

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

IN RE: 2011 REDISTRICTING CASES

Case No. 4FA-11-2209CI

BRIEF OF AMICUS CURIAE
ALEUTIANS EAST BOROUGH

INTRODUCTION

The Aleutians East Borough (“the Borough”), through its attorneys, WALKER & LEVESQUE, LLC., submits its amicus brief pursuant to this court’s Order dated November 22, 2011.

The Borough is a second-class borough organized under the laws of the State of Alaska, incorporated on October 23, 1987. The Aleutians Islands and the Borough have always been together in the same House District and same Senate District. The territory is compromised of the same people with similar history, interests and concerns. Once every 10 years a new redistricting plan is drawn. The final plan will determine the fate of the Aleutian Islands and the Borough for the next 10 years. If there is any way to keep the Aleutians and the Borough together, that way should be considered and given a “hard look.”

The Borough is primarily concerned with the Alaska Redistricting Board’s (“the Board”) decision to fracture the Borough’s municipal boundaries by splitting the City of Akutan from the rest of the Borough, placing its residents into House District 37, rather

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than into House District 36 with the rest of the Borough's citizens. The Borough is also concerned with the Board's decision to split up the Aleutian Islands. The result of the Board's action further divides the Borough into two separate Senate Districts, with the majority of the Borough in Senate District 36-R, while Akutan is in Senate District 37-S.

By splitting the Borough's municipal boundaries, the Board violated the requirements of the Alaska Constitution that "[e]ach house district shall be formed of contiguous and compact territory containing as nearly as practical a relatively integrated socio-economic area."¹ Testimony at trial proves that the Proclamation Plan is not the only plan that would satisfy the requirements of the federal Voting Rights Act.² As will be shown below, the Board erred in not following the requirements of Alaska's Constitution.

I. THE BOARD'S INVALID PROCESS

The Board's process both minimized and compromised the constitutional requirements stated in article VI, section 6. Plaintiffs George Riley and Ron Dearborn ("Plaintiffs") filed a Motion for Summary Judgment challenging the methodology used by the Board.³ In their Motion, the Plaintiffs argued that it was undisputed that the Board failed to take a 'hard look' "... at options to comply with the Alaska

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¹ Alaska Constitution, Art. VI, Section 6.

² See: Exhibit J-31; Defendant's Exhibit W and Plaintiff Exhibit 14 (Testimony shows that the following plans were non-retrogressive: 1) PAME; 2) TB; and 3) Modified Rights Plan #2.

³ See: Memorandum in Support of Riley Et. Al. Plaintiff's Motion for Summary Judgment: Invalid Process, dated December 5, 2011.

Constitution.”⁴ The court denied Plaintiffs’ Motion regarding the process used by the Board in its Order dated December 23, 2011,⁵ however, noting that “[t]he Board does not deny that it started by drawing the minority districts, on the advice of their Voting Rights Act expert, Dr. Handley.”⁶

Notwithstanding the Board’s admission, the court agreed with the Board’s arguments that the *Hickel*⁷ case does not contain a methodology that a redistricting board must adhere to.⁸ In denying the Plaintiffs’ Motion on Invalid Process, however, the court further noted that:

The burden is on the Board to show that the configuration of the district is required by the Voting Rights Act. If the Board cannot prove that the Voting Rights Act required the configuration of House District 38, the plan will be remanded back to the Board.⁹

By this same reasoning, if the Board failed to prove that the Voting Rights Act required House District 37 to be configured as in the Proclamation Plan, to the exclusion of all other options, then the Plan should be remanded back to the Board. Put simply, the Board’s assertion that its Proclamation Plan satisfied the Voting Rights Act does not allow it to ignore Alaska’s constitutional redistricting requirements of contiguity, compactness and relative socio-economic integration.¹⁰

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⁴ *Id.* at 2.

⁵ *See:* Order on the Plaintiffs’ Motion Summary Judgment: Invalid Process.

⁶ *Id.* at 2.

⁷ *Hickel v. Southeast Conference*, 846 P.2d at 51-52 n. 22, (Alaska 1992).

⁸ Order on the Plaintiffs’ Motion Summary Judgment: Invalid Process, December 23, 2011 at 3-4.

⁹ *Id.*

¹⁰ *Hickel v. Southeast Conference*, 846 P.2d at 51-52 n. 22, (Alaska 1992).

A. **IT IS UNDISPUTED THAT THE BOARD FAILED TO TAKE A “HARD LOOK” AT ALASKA’S CONSTITUTIONAL REQUIREMENTS**

The Board conceded the lack of a constitutional plan both in its trial testimony and in John Torgerson’s deposition.¹¹ In his deposition, Mr. Torgerson was asked the following:

Q. Now, in the process, do you remember the board trying to come up with a plan where first priority was compliance with the Alaska State constitution.

