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

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW, the Riley et. al. Plaintiffs, by and through the undersigned attorney, to proposed Findings of Fact and Conclusions of Law, in the above captioned matter, as follows:

BACKGROUND – PLAN DEVELOPMENT

1) The Alaska Constitution requires the redistricting of the Alaska State Legislature every ten (10) years following the decennial census by the Alaska Redistricting Board (hereinafter referred to as "Board").[1]

2) In preparation for the 2010 redistricting effort, the Legislature created the Redistricting Planning Committee,[2] which was to "make necessary

1 AK CONST. Art. VI, Sec. 3
2 AS 15.10.300

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preparations and arrangements" in advance of the formation of the Board.

3) The Redistricting Planning Committee was composed of Ron Miller (appointed by Speaker of the House Chenault), Linda Hay (appointed by Senate President Stevens) Brynn Keith and Margaret Paton-Walsh (both appointed by Governor Parnell) and Doug Wooliver (appointed by Chief Justice Carpeneti).[3]

4) The Redistricting Planning Committee selected and purchased the Redistricting Software (i.e. Citygate) to be used by the Board,[4] as well as contracted with Dr. Lisa Handley to advise the state on data and information needs for the redistricting process.[5]

5) The work of the Redistricting Planning Committee was not made part of the Record before this Court.

6) The Board is composed of five (5) members, who are respectively

3 ABR00004927
4 ABR00004927-8
5 ABR00004928-9

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appointed as follows: two (2) by the Governor, one (1)by the Senate President, one (1) by the Speaker of the House, and one (1) by the Chief Justice of the Alaska Supreme Court.[6]

7) Between June 25, 2010 and August 31, 2010, the Board was appointed as follows: Governor Sean Parnell appointed John Torgerson of Soldotna and Albert Clough of Juneau on June 25, 2010. Senate President Gary Stevens appointed Robert Brodie of Kodiak on June 25, 2010. The Speaker of the House of Representatives, Mike Chenault, appointed Jim Holm of Fairbanks on July 8, 2010. Alaska Supreme Court Chief Justice Carpeneti appointed Marie Greene of Kotzebue on August 31, 2010.[7]

8) On September 13, 2010, the Board conducted its first meeting, met with the Redistricting Planning Committee and was briefed on planning activities and the duties and responsibilities of the Board.[8]

9) Between October 26, 2010, and November 2010, the Board hired staff,

6 AK CONST. Art. VI, Sec. 10
7 Ex. J-41
8 ABR00004925 et. seq.

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including Ron Miller to serve as an Executive Director, Taylor Bickford, (Assistant Director,) Mary Core, (Administrative Assistant) Jim Ellis, (Administrative Coordinator) and Eric Sandberg (GIS and Census Data specialist).[9]

10) In November of 2010 the Board retained Michael White, of the Law Firm of Patton Boggs LLP, as Board Counsel.[10]

11) On February 23, 2011 Albert Clough resigned and Governor Parnell appointed Peggy Ann McConnochie from Juneau to replace Mr. Clough.[11]

12) The Board did not meet between December 14, 2010 and March 13, 2011.[12]

13) During this time the Boards staff engaged in research and preparatory work.[13]

9 Ex. J-41 The hiring of the Executive Director and other staff was done outside the Record.
10 Id. The hiring of the Board Counsel was done outside the Record.
11 Id.
12 ABR00002906 and ABR00003587
13 Test. Of Taylor Bickford

14) The Alaska Constitution establishes a mandatory process to be used by the Board, which begins with the reporting of the decennial census and requires the Board to

a) to adopt a proposed plan or plans 30 days after the reporting of the decennial census of the United States.

b) conduct public hearings on the proposed plans, and to

c) adopt a final plan and proclamation of redistricting no later than 90 days after the reporting of the decennial census of the United States.[14]

15) The Board received block-level population data from the U.S. Census Bureau on March 15, 2011,[15] and was required to adopt a proposed plan or plans by April 14, 2011, and a final plan and proclamation of redistricting by June 13, 2011.

