS Coalition submitted the three other draft statewide plans adopted by the Board. The City and Borough of Juneau, Bristol Bay Borough, the City of Valdez, and the Alaska Bush Caucus, submitted the draft regional and single-district plans adopted by the Board.

Between April 18 and May 6, the Board held public hearings on the draft plans in 32 communities across Alaska. During this time period, the Board and its staff logged nearly 60,000 air miles. These hearings, attended by over 640 people, were held in Anchorage, Fairbanks, Juneau, Cordova, Healy, Palmer, Delta Junction, Nome, Dutch Harbor, Kotzebue, Tok, Cold Bay, Bethel, Glennallen, Galena, Barrow, Kodiak, Sitka, Craig, Ketchikan, Wrangell, Seward, Petersburg, Homer, Kenai, Skagway, Haines, Valdez, Angoon, King Salmon, Dillingham, and Hoonah. The full Board attended both hearings in Anchorage, as well as the hearing in Fairbanks and Juneau. For the other hearings, the Board and staff split into three teams made up of two Board members and/or staff. The staff drafted written reports

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summarizing testimony received at each public hearing and presented those reports to the full Board on May 16, 2011.

Throughout the process, the Board received thousands of pages of written comment on the redistricting process and proposed plans in addition to comments at public hearings. A number of governmental entities, Alaska Native Corporations, Tribal Councils, and Alaska Native villages passed resolutions either supporting a regional plan or formally acknowledging its preferred district. Private plans were updated via email throughout the process, and two governmental entities, the Ketchikan Gateway Borough and the Mat-Su Borough, submitted regional plans for the Board's consideration.

The last public hearing was a statewide teleconference held in Anchorage at the Legislative Information Office on May 6. The Board invited groups to provide any new or revised plans. AFFR, AFFER, the RIGHTS Coalition, and Calista Corporation all submitted revised statewide plans, while the Municipality of Anchorage and FNSB both submitted revised regional plans. The teleconference also provided a forum for people from communities not visited by the Board to comment.

Shortly after the last scheduled public hearing, Dr. Lisa Handley, the Board's Voting Rights Act consultant, completed her preliminary racial bloc voting analysis for this redistricting cycle. She found that voting in Alaska had become more polarized over the past decade (2002-2010). Accordingly, she reported to the Board on May 17, 2011, that the overall statewide standard for creating an "effective" Alaska Native district had increased from 35% Alaska Native voting age population ("VAP") to a minimum of 41.8% Alaska Native VAP. Dr. Handley also found that a more district-specific analysis was warranted in two areas: Benchmark House Districts 37 and 6. Because most contests in Benchmark District 37 were

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not polarized, it consistently elected minority-preferred candidates despite having less than 41.8% Alaska Native VAP. On the other hand, Benchmark House District 6, which is well over 41.8% Alaska Native VAP, failed to elect the Alaska Native preferred candidate in the 2010 election due to higher incidents of racially polarized voting and lower than statewide average of white crossover vote. Dr. Handley's analysis found that 49.7% Alaska Native VAP was needed in Benchmark House district 6 in order to offer Alaska Natives an opportunity to elect their candidates of choice.

In light of this new standard, the Board invited all groups that had previously submitted plans for the configuration of Alaska Native districts to participate in a public work session on May 24, 2011, at the Board's office in Anchorage. The purpose of the work session was to provide these groups the opportunity to present any final thoughts, ideas, revisions, or amendments to their plans. A number of groups responded to the invitation, including AFFR, AFFER, the RIGHTS Coalition, and Calista Corporation, and made formal presentations to the Board. The Board also received new and revised plan submissions from the Bering Straits Native Corporation and Tom Begich, a consultant to several Alaska Native interests.

Besides the noticed public work session on May 24, the Board met 21 times in public meetings and held numerous work sessions of two or less Board members between May 16 and June 14. The Board took a regional approach to creating a final plan that focused first on the Native Districts as recommended by Dr. Handley, because it was the only way the Board could draw a map that satisfied both federal and state requirements. This was no easy task. Demographic changes, combined with the increased standard for the percentage of Alaska Native VAP required to create an "effective" Alaska Native district, made it an extremely difficult puzzle to solve. In fact, the Board's Voting Rights Act expert called this problem the

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most difficult and complicated she had ever seen.

Dr. Handley analyzed all the third party plans submitted to the Board on May 24, and determined they were all retrogressive and therefore did not comply with the Voting Rights Act. Thus, the Board was forced to draw its own plan. Led by the efforts of Board members PeggyAnn McConnochie and Marie Green, an Alaska Native, the Board eventually came up with several options in an attempt to meet the Voting Rights Act requirements. One staff plan, referred to as the TB Plan, took the unique approach of changing the historical make up of District 40 (even though it was only -1.35% from the ideal district size) by dividing the North Slope Borough and the Arctic Northwest Borough into separate districts and picking up population from more urban areas in and around Fairbanks and along the southeast border of the state. This plan had a number of potential problems including whether the new District 40 would be an "effective" Native district and the pairing of several important Alaska Native incumbents. The proposed plan also received overwhelming criticism from Alaska Native groups.

A second Alaska Native district plan know as the PAME Bethel/Kodiak plan was created by Board members McConnochie and Green with input from staff and other Board members, and was adopted unanimously in concept by the Board. This plan, however, included a Senate district which combined Kodiak with Bethel, thereby pairing one of the most powerful Alaska Native incumbent members of the Senate with the current Senate president. This pairing was severely criticized by Alaska Native groups in both the Bethel and Kodiak areas, and by the Kodiak Gateway Borough. Board member Green was also very uncomfortable with this pairing.

As a result, Board members McConnochie and Green went back to the drawing board

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and created a third plan, the PAME Kodiak/Aleutians plan. Although this plan split the Aleutians, it met the Voting Rights Act requirements without the offensive Senate pairing. The Board adopted this Alaska Native district plan into its final plan by a unanimous 5-0 vote on June 6, 2011.

While working out the difficulties with the Alaska Native districts, the Board simultaneously worked on regional plans for Southeast Alaska, Fairbanks, Kenai, Mat-Su and Anchorage. After much debate and discussion in public sessions, the Board unanimously adopted each of these regional plans in concept.

On June 6, 2011, the Board unanimously adopted its Final Plan. On June 7, the Board also unanimously adopted its Senate pairings, and directed staff to make necessary technical corrections, produce maps, and prepare written metes and bounds description of district boundaries in preparation for the Proclamation on June 14.

The final redistricting plan has an overall population deviation of 8.47% between House districts and 7.54% between Senate districts, the lowest of any redistricting plan in Alaska's history. House District 39, the least populated, has a population deviation of –4.86% below the ideal district size. House District 6 is the most populated, with a population deviation of +3.61% above the ideal district size. The configurations of the majority of the House districts were largely influenced by compliance with the Voting Rights Act.

B. Redistricting Challenges Faced by the Board

Demographic changes during the past decade made the 2011 redistricting especially difficult for the Board. The Board struggled to comply with the constricting requirements under the federal Voting Rights Act. The results heavily influenced the district configurations

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in the final plan. The Board was also strongly influenced by public testimony, and tried to honor the wishes of the populace where it could legally do so.

1. Under-population of Benchmark Alaska Native Districts

Historically, Alaska's Native population was principally located in rural areas. At the time of statehood in 1959, 70% of Alaska's indigenous population resided in rural, predominately Alaska Native villages and towns. By 2000, that number had dropped to approximately 57%. In the past decade, this "out-migration" accelerated as Alaska experienced a growing shift in population from rural to urban areas. While urban areas showed a high rate of growth, Alaska Native rural areas had either a slow or negative growth rate resulting in huge population deviations (ranging from -9.57% to -22.02%) in all but one of the current Alaska Native districts. Nearly 50% of the Alaska Native VAP presently resides in the five largest "urban" areas of the state: the City and Borough of Juneau, the Kenai Peninsula Borough, the Municipality of Anchorage, the Mat-Su Borough, and the FNSB.

These demographic changes had a substantial effect on the ability to create "effective" Alaska Native districts in order to comply with the federal Voting Rights Act. The Board was thus faced with the dilemma of finding the population necessary to meet the one-person, one-vote standard from areas of the state that would not lower the percentage of the Alaska Native VAP.

Based on significant public testimony, including testimony from Alaska Native legislators and leaders, the Board was encouraged to think outside the box to avoid retrogression. The Board met this goal by reconfiguring Alaska Native House districts from historical configurations. This in turn required the Board to loosen the Alaska Constitutional standards of contiguity, compactness, and socio-economic integration in some instances.

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2. *Lack of Alaska Native Population Concentrations Adjacent to the Benchmark Alaska Native Districts*

The out-migration of Alaska Natives from rural to urban areas left five of the six Benchmark House districts with substantial Alaska Native populations significantly under-populated. The Board could not make up for the population disparities in these districts without adding substantial non-Alaska Native population. There were no concentrations of Alaska Native populations adjacent to those districts, and there were only two areas with substantial Alaska Native concentrations that did not fall within the boundaries of a benchmark minority district. Both of these areas were included in the Proclamation Plan's Alaska Native districts.

The population in those two areas, however, was very small. Accordingly, in order to properly populate the Alaska Native districts, the Board had to include population from more urban areas of the state. However, the concentration of Alaska Natives in urban areas was such that it was not feasible to add Alaska Natives from urban areas to rural Alaska Native districts without also adding non-Alaska Native population percentages that would have caused possible retrogression.

As a result, non-Alaska Native population from urban areas had to be added in order to increase the population of under-populated Alaska Native districts. All of the third party plans submitted to the Board combined urban and rural population, and several added population from the FNSB with a rural, Alaska Native district. The FNSB had enough population for 5.49 House districts, and therefore had excess population, making it a logical choice to combine with surrounding areas that needed significantly more population.

