IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 REDISTRICTING CASES	Supreme Court No. S-14441 Superior Court No.: 4FA-11-2209 CI

PETITIONS FOR REVIEW FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

PETITION FOR REVIEW
(Riley et. al)

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PRINCIPAL CONSTITUTIONAL PROVISIONS RELIED UPON

AK. CONST. Art. VI, Section 6

The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

I. INTRODUCTION

George Riley and Ron Dearborn,[1] the Plaintiffs at trial below, seek partial review of the *Memorandum Decision and Order Re: 2011 Proclamation Plan*[2] issued by the Superior Court in *In Re 2011 Redistricting Cases*[3] While the Superior Court invalidated four (4) House Districts in the 2011 Redistricting Proclamation Plan for violation of Art. VI, Sec. 6 of the Alaska Constitution, the Plaintiffs seek review of the Superior Court's decision to sustain that the violation of the Alaska Constitution

II. STATEMENT OF THE QUESTIONS [App. R. 403(b)(1)(B)]

1. Did the Superior Court err in not invaliding the plan based upon process claims?
2. Did the Superior Court err in holding that the City of Fairbanks population was too small to give rise to an anti-dilution claims?
3. Did the Superior Court err in failing in holding that the Voting Rights Act excused violation of borough's rights to proportional representation/ split borough excess borough population.

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1 George Riley and Ron Dearborn were the Plaintiffs at trial below ("Riley Plaintiffs"). Riley and Dearborn are qualified voters who respectively reside in the Ester and Goldstream areas of the Fairbanks North Star Borough (FNSB).

2 Issued February 3, 2012.

3 Case No. 4FA-11-2209 CI (4th Jud. Dist., Alaska).

III. STATEMENT OF FACTS [App. R. 403(b)(1)(A)]

This case involves a challenge the 2011 Redistricting Proclamation Plan which was adopted on June 13, 2011 by the Alaska Redistricting Board. To a large degree, the facts as set forth in the Superior Court's Memorandum and Decision[4] is a complete and thorough statement of the facts in this case. However, critical to the equal protection arguments presented by this petition are the proportional representation population numbers. In dividing Alaska into 40 house districts using the 2010 US Census, the ideal district size is 17,755 persons.[5] The Fairbanks North Star Borough (FNSB) has a population of 97, 581[6] This means that the Borough has sufficient population to comprise 5.5 house districts, not the 5.49 found by the Court.[7] In dividing Alaska into 20 senate districts using the 2010 US Census, the ideal district size is 35,510 persons.[8] The City of Fairbanks has a population of 31,535.[9] This means that the City has sufficient population to comprise 88.8% of a senate district.[10]

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4 See Joint Excerpt of Record (hereinafter referred to as Jt. Exc.)
5 Jt. Exc. 106
6 Jt. Exc. 108; ARB 6584 - 6586
7 The Court incorrectly rounded down. The exact percentage is 5.4959729. If this number is rounded to the nearest hundredth, the result is 5.50. Rounding up is actually more appropriate in any case because the the City Voting Age Population is relatively higher in the City than in the Borough at large. See Jt. Exc. 113 n 174 & 175
8 I..e. 17,755 x 2.
9 Jt. Exc. 112
10 Id.

IV. STANDARD OF REVIEW

In exercising this Court' s jurisdiction to review redistricting plans, this Court employes a standard of review as it would review a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. Specifically, this Court will review the plan to insure that the Board has not exceeded the power delegated to it, to determine whether the plan is reasonable and not arbitrary, and that the plan meets the requirements of the Alaska Constitution. The Court applies a *de novo* review as to the determination of facts developed in the Superior Court and the Board Record.[11]

V. ARGUMENT

1. The Court Erred In Not Invaliding the Plan Based Upon Process Claims.

The Riley Plaintiffs sought to invalidate the Proclamation Plan because the Board followed an invalid process in drafting the plan.[12] Specifically, the Board did not attempt to draft a plan that complied with the Alaska Constitution prior to pursuing other alternatives. It is undisputed that the Board did not attempt to draft a plan complying with the Alaska Constitution.[13] In deposition Chairman Torgerson

11 *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1357-1358 (Alaska 1987), *citing Groh v Egan,* 526 P.2d 863 (Alaska, 1974)

12 Jt. Exc. 205

13 See Memo: Sum Jud. Invalid Process, at 4; See also accompanying Ex. 1 & 2

and Board-member Holm both admitted that the Board never attempted to draft a plan whose first priority was compliance with the Alaska State constitution.[14] Rather, the Board's prime focus from the beginning of the process was to draft a plan that had sufficient Native effective and influence districts to meet the Voting Rights Act (VRA)[15] benchmark.[16] At trial, the Board's expert testified that they were trying to maximize Native voting strength in order to assure non-objection from the Department of Justice under the VRA.[17] It is largely undisputed that race was "the predominate factor" motivating the drawing of district lines, and traditional, race neutral redistricting principles were subordinated to race.