14 AK CONST. Art. VI, Sec. 10
15 Ex. J-41

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16) Between March 15, 2011 and April 14, 2011, the Board conducted thirteen (13) Board meetings[16] and seven (7) public hearings.[17]

17) During this period, Board developed draft (or proposed) plans (referred to as Board Option 1 and Board Option 2)[18]

18) Also during this period the Board received proposed plans from the RIGHTS Coalition,[19] Alaskans for Fair and Equitable Redistricting ("AFFER"),[20] Alaskans for Fair Redistricting ("AFFR"),[21] the City and Borough of Juneau,[22] the Bristol Bay Borough[23] and the City of Valdez[24] and the Alaska Bush Caucus.[25]

19) Alaska is a "covered jurisdiction" under Section 5 of the Federal Voting Rights Act (VRA) which requires all covered jurisdictions submit any

16 See ABR00003587-3841; ABR0000680-744; ABR00005324-5363; ABR0000765-2118; ABR00004999-5185; ABR00002119-2826
17 See ABR00011861-11933
18 See Draft Plan Option 1 with alternatives at ABR00006091, 609993-8. See Draft Plan Option 2 with Alternatives at ABR00006092, 6099-6103.
19 ABR00006339-6340; 6346-6353
20 ABR00006243-6251
21 ABR00006252-6333
22 ABR00006341-6344
23 ABR00006334-6345
24 ABR00006354-6355
25 ABR00006335-6338

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voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting," including redistricting plans, to the Department of Justice ("DOJ") for preclearance before the change may be implemented.[26],

20) "Under section 5 of the Act, a reapportionment plans invalid if it would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[27]

21) Retrogression means "a decrease... in the absolute number of representatives which a minority group has a fair chance to elect."[28]

22) Retrogression is measured by comparing minority voting strength under the new plan with the minority voting strength under the immediately preceding plan using current (2010) census numbers.[29]

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26 42 U.S.C 1973(c) (2000)

27 *Hickel v Southeast Conference, 846 P.2d 38, 49 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

28 DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act. 76 Fed. Reg. 7470 (Feb. 9, 2011) (hereinafter referred to as "DOJ Guidance") citing Ketchum v Byrne, 740 F. 2d 1398, 1402 n. 2 (7th Cir. 1984)

29 DOJ Guidance, supra., at 1417

23) The "benchmark" against which a new plan is compared is the last legally enforceable redistricting plan in force or effect.[30]

24) In this case, the Benchmark Plan is the plan in effect for the 2010 election.

25) In formulating the various plans prior to May 16, 2011, neither the Board, the various third party groups submitting plans nor the public had the necessary information on the Voting Rights Act (VRA) Benchmark standards for the number of protected districts nor effectiveness standards defining the minimum level of Native Voting Age Population (VAP) because the Board failed to hire a VRA expert who could provide those standards prior to commencing this process.[31]

26) At no time did the Board make an attempt to develop a plan in which the first priority was compliance with the Alaska State Constitution.[32]

30 DOJ Guidance, supra., citing *Riley* v. *Kennedy,* 553 U.S. 406 (2008); 28 CFR 51.54(b)(1).
31 Trial Test. Of Bickford Taylor, Dr. Lisa Handley and Leonard Lawson (on rebuttal)
32 Ex. J-62 (Torgerson Depo @ 49: 7-11); Trial Test. Of Torgerson

27) Rather, the Board and the various third party groups submitting plans using the VRA benchmark and effectiveness standards from the 2002 redistricting process, and assumed that four (4) majority-minority districts and two influence districts were required, with a minimum of 35% Native VAP necessary to constitute a Native influence district.[33]

28) On April 8, 2011, the Board hired Dr. Lisa Handley to serve as its Voting Rights Act expert.[34]

29) On May 8, 2011, Ron Miller passed away and the Board appointed Taylor Bickford as Executive Director and Jim Ellis as Assistant Director.[35]

30) Between April 8 and May 16, Dr. Handley analyzed the various draft plans developed by the board and submitted by third parties.[36]