3. *Inability to Create Minority Districts in Urban Areas*

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Although nearly 50% of Alaska Natives live in the state's five largest urban areas, the creation of "effective" or "influence" districts in these areas proved impossible despite considerable efforts by the Board and its staff. The Alaska Native population in the urban areas is simply not sufficiently geographically compact enough to allow for the creation of such districts. While there are two areas of the Kenai Peninsula Borough that have small concentrations of Alaska Natives ranging from 40% to 60%, neither of those areas are actually placed within the urban districts of the Kenai Borough. Instead, both of those areas are included in districts outside the Kenai Borough, House Districts 35 and 36, in order to increase the Alaska Native populations in those districts.

C. Preclearance

Section 5 of the federal Voting Rights Act requires certain jurisdictions, known as "covered" jurisdictions, to submit any changes in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" to either the Department of Justice or the US District Court for the District of Columbia for preclearance before such change may go into effect. 42 U.S.C. § 1973c (2006). Alaska is such a state. 28 C.F.R. Part 51, Appendix. As a result, the Board had to obtain preclearance of its plan by the federal government. The Board enlisted the help of a Voting Rights Act expert, Dr. Lisa Handley, to assist them.

In order to obtain preclearance, a proposed plan must have "neither...the purpose nor...the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006), *as amended by* Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 580 (2006). The DOJ measures this by comparing the proposed plan with the "benchmark" plan, or current redistricting plan with the 2010 census data. The DOJ then determines whether (1) the plan

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was adopted free of any discriminatory purpose, and (2) whether the proposed plan will not have a retrogressive effect. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice, 76 Fed. Reg. 27, 7470-7471 (Feb. 9, 2011) (hereinafter referred to as "DOJ Section 5 Guidance"). The submitting jurisdiction has the burden of proving the proposed plan "will not have the effect of 'diminishing the ability of any citizens of the United States' because of race, color, or membership in a language minority group defined in the Act, 'to elect their preferred candidate of choice.'" DOJ Guidelines, *quoting* 42 U.S.C. 1973c(b) & (d).

The challenges outlined above made creating a redistricting plan that protected Alaska Native voting strength against any decrease from that in the Benchmark Plan no easy task. The significant demographic changes of rural Alaska made it extremely difficult to meet the one-person, one-vote standard while still maintaining the required percentage of Alaska Native VAP in the required number of minority districts. This problem was exasperated by the increase in the percentage of Alaska Native VAP required to create an effective Alaska Native district. Based on significant public testimony, including testimony from Alaska Native legislators and leaders, the Board was encouraged to think "outside-the-box" to ensure it avoided retrogression. As a result, the Board felt compelled to reconfigure the traditional boundaries of Alaska Native rural districts. It encouraged parties submitting alternative plans to do so as well.

The Board carefully considered these various alternative plans. A review of those plans highlights the difficulty of creating plans with Alaska Native population percentages comparable to those in the Benchmark Plan. Dr. Handley reviewed all nine of the alternative plans submitted after the completion of her racial bloc voting analysis, and found all of them to

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be retrogressive. None of the plans provide both five "effective" House districts and three "effective" Senate districts,[3] which Dr. Handley determined was the benchmark standard.

The Board, led by Board members Greene and McConnochie, eventually created a third plan that did not face the same challenges as the two previous Board plans. Dr. Handley analyzed this plan and determined that it would not diminish the ability of Alaska Natives to elect their candidates of choice as compared to the Benchmark plan. The Board ultimately adopted the Greene/McConnochie Alaska Native districts into its Final Draft Plan by a unanimous 5-0 vote on June 6, 2011. Dr. Handley determined the Proclamation Plan had five "effective" House districts, one "influence" House district, and three "effective" Senate districts, the same as the Benchmark.

As required by the VRA, the Board submitted its preclearance submission to the Department of Justice on August 9, 2011. The submission contained nine volumes and 44 folders of information, totaling more than 5,400 pages of documentation. Based on the advice of its consultants, the Board scheduled a meeting with the DOJ staff assigned to review and analyze Alaska's redistricting plan to answer any questions the DOJ might have about the Proclamation Plan.

On September 14, 2011, Board members John Torgerson and Marie Greene, along with Executive Director Taylor Bickford and Board legal counsel Michael White, met with representatives from the DOJ in Washington, DC. Chairman Torgerson presented a presentation explaining the Board's preclearance submission and advocating for preclearance.

[3] All of the third party plans also created an Alaska Native "influence" district in Southeast Alaska. The Board did so as well, based on the advice of their VRA expert. Since the Southeast districts are no longer at issue in this case in light of this Court's order granting summary judgment in favor of the Board on December 12, 2011, all reference to the Benchmark will focus on the five effective House Districts and three effective Senate Districts.

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The only substantive question the DOJ representatives asked the Board members at that meeting related to the treatment of Alaska Native incumbents by the Proclamation Plan. In response to DOJ's inquiries, the Board representatives explained that the Proclamation Plan in fact kept every current Alaska Native incumbent or Alaska Native preferred candidate in an Alaska Native district and did not pair any Alaska Native incumbents with one unavoidable exception in Southeast.

The Board explained that due to the significant population loss in Southeast Alaska, which resulted in the loss of one House district and half a Senate district, it was impossible to recreate Benchmark Senate District C which is currently represented by Alaska Native Senator Kookesh. Nor was it possible to create an Alaska Native "effective" or "influence" Senate district in Southeast Alaska. As a result of these various demographic changes and legal requirements, pairing Senator Kookesh with the incumbent Senator from Sitka was unfortunately unavoidable. The Board's conclusion was born out by the fact that no viable third party plan presented to the Board was able to avoid pairing Senator Kookesh.

On October 11, 2011, the DOJ precleared the Board's plan.

III.
STANDARD OF REVIEW

Judicial review of a redistricting plan "is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under Article VI, § 6 of Alaska's constitution." *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska 1987). The Board has the constitutional authority to reapportion Alaska's House and Senate districts, not the courts. *Groh v. Egan*, 526 P.2d 863, 866 (Alaska 1974); *see also Braun v. Borough*, 193 P.3d 719, 726 (Alaska 2008). As such, the Board has discretion in choosing its plan, and "the court will not lightly interfere with the reapportionment process." *In re 2001 Redistricting Cases*, 44 P.3d

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141, 149 (Alaska 2002) (Carpeneti, J., dissenting); *Braun v. Borough*, 193 P.3d at 726. The courts do not have the constitutional authority to decide what is preferable between alternative rational plans for legislative reapportionment. *Id.*

Instead, the courts view a plan in the same light as it would "a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations." *Id.*; *see also Kenai Peninsula Borough v. State*, 743 P.2d at 1357-1358. While courts have the authority to ensure the Board's choices did not violate the constitution, they cannot substitute their independent judgment for that of the Board, as the Plaintiffs suggest. *Kenai Peninsula Borough v. State*, 743 P.2d at 1357-1358.

The Riley Plaintiffs, the only remaining plaintiffs in this litigation, sporadically claim this Court should exercise its independent judgment rather than defer to the Board. They further urge this Court to substitute its independent judgment for that of the Board by adopting the Demonstration Plan offered by the Plaintiffs as the better option. This Court has already found the Plaintiff's arguments to be a misreading of the standard. This Court recognizes it is its job is to make sure the plan adopted by the Board meets the constitutional standards set forth in the Alaska Constitution, not redraw any offending district.

IV.
POTENTIAL EVIDENTIARY ISSUES

As this Court is aware, both the Riley Plaintiffs and the Board have filed Motions in Limine regarding a handful of issues. The Riley Plaintiffs have asked this Court to preclude the Board members and its Voting Rights Act expert, Dr. Handley, from testifying about the statements made to them by the Department of Justice regarding the Proclamation Plan. [*See* Riley Plaintiffs' Motion in Limine: Hearsay.] The Board has filed an opposition, which the Board believes fully briefs the reasons why the Court must deny the Plaintiffs' motion. These

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arguments are therefore incorporated herein. The Riley Plaintiffs' second motion asks this Court to take judicial notice of a preliminary injunction order from a 2007 case entitled *Nick v. Bethel*. For the reasons set forth in the Board's opposition and summarized below, the Court should also deny this motion.

The Riley Plaintiffs continuously attempt to offer evidence to support arguments not raised in their Complaint. Their Motion for Judicial Notice is but another example of their attempt to circumvent the Alaska Civil Rules, and argue whatever they feel like it whenever they feel like it. As the Board has argued time and again, the Riley Plaintiffs did not challenge the Voting Rights Act in their Complaint. [*See* Riley Plaintiffs' Complaint, *passim.*] The Board filed a Motion in Limine to prevent the Riley Plaintiffs from using such tactics and usurping the process. [*See* Board Motion in Limine to Preclude Evidence of Any Issue Not Raised in the Complaint, filed December 19, 2011.] The only purpose for the request to take judicial notice of the *Nick v. Bethel* preliminary injunction is to support their improper argument that House District 38 is not an effective district because there are Alaska Native language subgroups in House District 38 and therefore does not comply with the federal Voting Rights Act. This is an extension of their argument that the benchmark standard is four "effective" House districts, and therefore the configuration of House District 38 is not required by the VRA.