A. No.¹²

From the beginning, the Board focused on drawing minority districts, which was recommended by its Voting Rights Act expert.¹³

B. **THE VOTING RIGHTS ACT TRUMPS ALASKA’S CONSTITUTIONAL REQUIREMENTS ONLY IF IT IS THE “ONLY MEANS AVAILABLE”**

The Alaska Supreme Court has criticized other Redistricting Boards for not “reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution.”¹⁴ In the *Hickel* case, the Board elevated the Voting Rights Act above the Alaska Constitution.¹⁵ The Court considered such methodology error because it resulted in “unnecessarily” compromising the Alaska Constitution.¹⁶

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¹¹ Deposition of John Torgerson, November 16, 2011, Page 49/ Lines 7-10.

¹² *Id.*

¹³ Order on the Plaintiffs’ Motion Summary Judgment: Invalid Process, December 23, 2011 at 2.

¹⁴ *Hickel* at 51 n. 22.

¹⁵ *Id.*

¹⁶ *Id.*

C. **SHORTENED TIME DOES NOT ABSOLVE THE BOARD OR THE COURT FROM TAKING A HARD LOOK AT ALASKA'S CONSTITUTIONAL REQUIREMENTS**

Plaintiffs have argued that the methodology for drawing up a plan expressed in the *Hickel* case is a legal mandate. The court has taken the position that it is not a mandate, pointing to the 1998 Constitutional amendment that shortened the time period involved for the redistricting process. The Borough reads the *Hickel* case as guidance from the Supreme Court on the best way to draft a redistricting plan and not unnecessarily minimize or compromise the Alaska constitutional requirements. As the Court stated, "A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements."¹⁷

The Alaska Supreme Court also, while recognizing the short time-frames, noted:

The challenge of creating a statewide plan that balances multiple and conflicting constitutional requirements is made even more difficult by the very short time frames mandated by article VI, section 10 of the Alaska Constitution. But these great difficulties do not absolve this court of its duty to independently measure each district against constitutional standards.¹⁸

Therefore, the time constraints imposed on the Board do not absolve it of its duty to create a plan meeting Alaska constitutional standards.

The guidance provided by the Court is that in order not to "unnecessarily" compromise Alaska's Constitution, a Board tasked with designing a redistricting plan must test and compare a plan satisfying Alaska's Constitutional requirements with the

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¹⁷ *Id.*

¹⁸ *In re 2001 Redistricting Cases*, 44 P.3d, 141, 147 (Alaska 2002).

Voting Rights Act. The 2011 Redistricting Board failed to design its Proclamation Plan so that it could be compared and tested appropriately with the Voters Rights Act. The end result is that the Board cannot prove that any of the House Districts it adopted (especially those that do not comply with Alaska's Constitution) were "the only means available to satisfy the Voting Rights Act requirements."¹⁹

II. THE COURT HAS RULED THAT HOUSE DISTRICT 37 IS UNCONSTITUTIONAL

The Plaintiffs also filed Motions for Summary Judgment pertaining to the constitutionality of the Board's Proclamation House District 37.²⁰ The court ruled that House District 37 was neither compact nor contiguous,²¹ thereby placing the burden on the Board to prove that the Voting Rights Act required House District 37 to be configured in violation of the Alaska Constitution.

A. COMPACTNESS

Interestingly, when the Plaintiffs brought their Motion for Summary Judgment regarding the compactness of House District 37, the Board took the position that House District 37 was "... compact and that the configuration of the districts was required by equal population requirements and the Voting Rights Act."²² In essence, the Board

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¹⁹ *Id.*

²⁰ *See:* Plaintiffs' Motion for Partial Summary Judgment: Compactness, December 5, 2011 and Plaintiffs' Motion for Partial Summary Judgment: Contiguity HD 37, December 5, 2011.

²¹ *See:* Order on the Compactness of Districts 1, 2 and 37, December 23, 2011 and Order on the Contiguity of House District 37, December 23, 2011.

²² Order on the Compactness of Districts 1, 2, and 37, December 23, 2011.

confirmed the undisputed fact that it did not take a 'hard look' at the Alaska Constitutional requirements.

In its decision finding that House District 37 as drawn by the Board is not compact,²³ the court stated:

House District 37 divides the geographic and cultural unity of the Aleutians by combining the western Aleutians with Bethel-area communities hundreds of miles north. House District 37 expanses nearly 800 miles over the Bering Sea between Nunivak Island and Attu and expanses 500 miles between the Kuskokwim delta and Unalaska.²⁴

Accordingly, the Board bore the burden of proof to show not only that its configuration of House District 37 was required by the Voting Rights Act, but was also "... the only means available to satisfy the Voting Rights Act requirements."²⁵ The Board failed to satisfy this burden.