31) On May 17, 2011 Dr. Handley telephonically appeared before the Board

33 Test. Of Torgerson, Taylor and Lawson (on rebuttal)
34 Ex. J-41
35 Ex. J-41
36 Test. Of Bickford Taylor and Dr. Lisa Handley

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and advised the Board respecting her conclusions and advice as to the Voting Rights Act (VRA) Benchmark standards for the number of protected districts and the effectiveness standards defining the minimum level of Native Voting Age Population (VAP)[37]

32) Dr. Handley explained that "effective districts are districts that provide minority voters with the ability to elect candidates of choice to office".[38]

33) Dr. Handley did not explain what an influence district was,[39] however, it is generally understood that an "influence district" is a district in which the minority community, although not sufficiently large to elect a candidate of its choice, is able to influence the outcome of an election and elect a candidate who will be response to the interests and concerns of the minority community.[40]

34) Dr. Handley reported that Benchmark House Districts 37, 38, 39 and 40

37 ABR00003841 et. Seq.
38 ABR00003880: 1-3
39 Id.
40 Redistricting Law 2010, (National Conference of State Legislatures, Nov. 2009) at 69

were "effective" Native districts.[41]

35) Dr. Handley reported that Benchmark House District 5 was an "influence" Native district.[42]

36) Dr. Handley stated in regards to Benchmark House District 6 that she "wouldn't call it effective" and should be considered an influence district because it did not elect the minority preferred candidate despite strong support for the Native preferred candidate.[43]

37) Dr. Handley reported that Benchmark Senate District T, F, and C were "effective" Native districts.[44]

38) Dr. Handley reported that the benchmark to avoid retrogression of Native Voting strength for the 2010 plan was four (4) effective house districts and two (2) influence districts and three (3) effective Senate Districts.[45]

41 ABR00003881: 16-19
42 ABR00003881
43 ABR00003881: 1-7; ABR00003886:5-6
44 ABR00003882: 3-9
45 ABR00003881: 12-13; ABR00003882: 3-4

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39) Specifically, Dr. Handley advised that the degree of racially polarized voting had increased in Alaska since 2000.[46]

40) Dr. Handley concluded that in order for a legislative district to be an effective district in which the Native population had the ability to elect a candidate of their choice, the district would have to have 42% Native VAP statewide, with two exceptions: former District 6 which had greater polarized voting and would require 50% Native VAP; and former District 37 which was "not polarized at all" and could be effective at "anything down in the 30's(%)".[47]

41) Dr. Handley also advised the Board that the AFFR, AFFER, and RIGHTS Coalition proposals were all non-retrogressive.[48]

42) The only third party plan that Dr. Handley reviewed "at length" was the adjusted AFFR plan.[49]

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46 ABR00003875-6
47 ABR00003877-78
48 ABR00003917-3918; ABR00003922
49 ABR00003917: 16-20

43) The following day, Taylor Bickford and Michael White advised the board that Dr. Handley may have been working with the wrong data, and the Board asked staff to look into that issue.[50]

44) It was later discovered that Dr. Handley had been analyzing the various plans using total Native population figures rather than Native VAP population figures and didn't recognize the problem until the issue was raised by the Board staff.[51]

45) To help clarify Dr. Handley's presentation, Board staff procured Dr. Handley's presentation notes.[52]

46) The notes clarified Dr. Handley's definition of influence districts as meaning "districts (that) provide minorities with an opportunity to elect minority-preferred candidates to office but only if white voters provide

50 ABR00004101
51 Trial Test. Of Taylor Bickford and Dr. Handley.
52 Trial Test. Of Taylor Bickford and Dr. Handley.

sufficient support for the minority-preferred candidates to win."[53]

47) The notes clarified that Dr. Handley fixed the benchmark as being four (4) effective house districts (i.e. Dist. 37-40) and two (2) influence or equal opportunity districts (i.e. Dist. 5 and 6) and three (3) effective Senate Districts (i.e. Dist. C, S and T).[54]