The Riley Plaintiffs' argument is without merit as this Court ruled in its recent Order. Order Re Plaintiffs' Motion for Partial Summary Judgment/Law of the Case: Benchmark Standard entered December 23, 2011 ("Benchmark Order").] As this Court recognized in its Benchmark Order, the Benchmark standard is in fact five "effective" House districts and the Riley Plaintiffs admit that the "language differences and other factors" they proffered as

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justification for its benchmark arguments "is not something that these experts normally analyze." [Benchmark Order at 2-3 & n. 9.] Thus, any evidence the Riley Plaintiffs' attempt to introduce at trial regarding "language subgroups" is admittedly irrelevant and should be precluded.[4]

In addition to the *Nick v. Bethel* preliminary injunction, the Riley Plaintiffs have identified an expert witness, a lay witness, and an expert report which they apparently intend to use in support of there obsolete and irrelevant argument. Their expert witness, Dr. Walkie Charles, is expected to testify as to the difference between Yup'ik-speaking voters and other Alaska Natives in House District 38. [*See* Riley Plaintiffs' Final Witness List (filed December 27, 2011).] The Plaintiffs have also listed Walkie Charles' expert report regarding this same topic on their Exhibit List. [*See* Riley Plaintiffs' Exhibit List, Exhibit 1 (filed December 27, 2011).] The Riley Plaintiffs also have listed as a witness Robert Beans, who the Board believes will attempt to testify regarding the Alaska Native language sub-groups in House District 38. [*See* Riley Plaintiffs' Final Witness List.]

The sole purpose of this evidence is to support of the Riley Plaintiffs' argument that House District 38 is not an "effective" House district and is therefore not needed to comply with the Voting Rights Act. However, this Court has already ruled the Benchmark standard is five "effective" House districts, which includes House District 38. The only remaining question is whether compliance with the Voting Rights Act justified a deviation from the constitutional requirement of socio-economic integration in House District 38. The effectiveness of House District 38 is not at issue. Therefore, the Board intends to object to any

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[4] As the Riley Plaintiffs are well aware, the Department of Justice does not recognize any Alaska Native language sub-groups for purposes of analyzing retrogression under Section 5 of the VRA. A fact upon which both Dr. Handley and Dr. Arrington agree.

attempt by the Riley Plaintiffs to introduce any of this irrelevant evidence and testimony and this Court should sustain the Board's objection.[5]

V.
DISCUSSION OF RILEY PLAINTIFFS' LEGAL CHALLENGES

A. Principles That Govern Redistricting

The United States Constitution guarantees every citizen the right to vote and to have that vote counted. The ultimate goal of redistricting is to ensure every person is adequately represented. Since redistricting is inherently political in nature, the courts and legislatures have created additional requirements in an attempt to prevent political gerrymandering. Such requirements mandate House districts be compact, contiguous, and relatively socio-economically integrated. Alaska Const. Article VI, § 6. Courts have also recognized these requirements are often times conflicting in nature. Thus, the Board must meet these requirements as nearly as practicable, with acknowledged flexibility to account for the federal and state requirements that are also at odds with each other.

B. The Voting Rights Act

The federal Voting Rights Act, passed in 1965, was intended to protect the right to vote and to enforce the 14th Amendment and Article 1, Section 4, of the United States Constitution. Williamson, "The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions," 62 Wash. U.L.Q. 1 (1984). Many believe it has provided minority voters an opportunity to participate in the electoral process and elect candidates of their choice, generally free of discrimination. Redistricting Law 2010, prepared by the National Conference of State Legislatures, November 2009, pg. 51. This body of law also

[5] In fact, the Board believes this Court should issue a preclusion order prohibiting the Riley Plaintiffs from wasting the Court and the Board's time by attempting to introduce the completely irrelevant evidence.

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places the most constricting parameters on redistricting bodies. Dr. Handley said it best when she characterized redistricting within the confines of the VRA as more of an art than a science. [ARB 00003879.] Section 2 prohibits any state or political subdivision from imposing a "voting qualification or prerequisite to voting or standard, practice or procedure...in a manner which results in the denial or abridgement of the right to vote on account of race or color." 42 U.S.C. § 1973(a) (2006). Section 5 requires covered jurisdictions to prove their voting changes have "neither...the purpose nor will have the effect of denying or abridging the right to vote on account of race, color" or membership in a language minority group. 42 U.S.C. § 1973c (2006).

Because Alaska is a Section 5 "covered" jurisdiction, the Board knew it had to obtain preclearance of its plan from the DOJ and was appropriately concerned with the need to adopt a plan that was likely to be precleared. As established in the Board Record, the Board did not give undue weight to the VRA, nor compromise Alaska constitutional redistricting principals when drawing its plan, except to the extent it believed it was necessary in order to avoid retrogression and obtain preclearance under Section 5 of the VRA. This included giving proper consideration to the treatment of Alaska Native incumbents, dividing the Aleutians, and combining non-Alaska Native, Democratic voters to an Alaska Native district.

1. *Legal Requirements*

Section 5 of the VRA requires certain "covered" jurisdictions to submit any changes in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" to either the DOJ or the US District Court for the District of Columbia for preclearance before such change may go into effect. 42 U.S.C. § 1973c (2006). Alaska is such a state. 28 C.F.R. Part 51, Appendix.

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The DOJ reviews the proposed election changes, which includes a redistricting plan, to ensure it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (2006), *as amended by* Pub. L. No. 109-246, sec. 5, 120 Stat. 577, 580 (2006). A redistricting plan satisfies the effect prong if the electoral change does not lead to retrogression in minority voting strength. DOJ Section 5 Guidance at 7470-7471. The purpose is to insure that no voting-procedure changes would be made that would lead to a "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 7470.

The Department of Justice measures retrogression by comparing minority voting strength under the new plan in its entirety with minority voting strength under the immediately preceding or "benchmark" plan. DOJ Section 5 Guidance at 7470-7471.[6] Under Section 5, the covered jurisdiction has the burden of establishing that a proposed redistricting plan is not retrogressive. DOJ Section 5 Guidance at 7470. [*See also* ARB00013330.]

The DOJ has, over time, promulgated regulations to assist covered jurisdictions in navigating the preclearance process. The U.S. Supreme Court has given these administrative regulations promulgated by the DOJ strong persuasive effect in judicial preclearance proceedings. *E.g., Bossier Parish I*, 520 US at 483. Such regulations include a list of factors that may be considered when determining whether the submitted electoral change satisfies the

[6] The retrogression standard is not, however, to be confused with the vote dilution test under Section 2 of the VRA. *Reno v. Bossier Parish Sch. Bd. (Bossier Parish I)*, 520 US 471, 480 (1997). Section 2 and Section 5 "combat different evils and, accordingly,...impose very different duties upon the States." *Id.*; *Georgia v. Aschroft*, 539 US 461, 478 (2003).

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intent and effect prongs. 28 C.F.R. §§ 51.57-51.61 (2008).[7] The list of factors is not, however, exhaustive. *Id.*

The Board was aware that the effect on Alaska Native incumbents of any plan it adopted was of particular concern for the DOJ when reviewing submissions for preclearance under Section 5 of the VRA. In fact, when the Board met with the DOJ to explain and defend its plan prior to preclearance, the only substantive question the DOJ asked the Board was how the Proclamation Plan affected Alaska Native incumbents.

The Board also knew the DOJ would pay particular attention to the public comments the Board received from Alaska Natives, whether they approved or disapproved of the plan, and whether or not the Board took Alaska Native concerns into consideration when drawing the plan. 28 C.F.R. § 51.57-51.59. As a result, the Board actively sought input from the Alaska Native community throughout the redistricting process and took their concerns into account when drafting election districts.

2. *Effect on The Configuration of Alaska House Districts*

The 2011 redistricting process was the most complicated and difficult the Board's VRA expert had ever seen. A number of complicating factors made the Board's task extraordinarily difficult, including the (1) under-population of Benchmark Alaska Native districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native districts; and (3) inability to create minority districts in urban Alaska. The Board was only able to construct a non-retrogressive plan because, following the advice of its VRA expert, it drew the

[7] Included among these factors is "the extent to which the jurisdiction afforded members of racial and language minority groups an opportunity to participate in the decision to make the change; [and] the extent to which the jurisdiction took the concerns of members of racial and language minority groups into account in making the change." 28 C.F.R. §§ 51.59 (2011).

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Alaska Native districts first. It was simply impossible to do otherwise. This had ripple effects across the state, including urban areas not otherwise concerned with the federal Voting Rights Act.

Compliance with Section 5 was further complicated by the legal realities facing the Board. In reviewing plans for discriminatory purpose, the DOJ bases its determination "on a review of the plan in its entirety." DOJ Section 5 Guidance at 7471. The DOJ will examine the circumstances surrounding the adoption of the redistricting plan "to determine whether direct or circumstantial evidence exists of any discriminatory purpose." *Id.* Thus, the Board knew it had to prevent any hint of possible discrimination in its final plan by adopting and presenting to the DOJ the strongest plan it could in terms of minority voting strength.

Further complicating matters was the fact that going into this redistricting cycle, it was unclear, even to VRA experts, exactly what position DOJ would take regarding the U.S. Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009). In that case, the Supreme Court held in a 5-4 plurality opinion that Section 2 of the Voting Rights Act does not require the drawing of a majority-minority district in which the minority group is less than 50 percent of the district's voting age population. *Id.* at 3. The *Bartlett* court, however, cautioned that its ruling concerned only the *Gingles* precondition for considering an "effects" violation of Section 2, insisting that its decision did not add preconditions to consideration of a discriminatory "purpose" violation. *Id.* at 15. The effects of *Bartlett* on Section 5 preclearance, in light of the 2006 amendments to the VRA emphasizing the "ability to elect" standard, was both confusing and potentially conflicting. This was particularly true in light of Justice Kennedy's caution that *Bartlett* did not apply to an intent analysis.