B. CONTIGUITY

Unlike the compactness issue of House District 37, the Board did not appear to argue that House District 37 was contiguous.²⁶ Instead, the Board argued that it took a 'hard look' at other options keeping the Aleutians together.²⁷ However, the Board did not appear to argue that it took a 'hard look' at complying with the constitutional requirements.

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²³ Order on Compactness of Districts 1, 2 and 37 dated December 23, 2011, at 19.

²⁴ *Id.*

²⁵ *Hickel v. Southeast Conference*, 846 P.2d at 51-52 n. 22, (Alaska 1992).

²⁶ Order on the Contiguity of House District 37, December 23, 2011, at 8.

²⁷ *Id.*

The Board's justification for fracturing the Borough and the Aleutian Islands is that it was deemed necessary in order to comply with the Voting Rights Act.²⁸ According to the Board, it was threatened by Calista Corporation that any pairing of Senators Lyman Hoffmand and Senator Gary Stevens would result in a challenge to the Department of Justice.²⁹

However, at least two plans that kept the Aleutians and the Borough together were rejected. The Board's expert testified that both plans were non-retrogressive and would have been pre-cleared by the Department of Justice.³⁰ The Board rejected the plans based upon a misbelief that the Department of Justice required the protection of native incumbents.³¹

The burden of proof was placed on the Board to prove at trial that ". . . the geographic configuration of House District 37 is necessary under the Voting Rights Act."³² Pursuant to the Supreme Court's decision in *Hickel*, it is the Board's burden to prove the current configuration of House District 37 was the 'only means available' to satisfy the Voting Rights Act, in violation of Article VI, Section 6 requirements of the Alaska Constitution.³³ As with compactness, the Board failed to do so.

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²⁸ *Id.*

²⁹ Trial testimony of Chair Torgeson, January 11, 2012, and Testimony of Taylor Bickford, January 12, 2012.

³⁰ Trial testimony of Chair Torgeson, January 11, 2012, and Testimony of Taylor Bickford, January 12, 2012.

³¹ ARB00003901 (5/17/2011 Board Meeting, p. 60, l. 13-14).

³² Order on the Contiguity of House District 37, December 23, 2011, at 12.

³³ *Hickel v. Southeast Conference*, 846 P.2d at 51-52 n. 22, (Alaska 1992).

C. SIGNIFICANCE OF COMPACT AND CONTIGUOUS HOUSE DISTRICTS

Compactness and contiguity are generally considered to be traditional redistricting principles.³⁴ Along with consideration towards maintaining communities of interest, contiguity and compactness are important because they are neutral and objective redistricting criteria.³⁵

Many states include a review and consideration of the traditional redistricting requirements. In part, such consideration makes perfect sense because the traditional redistricting requirements of compactness, contiguity and maintaining community interests, are fair and neutral.

Alaska is one of the states that has adopted some of the traditional redistricting requirements as part of its Constitution, therefore mandating that all redistricting plans consider the traditional redistricting requirements. As stated above, to make certain that a redistricting plan does not “unnecessarily” compromise Alaska’s Constitution, a map compliant with the State’s constitutional requirements should be compared and tested against the Voters Rights Act. The Board failed to make this comparison. Therefore, it

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³⁴ *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

³⁵ *Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941, 1954 (1996)(noting “the legitimate role of communities of interest in our system of representative democracy”); *Prejean v. Foster*, 227 F.3d 504, 512 (5th Cir. 2000)(noting that traditional redistricting principles such as maintaining communities of interest “are important ‘not because they are constitutionally required . . . but because they are objective factors.’”)(quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 2827 (1993)).

has not shown that its House District 37 configuration was "the only means available to satisfy Voting Rights Act requirements."³⁶

CONCLUSION

For the reasons stated above, the Board's Plan should be remanded to redraw House District 37 to be joined with House District 36, so that the Aleutians East Borough will be maintained as a compact and contiguous district thus meeting the requirements of the Alaska Constitution, as well as those of the Voting Rights Act.

DATED at Anchorage, Alaska this 23rd day of January, 2012.

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Certificate of Service:

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³⁶ *Hickel*, 846 P.2d at, 51-52 n. 22.

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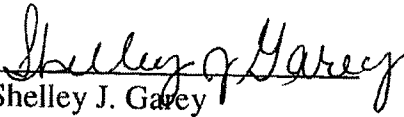
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