As a result of this primal focus upon race and compliance with the VRA, the resulting plan had many problems. Specifically, HD 37 was found to violate compactness and contiguity requirements of the Alaska Constitution, which the Board did not seriously deny.[18] Equally, HD 38 violated socioeconomic integration

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14 Id.

15 42 U.S.C 1973c (2006) For discussion of the VRA requiremens see Jt. Exc. 43-44

16 Jt. Exc. 206. The Court noted that "The Board does not deny that it started by drawing the minority districts on the advice of their Voting Rights Act expert." Id. For a discussion of the "benchmark" see Jt. Exc. 4

17 Test. Of Dr. Handley (Log Nos. 10:47:45- 10:48:49 There were major problems with the VRA analsysis which are discussed in the Bristol Bay Amicus Brief. See Plt. Exc. 5 et. seq.

18 Jt. Exc. 183; Jt. Exc. 186 et. seq.

requirements of the Alaska Constitution, which the Board did not seriously deny.[19] Additionally, the Board split Fairbanks "excess population" between HD 38 and 6 giving rise to an inference of discriminatory intent, and impairment of FNSB voters rights to fair and effective representation.[20] The trial Court found that neither HD 37 nor HD 38, as configured, were necessary to comply with the VRA.[21] Additionally, despite the fact that the Mat-Su Borough did not have significant excess population, that Borough boundary was also split twice.[22] The Kenai Borough boundary was also split twice.[23] The Trial Court also found that HD 1 and 2 in the FNSB violated the Alaska Constitution,[24] and, upon information and belief, the Board is not seeking review of those decisions.[25]

In *Hickel*,[26] this Court predicted such a result when a Board first ties to use race as "the predominate factor" motivating the drawing of district lines. In that case, the

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19 Jt. Exc. 148

20 See discussion in subsection 3 below.

21 Jt. Exc. 121-133

22 See discussion *infra*, subsection 2.

23 Id. However, it should be noted that the splits in the Mat-Su and the Kenai did not result in a diminution of proportional representation in those boroughs.

24 Jt. Exc. 114-117

25 While the Trial Court denied the claims of Petersburg, the Trial Court has suggested that this Court review the matter *sua sponte* because at trial the Court learned that the analysis presented by the Board's expert in summary judgment practice was flawed, and the Southeast districts may be questionable. See Jt. Exc. 135-136

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

Court invalidated Southeast Alaska Native effective districts which had Native VAP in excess of amounts needed to make the districts effective using a near identical process used by the Board in the present case.[27] This Court criticized this process as follows:

> Our conclusion underscores the error in the Board's methodology in reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution. The Board was advised to expect that any challenges to the reapportionment plan would come under the newly amended section 2 of the Voting Rights Act. Consequently, the Board accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution. This methodology resulted in proposed district 3, a district which does not comply with the requirements of the Alaska Constitution. However, proposed district 3 is not required by the Voting Rights Act, either.
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> Article VI, cl. 2 of the United States Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land...." This mandates that provisions of state law, including state constitutional law, are void if they conflict with federal law. To the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way. However, to the extent that those requirements are not inconsistent, they must be given effect. The Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.
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> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to

27 *Hickel,* 846 P.2d at, 51 It should be noted that in the present case the Native VAP in all rural Native effective districts also exceeded levels necessary to comply with the VRA. Jt. Exc. 127-128

satisfy Voting Rights Act requirements.[28] (emphasis added)

This Court has provided specific guidance to the Board respecting the process to be used, and in this case the Board ignored that guidance and replicated the flawed process used by the Board in *Hickel,* with the inevitable result of great and unnecessary violence to the Alaska Constitution.