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Faced with these conflicting and confusing legal standards, as well as the burden of establishing that its Proclamation Plan had neither discriminatory intent nor effect in order to obtain preclearance, all of which had to be done in a sixty day time period, it was crucial that the Board present as strong a plan as possible to DOJ.[8] Based on the advice of its VRA expert and its legal counsel, the Board determined that its best chance at preclearance was to present a redistricting plan that (1) avoided any hint of possible discrimination that could be considered by DOJ as evidence that the Board's Proclamation Plan had a discriminatory purpose; and (2) met the Benchmark, which consisted of five "effective" House districts, one "influence" House district, and three "effective" Senate districts. At the same time, in order to avoid any claim of discriminatory intent, the Board determined that it was reasonable to avoid pairing Alaska Native incumbents where possible, especially in light of the input from the Alaska Native community. Under these circumstances, the Board's assessment of what was necessary to meet the requirements of Section 5 and avoid retrogression was not only reasonable, but correct.

C. The Riley Plaintiffs' Challenges to the Board's Proclamation Plan Are Without Merit Both Legally and Factually, and Must Therefore Be Denied.

1. *The Configuration of House District 1 Was Caused by the "Ripple Effect" of Complying with the federal Voting Rights Act.*

Redistricting involves a number of conflicting federal and state laws. Each requirement has its own intended purpose to ensure every person is afforded an equally effective vote. However, each requirement slightly hinders the ability to fully comply with the next, and so on. Courts have attempted to assist those responsible for redistricting with these conflicting requirements by providing a hierarchy of such standards, listed in order of priority. The Alaska

[8] Dr. Arrington agrees that when seeking preclearance from DOJ you want to present the strongest plan. [Arrington Depo. at 198:22-199:5.]

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Supreme Court has instructed the Board, responsible for redistricting in Alaska, to follow such a hierarchy. Those priorities are, in order of importance: (1) the federal constitution; (2) the federal Voting Rights Act; and (3) the requirements of article VI, section 6 of the Alaska Constitution. *In re 2001 Redistricting Cases*, 44 P.3d at 143 n.2, (quoting *Hickel v. Southeast Conference*, 846 P.2d 38, 62 (Alaska 1992).)

Under this hierarchy, the Board first focused on the one-person, one-vote requirement of the US Constitution. Next, the Board focused on the federal Voting Rights Act. This proved to be the most difficult, and the problems created by population shifts in rural Alaska and the requirements of the federal Voting Rights Act had ripple effects across the state. One example is the effect the configuration of "effective" House district 38 had on districts in and around Fairbanks.

Because of the demographic changes over the past decade, the Board had to draw the minority districts that complied with the federal Voting Rights Act first before turning its attention to the urban districts. The Board drew its first round of plans, which it had to adopt within 30 days of receiving the census data, using the same Alaska Native VAP percentage used in the benchmark plan – 35% Alaska Native VAP – when drawing the minority districts. However, shortly thereafter, Dr. Handley completed her racial bloc voting analysis and discovered the necessary Alaska Native VAP percentage for an "effective" district had in fact increased over the past decade due to racially polarized voting. The Board was thus forced to redraw all of its Alaska Native districts in order to comply with this new standard, which in turn affected many of the urban district boundaries.

The configuration of House District 1 was affected by the Board's decision to add population from the Goldstream and Ester areas of the FNSB to "effective" House District 38

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in order to comply with the federal Voting Rights Act. [ARB00002991-ARB00002993; ARB00004151-ARB00004156; ARB00002928.] As explained in both Dr. Handley's Report and the Board's Preclearance Submission, the 2010 census revealed that the rural Alaska Native districts, as a whole, were seriously under-populated. [ARB00006543; ARB00006544; ARB00006548; ARB00013350.] The five rural Alaska Native districts (outside Southeast Alaska), were short a total of over 10,000 persons from the ideal district size. As a result, at least one of the five rural Alaska Native districts had to pick up substantial urban population not previously included within this set of Alaska Native districts. [ARB00013358 at n.22.] This problem, caused by several factors, including the "out-migration" of Alaska Natives and the generally slower growth rate in rural Alaska than urban Alaska, was complicated by the fact that there were virtually no substantial Alaska Native population concentrations adjacent to the existing rural Alaska Native districts from which to draw population, and the impossibility of creating an Alaska Native district in urban areas of the State. [ARB00013404-ARB00013406.] Accordingly, in order to find the population necessary to meet the federal equal protection requirement of one-person, one-vote, population from more urban areas of the state had to be added to at least one rural Alaska Native District.

The Board considered different options, including several plans presented by third parties, a number of which drew districts that took population out of various areas of Fairbanks. However, none of those alternatives provided viable solutions because all of them were retrogressive. [ARB00003550; ARB00004692-ARB00004693.] In the end, the Board determined the most reasonable alternative that allowed the Board to create a non-retrogressive plan was to add population from the Ester and Goldstream areas of the FNSB to House District 38. [ARB00013407-ARB00013408.]

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The need to "export" some of the excess population out of the FNSB, into House District 38, meant there was less population in the Fairbanks area. [ARB00002928-ARB00002937.] The Board decided to move the Eielson population up to Fairbanks instead of combining it with population from the Mat-Su, which enabled the Board to create five districts wholly within the FNSB boundaries. [ARB00002928-ARB00002929; ARB00002990; ARB00002998-ARB00002999.] But the Board still struggled with creating compact, contiguous, and socio-economically integrated areas given the restricted population. The removal of the excess population left very little wiggle room within the confines of the FNSB boundaries. Thus, the Board relied on natural and local boundaries to create districts with as nearly as practicable ideal populations that also met the constitutional standards. [ARB00002991; ARB0000299.; ARB00003006.] House District 1 is such a district. It contains 18,004 people, which is 1.40% deviation from the ideal district size. [ARB00002993.] Without the slight jog to the left, House District 1 would be short 681 people, resulting in a deviation of -3.83%.

The hierarchy of legal standards which the Board must comply with starts with the one-person, one-vote requirement. *In re 2001 Redistricting Cases*, 44 P.3d at 143 n.2; *Hickel v. Southeast Conference*, 846 P.2d at 62. The federal Voting Rights Act is next. *Id.* Although House District 1 is not a minority district, specifically created to comply with the Voting Rights Act, the configuration of adjacent "effective" House districts indirectly affected the configuration of House District 1. This is a prime example of the "domino effect" caused by compliance with the VRA. House District 38 needed population. The Board had to add non-Alaska Native population that would not decrease the effectiveness of House District 38. This population existed in the outskirts of the FNSB, in the communities of Ester and Goldstream.

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This in turn restricted the configuration and population available for House District 3, which was adjacent to House District 38. The configuration of House District 3 then limited the options available for directly adjacent House District 1. As a result, the configuration of House District 1 was in fact necessitated by the need to comply with the VRA. So although this Court has found House District 1 is not constitutionally compact, the Board will establish at trial that it was justified in its need to relax the constitutional standards in House District 1 in order to comply with the VRA.

2. *The Evidence In This Case Establishes That The Configuration of House District 37 Was Necessitated By The Board's Need to Create a Non-Retrogressive Plan that Complied with Section 5 of the VRA.*

As this Court is well aware, the problems created by the population shifts and slower relative growth rates in rural Alaska and the requirements of the federal Voting Rights Act had ripple effects across the state. As a result, the Board was forced to consider options it was not all together comfortable with in order to meet the federal and state requirements of redistricting. One such compromise was House District 37.

In order to create a non-retrogressive plan, the Board separated the Aleutian Islands, from Akutan west, from the rest of the Aleutians and added it to the Bethel area. [ARB00003326; ARB00003339; ARB00003430; ARB00003433.] The goal was to increase the Alaska Native VAP in House District 36 so the Alaska Peninsula could be paired with Kodiak to form an "effective" Senate district. [ARB00003328; ARB00003431; ARB00013485.] The best way to accomplish that goal was to separate the communities in the Aleutian Chain with large, non-Alaska Native populations from the Western Aleutians, and add them to the Bethel region with its high concentration of Alaska Native VAP. [ARB00003326; ARB00003339; ARB00003430; ARB00003433.] This configuration also avoided pairing

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Bethel and Kodiak in a Senate district, thereby pairing the most powerful Alaska Native incumbent in the Senate, Senator Hoffman, with the President of the Senate, Senator Stephens, which was very important to Alaska Native groups. [ARB00005855-ARB00005857; ARB00005969-ARB00005970; ARB00005977; ARB00005981-ARB00005982; ARB0000-5984-ARB00005985; ARB00006009.] Indeed, the Board will establish at trial that if it had adopted a plan that paired Senator Hoffman, it would have received serious objection to preclearance from Alaska Natives.