48) The notes clarified that Dr. Handley determined that Board Option plans were retrogressive because they only provided for four effective house districts, two influence house districts, and two effective Senate Districts.[55]

49) The notes only opined that the AFFR adjusted draft plan was non-retrogressive, but did not reference the other plans.[56]

50) There is no written or oral communication by Dr. Handley to the Board in the Board record retracting her opinions that AFFER, adjusted AFFR, and

53 Ex. J-44 @ 2
54 Ex. J-44 @ 2-3
55 Ex. J-44 @ 3-4
56 Ex. J-44 @ 4

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the RIGHTS Coalition plans are non-retrogressive, nor any latter statement in the Record by Dr. Handley to the Board stating that any of these plans are retrogressive.

51) The Board scheduled a meeting with Dr. Handley in person to help clarify some of these issues.[57]

52) On May 24 2011 Dr. Handley traveled to Alaska and met with the Board on person, and clarified her opinion that the VRA benchmark was four (4) effective house districts, two (2) influence or equal opportunity districts, and three (3) effective Senate Districts.[58]

53) On May 24 Dr. Handley also confirmed that the effectiveness standard for a Native district was 42% Native VAP statewide, with two exceptions: former District 6 which had greater polarized voting and would require 50% Native VAP; and former District 37 which could be effective at 35%, but Dr. Handley could not identify the minimum Native VAP in that

57 Trial Test. Of Chairman Torgerson and Taylor Bickford.
58 ABR00004206; ABR00004208

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district needed to be effective in the area within former District 37.[59]

54) Between May 16th and June 14th, the Board continued to meet in public meetings, and work sessions.

55) During this period of time, the Board also held executive sessions on June 1, 2011,[60] June 4, 2011,[61] and June 13, 2011[62] to discuss litigation, despite the fact that there was no litigation was pending.[63]

56) It is clear from the record that in at least one of these sessions the Board discussed possible plans.[64]

57) The Board delegated the responsibility to draw the Fairbanks plan to Member Jim Holm, and all members of the Board deferred to his proposed plan in this regard.[65]

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59 ABR00004205-6
60 ABR00002909
61 ABR000043348
62 ABR00003565
63 Trial Test. Of Chairman Torgerson
64 ABR000043348
65 Trial Test. Of Chairman Torgerson and Jim Holm; Ex. J-62 (Depo J. Torgerson) at 58:23-24 & 75:1-4

58) The Board did not have any member from Anchorage, so it accepted a proposed plan for Anchorage submitted by Randy Ruedrich, the Chairman of the Alaska Republican Party and Anchorage Mayor Sullivan through AFFER and sponsored by Chairman Torgerson.[66]

59) The Board delegated the responsibility to draw the Rural and Southeast portions of the plan to Marie Green and Peggy Ann McConnochie.[67]

60) During this period, the majority of the Board's focus was on constructing the rural Native districts.[68]

61) The Board believed that some urban population would have to be added to a predominately rural Native effective district.[69]

62) At some unknown point, a decision was made to include the population

66 Trial Test. Of Chairman Torgerson and Taylor Bickford.; Ex. J-62 (Depo J. Torgerson) at 59:18-25
67 Trial Test. Of Chairman Torgerson and Taylor Bickford.; Ex. J-62 (Depo J. Torgerson) at 59:1-4
68 Ex. J-41; Trial Test. Of Chairman Torgerson and Taylor Bickford.
69 Ex. J-41; Trial Test. Of Chairman Torgerson and Taylor Bickford.

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of Ester and Goldstream areas of the Fairbanks North Star Borough into a predominately rural Native effective district.[70]

63) The record does not record the decision or the reason for the decision to include the population of Ester and Goldstream areas of the Fairbanks North Star Borough and the Denali Borough into a predominately rural Native effective district, nor explain why decision was made.

64) Chair Torgerson testified that the only option the Board considered other than Fairbanks was Mat-Su, but he was not sure if Peggy Ann McConnochie and Marie Green looked to other areas of the state.[71]

65) Neither Peggy Ann McConnochie nor Marie Green testified at trial to explain why Fairbanks population was selected to be included in a rural Native effective district.