The Board considered several other options, including suggestions from a number of third parties before realizing this was the only viable option. [ARB00013351-ARB00013359; ARB00013484-ARB00013485.] The configuration of Proclamation House District 37 was the only way to create a plan that was not retrogressive and therefore was the plan most likely to obtain preclearance under Section 5 of the Voting Rights Act. [9]

[9] In footnote 31 to this Court's Order on the Riley Plaintiffs Motion for Summary Judgment on the Contiguity of House District 37, the Court notes it is concerned by the Riley Plaintiffs' inferences that Dr. Handley did not identify what Alaska Native VAP was needed in the Aleutians in order to maintain House District 37 as an "effective" district. The Court should not be concerned for the Plaintiffs' "inferences" are not only wrong, but a big red herring. First, Dr. Handley opined Benchmark House District 37, which contained the entire Aleutian chain and Alaska Peninsula, was performing as an "effective" House district with 37.79% Alaska Native VAP. [*See* ARB00013347-ARB00013348; Joint Ex. 56 (Dr. Handley's Rebuttal Report to "Expert's Report of Theodore S. Arrington, PH.D.," at 2).] Dr. Handley found every other "effective" House district needed a minimum of 41.8% Alaska Native VAP to remain "effective", except for Benchmark House District 6, which needed at least 49.7% Alaska Native VAP due to a higher rate of racially polarized voting. [ARB00013347.] Neither the Proclamation Plan nor the Demonstration Plan contains a House district wholly comprised of the same geographic region as Benchmark House District 37. Thus, it is difficult to ascertain exactly what Alaska Native VAP is needed in the new districts. It is clear, however, that the number must at a minimum be between 37.79% and 41.8% depending on how much of Benchmark House District 37 remains in the new district. The most comparable district in the Demonstration Plan is House District 37, which has an Alaska Native VAP (using a "Native+1" standard) of 45.40%. The most comparable district in the Proclamation Plan is House District 36, which has an Alaska Native VAP (using a Native+All standard) of 71.45%. As explained above, the Alaska Native VAP in Proclamation House District 36 was increased in order to create a third effective Senate Seat, not for purposes of creating an "effective" House seat. Dr. Handley found House District 38 in the Demonstration Plan was not an "effective" House district because besides its Alaska Native VAP being too low (33.47%), the Alaska Native-preferred candidate lost in both racially polarized statewide Democratic primary elections. [*See* Dr. Handley's Rebuttal Report, pg. 5.] Dr. Handley also found Senate District S in the Demonstration Plan, which combines Demo. House District 37 and Demo House District 38, does not meet the benchmark because it only has a VAP of 39.67%, which is below the necessary VAP to make it effective. [*Id.*]

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One option the Board considered before adopting the current configuration of House District 37 was the TB Plan. However, the Board ultimately abandoned the TB Plan 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 the low voter turnout in the area. [ARB00004158-ARB00004166; ARB00004477-ARB00004489; ARB00004536-ARB00004542; ARB00004548-ARB0000 4550; ARB00005246-ARB00005270; ARB00005969-ARB00005970; ARB00005971-ARB00005972; ARB00005973; ARB00013484.]

A second plan which also did not split the Aleutians was the PAME Plan created by Board members Greene and McConnochie. [ARB00004149-ARB00004157; ARB00005217-ARB00005245; ARB00004431-ARB00004476; ARB00004524-ARB00004536; ARB0000-4550-ARB00004613; ARB00013484.] The Board adopted this plan in concept on May 28, 2011. [*Id.*] However, the Board eventually rejected this plan as well due to concerns about the inclusion of a Senate district that combined Kodiak with Bethel. The Alaska Natives in western Alaska repeatedly told the Board they did not want Senator Hoffman from Bethel paired with Senator Stephens from Kodiak. [ARB00005855-ARB00005857; ARB00005969-ARB00005970; ARB00005977; ARB00005981-ARB00005982; ARB00005984-ARB0000-00005985; ARB00006009; ARB00013484.] Board members Greene and McConnochie felt compelled to at least try and come up with a plan that met the Benchmark and avoided pairing these two incredibly powerful Senators, and had an Alaska Native VAP percentage high enough to exceed the VAP of Senate C in the Benchmark Plan to maintain an "effective" Senate district.

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After considerable effort, the Board determined the only way to accomplish this was to split the Aleutians. [ARB00003326; ARB00003339; ARB00003430; ARB00003433.] Dr. Handley had opined an "effective" Senate district in western Alaska needed to be as high as possible; therefore the Board had to shed the non-Alaska Native population from House District 36, which included the Aleutian Islands west of Unimak Pass. [ARB00003325; ARB00003339; ARB00003430.] This increased the Alaska Native VAP in House District 36 to 71.45%, which, when combined with House District 35, resulted in an Alaska Native VAP of 43.75% in Senate District S. [ARB00006034.] Dr. Handley concluded this was high enough to create an "effective" Senate district.[10] [ARB00013329-ARB00013369.] This configuration also avoided pairing Bethel and Kodiak in a Senate district. [ARB00003328; ARB00003431.]

A number of third party plans, including the FNSB who actually raised the Aleutian split in their complaint, submitted plans to the Board that split the Aleutians. Although it was not the Board's first choice, after considering all the options including the suggestion of a number of third parties, the Board determined that the current configuration of House District 37 was the only way to create a plan that was not retrogressive and therefore was the plan most likely to obtain preclearance under Section 5 of the Voting Rights Act.

In sum, the evidence before this Court will establish that the Board's choice was imminently reasonable under the circumstances faced by the Board. Even though the configuration of House District 37 does not comply with the contiguity and compactness requirements of the Alaska Constitution as determined by this Court, compliance with the State constitutional requirements was "impracticable in light of the competing requirements imposed

[10] Dr. Arrington agrees with Dr. Handley's analysis regarding "effective" Senate districts as well.

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under" the federal Voting Rights Act.

3. *The Evidence In This Case Also Establishes That The Configuration of House District 38 Was Necessitated By The Board's Need to Create a Non-Retrogressive Plan that Complied with Section 5 of the VRA.*

As this Court has recognized, the out-migration of Alaska Natives from rural to urban areas, as well as the relatively slower growth rate in rural Alaska, had the most profound effect on the 2011 redistricting process. This dramatic population shift left a vast majority of the Alaska Native Benchmark districts drastically under-populated. [ARB00006024-ARB0006025; ARB00013351; ARB00013358 at n.22.] In order to meet the one-person, one-vote requirement, at least 10,100 people needed to be added to the rural Alaska Native districts. [ARB00006544; ARB00006639-ARB00006666; ARB00013351.] This fact, coupled with the fact there were no groups of urban, Alaska Native populations adjacent to these rural districts, forced the Board to think outside the box. [ARB00006024-00006025.] This meant that for the first time in Alaska redistricting history, the Board was forced to combine non-Alaska Native populations with at least one rural, Alaska Native district. [ARB00006024-ARB00006025; ARB00013358 at n.22.] The Board was not alone in its conclusion. In fact, every third party plan submitted to the Board contained at least one district that combined urban population with rural population in an Alaska Native district. [ARB00000745-ARB00000764; ARB00003990-ARB00004185; ARB00004186-ARB0000- 4321; ARB00004410-ARB00004543; ARB00005186-ARB00005274; ARB00005324-ARB- 00005363.] Several of these plans took population from the FNSB and added it rural, Alaska Native populations. [*Id.*] However, none of the other plans provided a viable option as the Proclamation Plan was the only non-retrogressive plan. [ARB00003550; ARB00004692-ARB00004693; ARB00013353-ARB00013356; ARB00013359.] Moreover, none of those plans took into account that because

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non-Alaska Native population was being added into an "effective" Alaska Native district, it was necessary to insure that the added urban population came from areas that historically voted Democratic because Alaska Natives overwhelming vote Democratic and non-Alaska Native Democrats are more likely to support Alaska Native preferred candidates.

After study and deliberation, the Board agreed with several other third parties that the most logical areas of choice for combining urban populations with rural, Alaska Native populations were communities within the FNSB. [ARB00004156-ARB00004157.] Upon the advice of its Voting Rights Act expert, Dr. Handley, the Board opted to combine non-Alaska Native Democratic voters from the Goldstream and Ester communities in the FNSB with Alaska Native populations to create House District 38. [ARB00013407-ARB00013408.]

House District 38 is an Alaska Native "effective" House district. [ARB00013358-ARB00013359.] It is comprised of the Wade Hampton Census Area, a number of interior villages, the Denali Borough, and the communities of Ester and Goldstream. [ARB00006046.] The majority of this area, excluding Ester and Goldstream, experienced a dramatic decrease in population in the past ten years, as did all of the rural Alaska Native districts. [ARB00006024; ARB00013358 at n.22.]

The Board chose to pick up the population from the Goldstream and Ester areas of the FNSB in order to bring the overall population of House District 38 within constitutional tolerance for a number of reasons. First, the FNSB had excess population to give, just under half an ideal house seat, or approximately 8,700 people. [ARB00004156-ARB00004157.] Second, Fairbanks had some historical economic, cultural, and social ties to rural Native Alaska. [ARB00013410.] Third, its geographic location made it relatively proximate to the

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rural districts. Fourth, and most importantly, the FNSB had areas with historical Democratic voting patterns which were crucial. [ARB00004337; ARB00013358 at n.22.]

Dr. Handley had advised the Board that if urban, non-Alaska Native population had to be added to rural Alaska Native districts, the urban non-Alaska Native population should be from areas that tend to vote Democratic. [ARB00004337; ARB00013358 at n.22.] She explained this was important because the Alaska Native's preferred political party is the Democratic Party, and by adding Democratic-voting, non-Alaska Native population, the Board would enhance the effectiveness of that district not only because Alaska Natives tend to vote Democratic, but also due to the expected increased white cross-over vote. [*Id.*] The Plaintiffs' own Voting Rights Act expert, Dr. Arrington, testified at his deposition that (1) when adding urban population to a rural minority district "you would want to add Democrats" because adding Democrats potentially increases the effectiveness of the district [Arrington Depo. at 103:12-104:5]; (2) the Alaska Natives' political party of choice is the Democratic Party and Alaska Natives vote overwhelmingly for Democrats [*Id.* at 90:2-5, 19-22; 92:15-16;]; and (3) Democrats are more likely to support an Alaska Native-preferred candidate and Alaska Native-preferred candidates are more likely to be Democrats [*Id.* at 99:7-12].

This is exactly what the Board did – it added predominantly Democratic-voting, non-Alaska Native communities to an otherwise rural, Alaska Native district without decreasing the effectiveness of the district. The Board acted on the advice of their Voting Rights Act expert and legal counsel that this was the only way to meet the Benchmark. In fact, the Proclamation Plan, which includes House District 38, is the only plan that was not retrogressive and therefore could obtain preclearance under Section 5 of the Voting Rights Act. Thus, the Board was justified in combining population from the FNSB with a rural Alaska Native House district in

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order to comply with the VRA.

It is expected that the Riley Plaintiffs will attempt to confuse this Court by arguing that because Dr. Handley did not expressly advise the Board that the exact configuration of House District 38 was necessary in order to avoid retrogression, it cannot meet its burden of proof in demonstrating that compliance with the Alaska Constitution in the configuration of House District 38 would have been impracticable in light of the competing requirements imposed by the federal Voting Rights Act. *E.g., In re 2001 Redistricting Cases,* 44 P.3d at 146 (Alaska 2002). Any such argument is fundamentally flawed.

As this Court is now well aware, both Dr. Handley and Dr. Arrington agree that the only redistricting plan that was not retrogressive and therefore complied with Section 5 of the VRA is the Proclamation Plan. This includes the Riley Plaintiffs' Demonstration Plan. Because there is no other redistricting plan that that is not retrogressive, it naturally follows that the configuration of the Alaska Native districts in the Proclamation Plan, including House District 38, were in fact necessary in order to avoid retrogression and comply with the requirements of Section 5.

It was not Dr. Handley's job to draw maps or attempt to determine whether the Board could possibly create some other configuration of House District 38. Her job was to advise the Board as to whether its proposed plan and any of the alternative plans presented to the Board met the requirements of Section 5 and was therefore not retrogressive. It was the Board's job to analyze and consider all of the potential options, none of which met the VRA requirements and all of which were retrogressive. It speaks volumes that the Riley Plaintiffs had to create a Demonstration Plan, rather than have Dr. Arrington opine on a plan actually presented to the Board. Even that plan, however, in the opinion of their own VRA expert, does not meet the

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Benchmark and is retrogressive. If there is another option for the configuration of House District 38 in a non-retrogressive plan, then why have the Riley Plaintiffs not presented that plan to the Court. They have not presented such a plan because no such plan exists. The standard is not whether Dr. Handley advised the Board that the exact configuration of House District 38 was necessary in order to comply with the VRA. The standard is whether compliance with the socio-economic integration requirement of the Alaska Constitution is impracticable in House District 38 in light of the competing requirements imposed by the federal Voting Rights Act. The evidence in the Board Record as supplemented at trial clearly establishes that it was.

4. ***The Evidence In this Case Establishes that The Board Had Legitimate Non-Discriminatory Reasons for Splitting the Excess Population of the FNSB, and Thus the Riley Plaintiffs' Geographic Proportionality Challenge Regarding the FNSB is Without Merit.***

It is not disputed that the Board split the excess population of the FNSB between two House districts – House District 38 and House District 6. The Riley Plaintiffs contend the Board's decision violates the geographic proportionality (also referred to as the "anti-dilution rule") rights of the FNSB residents who are so split. The evidence in this case establishes that the Riley Plaintiffs' allegation is without merit because the Board had a legitimate, non-discriminatory reason for its decision.

As explained above, the Board had to combine a portion of the FNSB's excess population with House District 38 in order to comply with the Voting Rights Act. However, House District 38 could not take all the excess population, which totaled nearly 8,700 people, or nearly half an ideal district. Thus, the Board opted to combine the remaining excess population with House District 6. The resulting configuration complies with the Voting Rights Act, while still affording equal representation to the FNSB's excess population.

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A voter's right to an equally geographically effective or powerful vote is a significant constitutional interest, although not a constitutional right. *Kenai Peninsula Borough v. State*, 743 P.2d at 1371-72. The voter, as an individual member of a geographic group or community, has a significant interest in having his/her vote protected from disproportionate dilution by the votes of another geographic group or community. *In re 2001 Redistricting Cases*, 44 P.3d at 149-50 (Carpeneti, J., dissenting).

As a significant constitutional interest, a voter's right to an equally geographically effective vote is protected by the Equal Protection Clause. *Kenai Peninsula Borough,* 743 P.2d at 1371-72. The Alaska Equal Protection Clause is more stringent than its federal counterpart, but the analysis in determining whether a violation has occurred is very similar. *Id.* at 1372. When a voter claims the Redistricting Board *intentionally* discriminated against a particular geographic area, Alaska courts apply a neutral factor test. *Id.* The courts look at both the process followed by the Board in formulating its decision and to the substance of the Board's decision. *Id.* If the evidence shows, based on a totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a particular geographic area, then the Board has the burden of proving any intentional discrimination will lead to more proportional representation. *Id.*

The right to geographic equal protection **does not**, however, entitle members of a political subdivision to control a particular number of seats based upon their population, or proportional representation. *In re 2001*, at 143-44 & n. 7, 146-47. There is simply no requirement of "strict" proportionality. *Id.* It only means that a Redistricting Board "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote." *Id.* at 144 & n. 8

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(groups of voters are not entitled to proportionality absent invidious discrimination). Intentional discrimination can be inferred where a redistricting plan "unnecessarily divides a municipality in a way that dilutes the effective strength of municipal voters." *Id.* Thus, "failure to keep all of a borough's excess population in the same house district" provides "some evidence of discriminatory intent." *In re 2001 Redistricting Cases,* 44 P.3d at 146-47.

An inference of intentional discrimination, however, can be rebutted by valid non-discriminatory justifications.[11] Such justifications may include the necessity of complying with federal and/or state law, such as one-person, one-vote, the VRA, the Article VI, Section 6 requirements of compactness, contiguity, and socio-economic integration, or "the need to accommodate excess population. *Id.* at 144, & n. 7. Simply put, the right to geographic equal protection does not trump the constitutional mandates of one-person, one-vote, compactness, contiguity, socio-economic integration, or the VRA. Moreover, as our Supreme Court made clear in its last guidance on redistricting, the "need to accommodate excess population would be sufficient justification to depart from the anti-dilution rule." *Id.* at 144, n. 7.

As noted above, rural communities experienced an out-migration of population over the last decade, leaving a majority of the Alaska Native districts severely under-populated. As a result, the Board needed to combine urban population with rural, Alaska Native populations to create minority districts that contained as nearly as practicable an ideal population. The FNSB had enough population for 5.49 House districts. The communities in the more rural areas of the northwest portion of the FNSB, Goldstream and Ester, had enough population to bring House District 38 as nearly as practicable to the ideal district size. These communities also

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[11] As stated by the Court in *In re 2001*: "But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the Article VI, section 6 requirements of compactness, contiguity, and socio-economic integration." 44 P.3d at 144.

historically tended to vote Democratic, as do Alaska Natives. Thus, Dr. Handley advised combining non-Alaska Native Democratic voters with Alaska Native voters would provide Alaska Natives with the best opportunity to elect their candidate of choice. As a result, the Board would be able to make House District 38 an "effective" district, avoid retrogression, and meet the benchmark for Section 5 preclearance by adding population from Goldstream and Ester.

However, House District 38 could not absorb the entire 8,700 excess population in the FNSB and still maintain the necessary Alaska Native VAP for that district to remain an "effective" Alaska Native district. Thus, the Board took approximately 5,500 FNSB residents from the Ester and Goldstream areas and placed them in House District 38. That left the Board with two choices for the remaining FNSB excess population: (1) incorporate and evenly distribute the approximately 2,200 people (or 12.39% of an "ideal district") into the remaining 5 house districts within the FNSB, thereby increasing the deviations within the FNSB by 2.478% per House district[12]; or (2) combine the remaining excess population in the FNSB into a single district outside the Borough. The Board placed the balance of the FNSB's excess population into the Richardson Highway District, House District 6, which closely resembles its current configuration. Thus, the residents of the FNSB would still be voting with substantially the same group of people as they did over the past ten years. The Board's choice under the circumstances was a reasonable method to accommodate the excess population within the FNSB that could not be placed into House District 38.

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[12] Increasing the average deviation within the FNSB districts by approximately 2.5% was not a viable option, especially given the relatively high growth rate in the FNSB area. *See In Re 2001 Redistricting Case*, 44 P.2d at 144 n. 7. Spreading the population amongst the five districts within the FNSB would have created deviations ranging between +3.878 and +4.558%, risking a violation of the "as near as practicable" population requirement of Article VI, Section 6 of the Alaska Constitution. *Id.* at 145-46.

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The excess population of the FNSB, although divided between two House districts, was not unnecessarily divided in order to dilute their vote. Indeed, "groups of voters are not constitutionally entitled to proportional representation absent invidious discrimination." *In re 2001 Redistricting Cases*, 44 P.3d at 146. The Board simply needed some, but not all of the excess FNSB population to bring up the population in an otherwise severely under-populated "effective" Alaska Native House district and comply with the VRA. The Board then reasonably chose to place the remaining FNSB excess population with a substantially similar group of voters as those they have been voting with the past ten years rather than increase the deviations within the urban FNSB by approximately 2.5% per house district. The Board had both legitimate and non-discriminatory reasons for splitting the excess FNSB population between two districts – compliance with the VRA and the one-person, one-vote requirement, as well as the need to accommodate excess population. All are "sufficient justification to depart from the anti-dilution rule." *Id.* at 144 n.7. The Board did not discriminate against the voters of the FNSB, intentional or otherwise. Thus, splitting the excess population of the FNSB between two House districts did not violate the Equal Protection Clause of the Alaska Constitution.

5. *The Riley Plaintiffs' Geographic Proportionality Challenge Regarding the City of Fairbanks is Without Merit Because the City Has No Constitutional Right to Be Placed in a Single Senate District.*

In addition to splitting the FNSB's excess population, the Riley Plaintiffs argue the Board also violated the Equal Protection Clause by not placing both House districts that contain the City of Fairbanks in a single Senate district. However, the Equal Protection Clause does not apply to this particular situation. For the population within the boundaries of the City of Fairbanks falls short of having enough population to support a single Senate district. In any

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event, geographic proportionality does not entitle political subdivisions to control a particular number of seats based upon their populations. *In re 2001 Redistricting Cases*, 44 P.3d at 144.