66) At trial the Board staff testified that the reason for selecting

70 Trial Test. Of Taylor Bickford.
71Testimony of John Torgerson,

Ester/Goldstream and Denali Borough population for inclusion into a predominately rural Native effective district was because the Board believed that these populations voted overwhelming Democratic.[72]

67) The decision required Mr. Holm to wait until the completion of the rural plan in order to complete his work on the Fairbanks plan.[73]

68) During this time, the Board developed two plans -- the so-called TB Plan[74] and the PAME Plan[75] --- that Dr. Handley opined would be non-retrogressive.[76]

69) The rejection of the TB and PAME Plans and the reason for these rejections were not recorded in the Board record.

70) At trial the Board staff testified that the neither the TB Plan nor the PAME Plan were adopted because the TB plan paired paired a Native Senate

72 Trial Test. Of Chairman Torgerson and Taylor Bickford.
73 Trial Test. Of Jim Holm.
74 Ex. J. 31
75 Def. Ex. W
76 Trial Test. Of Taylor Bickford.; Trial Test. Of Dr. Handley as to the TB Plan. The PAME Plan is found at Ex.

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incumbent with a non-Native Senate incumbent, and the PAME Plan paired two Native Senate incumbents. [77]

71) On or about June 13, 2011 the Board adopted the final plan for redistricting.[78]

72) The Proclamation did **not** make any findings or otherwise proclaim that the Board intended to deviate from the requirements contained in Art. VI, Sec. 6 of the Alaska Constitution. [79]

73) The Proclamation proclaimed that "the configuration of House Districts 34, 36, 37, 38 and 39 were necessary to comply with the requirements of the Federal Voting Rights Act.[80]

74) The Proclamation did **not** proclaim the configuration of House Districts 1,2,5, 6, nor Senate Districts A, B, C, or S were necessary to comply with

77 Trial Test. Of Taylor Bickford.;
78 Ex. J-41 @ 21-2
79 Ex. J.-41 @ 1-2
80 Ex. J.-41 @ 1-2

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the requirements of the Federal Voting Rights Act.[81]

75) On or about August 4, 2011, several weeks after adoption of the Proclamation Plan, Dr. Handley submitted her final report.[82]

76) The purpose of Dr. Handley's report was to support the Board's DOJ submission and was not intended to be used by the Board in its deliberations, which predated the report.[83]

77) Dr. Handley's report is confusing as to her opinion of the benchmark standard.[84] In discussing the Benchmark plan, Dr. Handley opined that the the VRA benchmark was four (4) effective house districts, one (1) equal opportunity districts, and three (3) effective Senate Districts.[85] However, in her discussion of alternative plans, she infers a different standard: i.e. "(n)one of these alternative plans provide both four majority Alaska

81 Ex. J.-41 @ 1-2
82 Ex. J-40 The Report is not dated. The Board Record Index indicates that the Report was received August 4, 2011. Dr. Handley was unable to remember exactly when the report was submitted, but confirmed that it was sometime after June Ex. 57 (Handley Depo) at 122: 21-22
83 Trial Test. Of Dr. Handley
84 Trial Test. Of Dr. Arrington
85 ABR00004206; ABR00004208

Native VAP house districts and a fifth district that offers a very sizable Alaska Native VAP, as well as two majority Alaska Native senate districts and a third senate district that has a substantial Alaska Native population and is likely to be effective."[86]

78) Dr. Handley's report opines that the Proclamation plan is non-retrogressive because it offers "five effective minority house districts and three effective senate districts."[87]

79) Clearly, Dr. Handley used different standards in evaluating the alternative plans and the proclamation plan. For example, the Proclamation plan does not provide "four majority Alaska Native VAP house districts and a fifth district that offers a very sizable Alaska Native VAP"; rather it only provides for three (3) majority Alaska Native VAP house districts.[88] Nor does the Proclamation plan provide "two majority Alaska Native senate districts;" rather it only provides for one senate district that has a majority

86 Ex. J-40 @ 25-26
87 Ex. J-40 @28-29
88 Cf. Ex. J-40 @ 29

of Alaska Native VAP.[89]

80) Dr. Handley's report does not mention that the Board developed two alternative plans that she determined to be non-retrogressive, thereby creating the misleading impression that the Proclamation Plan was the only plan known to be non-retrogressive.