An "anti-dilution" argument basically prevents the Board "from intentionally discriminating against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote." *Id.*, (*citing Kenai Peninsula Borough,* 743 P.2d at 1370-72.) However, groups of voters are not constitutionally entitled to proportional representation absent invidious discrimination. *Id.* at 146. While failure to keep a *borough's* house districts together when forming Senate districts "provides *some* evidence" of intentional discrimination, the Board can negate such an inference by providing legitimate, non-discriminatory reasons for doing so. *Id.* at 144, 146-47 (emphasis added). More importantly, there is no anti-dilution violation when the complaining group of voters falls short of having enough population to support an election district. *Id.* at 145.

This is exactly the situation with the City of Fairbanks. The total population of the City of Fairbanks is 31,535. Since a Senate district is comprised of two House districts, the City of Fairbanks population is roughly equal to .89% of a Senate district. Thus, it falls short of having enough population to comprise an entire, single Senate district. As such, the voters of the City of Fairbanks have no constitutional right to be placed in a single Senate district.

Even if there was a viable geographic proportionality argument here, the Proclamation Plan does not invidiously minimize the City of Fairbanks voters' right to an equally effective vote because the residents of the City of Fairbanks effectively control one Senate seat, Senate District B, and constitute the plurality of the other, Senate District A.

Senate District B, comprised of House District 3 and 4, has a total population of 36,219, 709 people larger than the ideal Senate district size of 35,510. [ARB00006034.] Of this total

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population, 17,522 reside within the City of Fairbanks. This means approximately 49% (48.36%) of the total population in Senate District B are City of Fairbanks residents. The total voting age population of Fairbanks City residents in Senate District B is even higher at 49.29%. The remaining 51% of the population is spread out among a number of small, unorganized areas such as Fox, Two Rivers, and Pleasant River. In fact, the community with the second largest number of voters in Senate District B is Steele Creek, with 14.12% of the total population and 14.06% VAP.

These statistics make clear the Senate pairings in the Proclamation Plan do not minimize – much less *invidiously* discriminate against – the City of Fairbanks voters' right to an equally effective vote. The plan does not in any way dilute their vote, for the City of Fairbanks voters effectively "control" the vote in Senate District B. The voters within the City of Fairbanks are far and away the largest organized voting bloc in Senate District B, comprising 49.29% of the VAP. The area outside of the City of Fairbanks, on the other hand, is entirely made up of smaller, unorganized communities in which it is much more difficult to campaign. Clearly, as goes the City of Fairbanks, so goes the Senate district in any given election. Since "control" of a Senate district is the basis of any anti-dilution claim, the difference between making up 49% of a district and 51% of a district is simply not constitutionally significant. As the City of Fairbanks effectively "controls" Senate District B, there can be no anti-dilution rule violation.[13]

[13] City of Fairbanks voters in Senate District A are in a similar position. Although they comprise less of a plurality than the voters in Senate District B, the do make up the largest politically salient class of voters in Senate District A with 9,770 VAP, or 38.66% of the VAP. Just as in Senate District B, the remaining VAP in Senate District A is spread out among small, unorganized political subdivisions. Thus, placement in Senate District A does not minimize the City of Fairbanks voters' effective vote. Indeed, the fact that the residents of the City of Fairbanks constitute the largest voting bloc in two Senate seats means its residents have the opportunity to be represented by two Senators, rather than one. How more representation in the legislature dilutes the voting strength of the residents of the City of Fairbanks is hard to fathom.

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The real driving force behind the Riley Plaintiffs' City of Fairbanks anti-dilution claim has nothing to do with protecting the rights of Fairbanks residents as a whole. Their motivation is completely partisan. It is expected that the Riley Plaintiffs will spend a considerable amount of time at trial attempting to present evidence related to a claim they have not pled: partisan gerrymandering. Their real "beef" is that the Proclamation Plan pairs two incumbent Democratic senators, Joe Paskvan and Joe Thomas, in Senate District B, and as Democrats, they do not like that. Accordingly, the Riley Plaintiffs will offer the testimony of a number of Democratic legislators and staff about completely irrelevant issues that have nothing to do with the matters properly before this Court. Incumbent protection (other than as relevant to Alaska Native incumbents for purposes of Section 5) was not a guideline adopted by the Board. Thus, the fact that the Proclamation Plan pairs a few legislators (including at least four incumbent Republicans) has nothing to do with the issues before this Court. At trial, the Board will establish that virtually every plan presented to the Board paired incumbents, and the Proclamation Plan's incumbent pairings were nothing more than the natural result of redistricting.[14]

In short, the evidence at trial will establish that there is no legal or factual basis to the Riley Plaintiffs' anti-dilution challenge regarding the City of Fairbanks. As a result, the Court must wholly reject this claim.

6. *House District 5 is "Relatively Compact" and Therefore Constitutional.*

In their Complaint, the Riley Plaintiffs raise a compactness challenge to House District 5. [*See* Riley Plaintiffs Complaint at ¶ 21.] Interestingly, they did not seek summary judgment

[14] On the other hand, for example, the Demonstration Plan, drawn by Mr. Lawson, the Political Director of the Alaska Democratic Party, pairs 14 Republicans and three Democrats, two of which are Democrats that organized with the Republican house majority. [See Joint Exhibit 51.]

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on the compactness of House District 5. The reason is obvious: House District 5 is relatively compact and therefore complies with the compactness requirement of the Alaska Constitution.[15] Whether one considers "mathematical" compactness or the more appropriate visual tests, House District 5 passes constitutional muster.

As illustrated below, House District 5 and MRP House District 8 (the district directly comparable to House District 5[16]) are relatively the same in terms of compactness under the Reock test. Moreover, House District 5 is more mathematically compact in four of the other seven mathematical compactness tests generated by Mr. Lawson for Proclamation House District 5 and MRP House District 8.

Compactness Test	**Proc. HD-5**	**MRP HD-8**
Reock (closest to 1 most compact)	.38	.39
Perimeter (smallest perimeter most compact)	236.03	267.39
Population Polygon (closest to 1 most compact)	0.32	0.28
Population Circle (closest to 1 most compact)	0.20	0.18
Ehrenburg (closest to 1 most compact)	0.58	0.45

[15] This Court is well aware of the legal standard for compactness in Alaska and thus there is no need to repeat those standards here. The Board incorporates by reference its discussion of the Alaska compactness standard as set forth in its previous briefing as though fully set forth herein.

[16] Both districts take population from the west side of the FNSB, including the Chena Ridge area, and combine it with the unpopulated Eielson Bombing Range. MRP House District 8, includes the population from Fox and Goldstream that the Board included in House District 38 in order to comply with the federal Voting Rights Act. An illustrative map of MRP House District 8 as well as Proclamation House District 5 is attached hereto for ease of reference and understanding.

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House District 5 is also within the "standard" deviation of MRP-8 on the two other tests, the Schwartzberg (1.53 to 1.40) and the Population Polygon (.28 to .30).

Likewise, House District 5 is clearly "visually compact." It is not an "odd-shaped district," nor does it contain any "corridors" of land or strange "appendages" that may raise concerns as to the compactness of a district. *Hickel v. Southeast Conference,* 846 P.2d at 45-46. Indeed, it looks virtually the same as MRP House District 8 in its shape.

While the Riley Plaintiffs' exact arguments are not known at this time, it is expected that they will attempt to argue House District 5 is not compact because it includes the large unpopulated Eielson Bombing Range within its configuration in order to allow the Board to pair it with Proclamation House District 6 to form Proclamation Senate District C. Any such argument is completely without merit for a number of reasons.

First, the Board had to put the Eielson Bombing Range somewhere. Much of Alaska consists of large tracts of unpopulated land. Those land areas have to be placed into an election district. No matter which district the Bombing Range is placed in, it will still be an unpopulated tract. The geographic facts are self-evident.

Second, the Bombing Range is not used to connect two populated areas. The inclusion of an unpopulated tract in an election district does not run afoul of any compactness requirements. If this were the case, it would be impossible to constitutionally redistrict Alaska.

Third, the Riley Plaintiffs' own MRP House District 8 attaches the Eielson Bombing Range to populated areas from the western portion of the FNSB. Other than some minor differences in which areas of population from the western portion of the FNSB the Bombing Range is attached to, there is virtually no difference between the shape of the two districts. A

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review of the illustrative maps show MRP House District 8 includes the entire Bombing Range within its borders, which runs east to share a border with MRP House District 5 (the MRP Plan's "Richardson Highway District"), exactly like Proclamation House District 5. The Riley Plaintiffs' "do as I say, not as I do" argument doesn't pass the giggle test.[17]

Finally, any argument by the Riley Plaintiffs that there was some nefarious partisan purpose for the configuration of House District 5 has no basis in fact. Such argument has absolutely nothing to do with whether House District 5 is constitutionally compact. Since the Riley Plaintiffs have not raised a partisan gerrymandering claim, they have no basis for claiming that an otherwise constitutionally compact district is somehow otherwise improper.

In short, House District 5 is relatively compact and therefore constitutional. Any arguments by the Riley Plaintiffs to the contrary have no basis in fact or law.

VI.
CONCLUSION

As this Court has noted, the Board faced a leviathinic task when redistricting Alaska. Demographic changes over the past decade created a "perfect storm" of problems, which made the already conflicting federal and state requirements that much more at odds with each other. The Board was forced to consider options never before encountered in an Alaska redistricting process. Yet the Board took this challenge in stride, striving to comply with every redistricting requirement as nearly as practicable.