81) Dr. Handley's Report does not specifically opine as to the effectiveness standard for Native districts. [90]

82) On August 9, 2011, the Board submitted the Proclamation Plan to the DOJ for preclearance under Sec. 5 of the VRA.[91]

83) In the submission to DOJ, the Board represented that the Benchmark was four (4) effective house districts, one (1) and one equal opportunity house district and one (1) influence house district and three (3) effective Senate

89 Cf. Ex. J-40 @ 31
90 See generally J-40
91 Ex. J- 39

Districts.[92]

84) In the submission to DOJ, the Board represented that the Proclamation plan created five (5) effective house districts[93] and three (3) effective Senate Districts.[94]

85) If the Court was to accept Dr. Handley's report and the Board representations in the DOJ submissions as authoritative and conclusive, this Court would have to conclude that the Proclamation plan exceeded the VRA benchmark by creating five (5) effective districts when the benchmark was only four (4) effective districts.

86) Dr. Handley advised the Board that it should make the plan as "strong as possible," relative to Native effective districts,[95] which was an erroneous statement of the law, in that the Board only had the discretion to exceed VRA Benchmark standards to the extent that the plan did not violate the

92 Ex. J- 39 @ 7-8
93 Ex. J-39 @ 11
94 Ex. J-39 @ 13
95 Trial Test. Of Dr. Handley.

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Alaska Constitution.[96]

87) The Board actions to create a plan that made the Native effective districts as "strong as possible," were taken under a mistaken legal standard respecting its discretion to maximize Native voting strength without regard to the requirements of the Alaska Constitution.

88) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 40 effective was at most 42%, and Proc. HD 40 Native VAP is 62.09%.[97]

89) Dr. Handley testified that the minimum Native VAP to make Proc. HD 39 effective was 42%, and Dr. Arrington testified that the minimum Native VAP to make Proc. HD 39 effective was between 42-50%, but Proc. HD 39 has a Native VAP of 67.09%.[98]

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96 *Hickel v Southeast Conference, 846 P.2d 38, 51-52 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

97 Trial Test. Of Dr. Arrington and Dr. Handley. Dr. Handley agreed that it might be possible that the North Slope district may be effective at less than 42% because of the low voter registration of non-Native North Slope workers at Prudhoe Bay.

98 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29

90) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 38 effective was at most 42%, and Proc. HD 38 Native VAP is 46.36%.[99]

91) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 37 effective was at most 42%, and Proc. HD 37 Native VAP is 46.63%.[100]

92) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 36 effective was at most 35%, and Proc. HD 36 Native VAP is 71.45%.[101]

93) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD R effective was at most 42%, and Proc. SD R Native VAP is 43.75%.

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99 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29

100Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29

101Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40: @ 29. Dr. Handley has indicated that she does not know how low Native VAP in this area of the State may go and still allow a District to remain effective. Id.; See also Ex. 57 (Handley Depo) at 67: 13-22

94) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD S effective was somewhere between 42-50%, and Proc. SD S Native VAP is 46.85%.

95) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD T effective was at most 42%, and Proc. SD T Native VAP is 65.05%.

96) The Court finds that the Native VAP in Proc. HD 36, 39. 40 and SD T exceeded the minimum effectiveness standards to create Native effective districts.

97) Some members of the Board were under the impression that no other plan existed which was non-retrogressive.[102]

98) The Board never offered the testimony of Members Brodie, Green or McConnochie, so that there is no evidence as to whether those members

102Trial Test. Of Chairman Torgerson and Jim Holms

were under the impression that no other plan existed which was non-retrogressive.

99) The Court finds that other non-retrogressive plans were possible,[103] and to the extent that the Board believed that there were no other non-retrogressive plans available to it, the Board worked under a mistaken factual impression.

100) At some undetermined time after the Board's submission of the Proclamation of the Plan to DOJ for preclearnace and while she was working for DOJ on the Texas redistricting, Dr. Handley discovered that her advice to the Board respecting the Benchmark standard was in error: i.e. that the DOJ did not consider influence or "equal opportunity" districts in their determinations as to whether a plan was retrogressive.

101) After discovery of her error, Dr. Handley did not perform any new computations nor analysis to adjust her opinion respecting the benchmark

103 Trial Test. Of Dr. Arrington, Dr. Handley and Leonard Lawson. See Ex. J-31, Def. Ex. W, and Plt. Ex. 14.

standard or whether the plan was retrogressive. Rather, Dr. Handley merely changed her nomenclature to reclassify Benchmark HD 6 as an "effective" district under the benchmark.[104]

102) As a matter of law, the Court concludes that after the 2006 Amendments to Sec. 5 of the VRA, neither influence nor equal opportunity districts are relevant in determining the benchmark standard nor retrogression of minority voting strength.[105]

103) The Board relied upon Dr. Handley's advise respecting the the applicable benchmark and retrogression standards,[106] which were clearly in error.

104) The Board actions were taken under the mistaken legal standard respecting the applicable benchmark and retrogression standards.

104 Trial Test. Of Dr. Handley

105 See also *Texas v USA*, Civil Action No. 11-13-3 (Memo Opinion, December 22, 2011) at 9 citing H.R. Rep. No. 109-478, at 45 (*reprinted in 2006 U.S.C.C.A.N. 618). See also Texas v USA, supra, at 12, 25-28. Despite* the fact that Dr. Handley was a principle expert witness in the Texas v USA case, upon cross examination, Dr. Handley did not know that Texas was arguing in favor of the counting "opportunity" districts in the benchmark and retrogression standards, and that the the three-judge panel's memorandum opinion in that case held that use of "opportunity" districts was not permissible for such purposes. Dr. Handley also testified at trial that she was familiar with the DOJ Guidelines, however, she was unaware that the DOJ Guidelines clarified that the Department would be guided by the Congressional directive to "ensure that the ability of such citizens to elect their preferred candidate of choice is protected. That ability to elet either exists or it does not in any particular circumstances.". DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)

106 Trial Test. Of Chairman Torgerson and Jim Holms

PLAINTIFFS CLAIMS

105) Plaintiffs have challenged a number of House and Senate Districts as violative of the Art. VI, Sec. 6, and the Equal Protection requirements of of the Alaska Constitution.

106) Defendants have variously denied the violations and, in the alternative, have argued that any such violations may be excused by the necessity to comply with the Federal Voting Rights Act.

107) Prior to Trial, this Court ruled that the Proclamation Plan violated the Alaska Constitution with regard to Proc. HD 2 (compactness), HD 1 (Compactness), HD 38 (socioeconomic integration), and HD 37 (compactness and contiguity). Additionally, the Court ruled that splitting the excess population of the Fairbanks North Star Borough into two house districts (i.e. HD 6 and 38) violated Alaska's equal protection clause.

108) Prior to trial the Court held that the constitutional violations respecting

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HD 2 could not be excused by the necessity to comply with the Federal Voting Rights Act. The Court reserved for trial on the issue of whether the remaining violations of Alaska's Constitution may be excused by the necessity to comply with the Federal Voting Rights Act.

109) Plaintiffs reserved for trial their claims that Proc. HD 5 violated the Alaska Constitution's requirement that House Districts be compact.

110) Plaintiffs reserved for trial their claims that Proc. SD A-C and S violated the Alaska Constitution's Fair and Effective Representation requirements.

STANDARD OF REVIEW/ BURDENS OF PROOF

111) This Court reviews the redistricting plan to ensure that it is not unreasonable and is constitutional under Art. VI, § 6 of Alaska's Constitution.[107]

107 *Groh v Eagan,* 526 P. 2d 863 (Alaska, 1974); *Carpenter v Hammond,* 665 P.2d 1204 (Alaska 1983)