[17] Interestingly, the Riley Plaintiffs identify no Senate pairings for their Demonstration Plan other than the Alaska Native Districts in an attachment to Dr. Arrington's expert report. Nor do they provide any demographic data regarding the population totals and deviations for their Senate districts. In fact, Mr. Lawson has admitted at his deposition that he did not prepare any demographic data for the Demonstration Plan Senate districts. Moreover, under the actual configuration of the MRP Plan, it is possible to make the exact same Senate pairing made by the Board.

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Compliance with the constricting federal Voting Rights Act mandated that the Board deviate from state constitutional standards in a handful of districts. However, the Board was wholly justified in doing so by its need to comply with federal law. The Board did not abandon or ignore any redistricting requirement in favor of another. The Board simply followed the redistricting principles in order of priority, as set forth by the Alaska Supreme Court, and met all the requirements as nearly as practicable.

The configuration of House Districts 37 and 38 were both necessary to comply with the Voting Rights Act. This in turn required the Board to deviate from the state constitutional requirements of contiguity and compactness in House District 37, and socio-economic integration in House District 38. Yet, as the Board will show at trial, such deviations were necessary in order to comply with the federal Voting Rights Act. The Voting Rights Act also mandated the configuration of House District 1, even though it is not an "effective" Alaska Native district, as a result of the a ripple effect caused by the Voting Rights Act. Compliance with the Voting Rights Act simply limited the Board's configuration options. Despite these constricting parameters, the Board was still able to meet the state constitutional requirements as nearly as practicable.

The Riley Plaintiffs' arguments fail to take into consideration the realities of redistricting. The Board faced enormous challenges in ensuring every Alaskan has an equally effective vote for the next ten years. The Proclamation Plan does just that. Therefore, this Court should deny the Plaintiffs' claims and find in favor of the Board on all of the their remaining challenges.

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DATED at Anchorage, Alaska this 28th day of December 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December 2011, a true and correct copy of the foregoing document was served on the following via:

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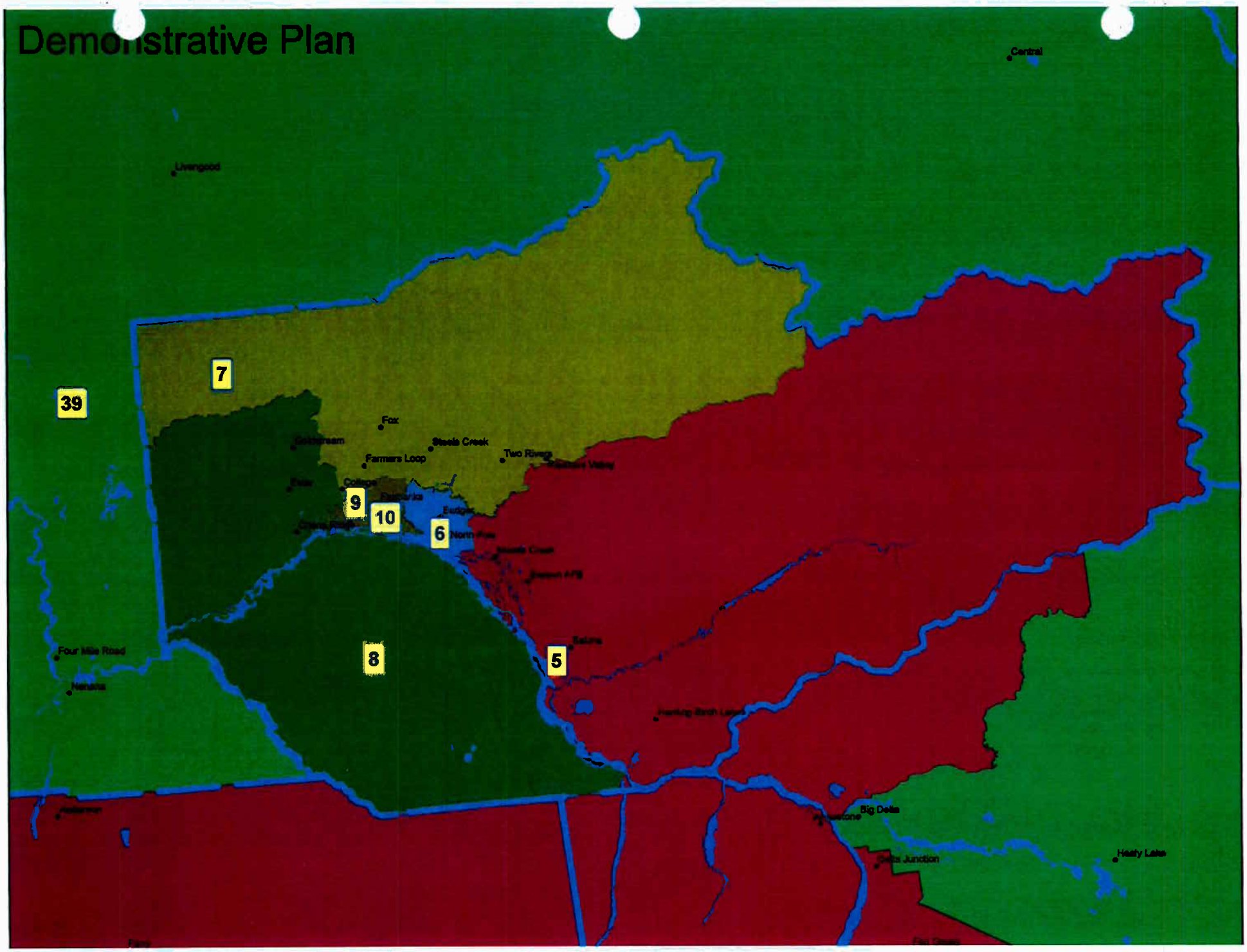
Demonstrative Plan
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Steele Creek
Two Rivers
Farmers Loop
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North Pole
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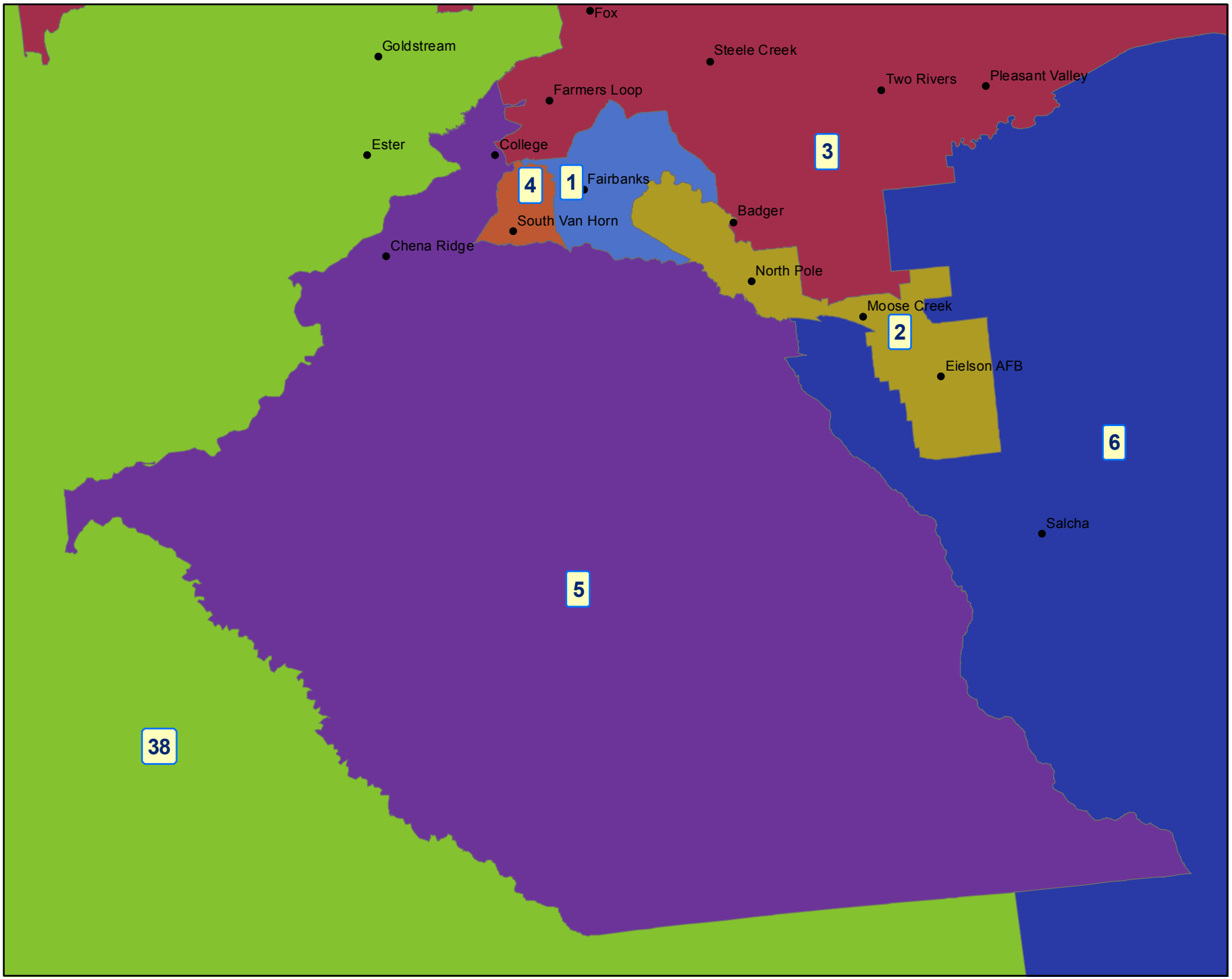
Four Mile Road
Nenana
Big Delta
Delta Junction
Healy Lake

Proclamation House Districts

HD-5



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