This Court's guidance in *Hickel* was an eery premonition of the U.S. Supreme Court's racial gerrymandering cases which followed shortly after *Hickel.* During the 1990 redistricting cycle, the Courts heard several "racial gerrymandering attacks in the federal courts for denying White voters their right to equal protection of the laws under the 14th Amendment.[29] The U.S. Supreme Court rebuked the Justice Department for its maximization policy in Georgia and held that a racial gerrymander must be subjected to 'strict scrutiny" to determine whether it was "narrowly tailored" to achieve a "compelling state interest" in complying with the VRA.[30] Many of the racial gerrymanders were struck down by the federal courts because their drafters had not

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

29 *Shaw v Reno (Shaw I)* 509 U.S. 630 (1993); *U.S.v Hays,* 515 U.S. 737 (1995); *Miller v Johnson,* 515 U.S. 900 (1995); *Bush v Vera,* 517 U.S. 952 (1996); *Shaw v Hunt (Shaw II),* 517 U.S. 899 (1996); *Lawyer v Dept. of Justice,* 521 U.S. 567 (1997)

30 *Miller v Johnson, 515 U.S. 900, 924-25 (1995); See also Shaw I, supra.*

followed "traditional districting principles."[31] The *Hickel* process which requires an Alaskan Redistricting Board to first focus upon compliance with Alaska's Constitution is in accord with the U.S. Supreme Court's direction that state redistricting authorities should follow "traditional districting principles" and serves as a powerful prophylactic to racial gerrymander claims experienced in the Lower '48 States. It should be presumed that when this Court states that "The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution" that this Court is not offering causal advice. Compliance with the Alaska Constitution is no fools errand,[32] particularly when such compliance insulates Alaska process from racial gerrymander claims. Moreover, the process assures a demonstrable record that when the strictures of the Alaska Constitution are minimized, such minimization is necessarily required by the demands of federal law.

To some degree, the Trial Court excused the need to comply with this process due to time constraints.[33] However, this court addressed this issue in 2001. While recognizing the short time-frames in redistricting, this Court made clear "...these great

31 *Shaw I, surpa.*; *Miller v Johnson, surpa.; Bush v Vera, supra.; Shaw II supra.*

32 At oral argument before the Trial Court the Board's counsel explained that the reason that the Board did not first attempt to comply with the Alaska Constitution was that it was a "fools errand".

33 Jt. Exc. 206

difficulties do not absolve this court of its duty to independently measure each district against constitutional standards."[34] The failure of the Trial Court to appreciate the wisdom of this approach was error.

2. Court Erred In Holding That The City Of Fairbanks Population Was Too Small To Give Rise To An Anti-Dilution Claim.

The Riley Plaintiffs alleged the plan violates Fairbanks City voters' right to fair and effective representation because the two (2) house districts principally comprised of City voters (i.e. Proc. HD 1 and 4) were divided between two Senate Districts (Proc. SD A and B), and that City voters do not comprise a majority of voters in either resulting Senate district.[35] It is undisputed that the City comprises 89% of an ideal Senate District.[36] In the previous plan adopted in 2001, city voters comprised two (2) house districts, which are paired to comprise a single Senate District.[37] Thus, the Proclamation plan splits the historic Fairbanks Senate Seat.

In denying Plaintiffs challenge, the Court held that the voters within the City of Fairbanks have "no right to strict proportionality, the anti-dilution rule cannot be

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34 In Re 2001 Redistricting Cases, 44 P.3d 141, 147 (Alaska 2002).
35 Ex. J-46, at 18 (ARB Admissions)
36 See also, Memo Decision, at 112.
37 Memo Decision, at 112.

violated if the City cannot support a senate district based on it population. No further analysis is necessary."[38] In reaching this holding, the Court failed to cite any legal authority. In reaching this conclusion, the Court was in error.

The Equal Protection Clause of the Alaska Constitution guarantees voters 'fair and effective representation,[39] which guarantees the right to proportional geographic representation.[40] The right of fair and effective representation prohibits the Board from intentionally discriminating against a borough or other "politically salient class" of voters by invidiously minimizing that class 's right to an equally effective vote.[41] While the Trial Court made no finding as to whether the residents of the City of Fairbanks constituted a politically salient class,[42] the Court held that the population of

38 Memo Decision at 113

39 *Hickel,* 846 P.2d at, 48-49

40 *Kenai Peninsula Borough , 743 P.2d, at 1369, 1372-73*

41 *In re 2001 Redistricting Cases,* 44 P.3d 141, 144 (Alaska, 2002)

42 The Trial Court did not specifically rule on whether Fairbanks City residents constitute a "politically salient class"distinquishable from Borough voters residing outside the City. Generally, the first inquiry into a fair and effective representation claim is whether the voters in question constitute a "politically salient class". *In re 2001 Redistricting Cases, 44* P. 3d 141, 144 (Alaska 2002), citing See also, *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1370-73 (Alaska, 1987); *Karcher v Daggett,* 462 U.S. 725, 754 (1983) (Stevens, J., concurring); *Gaffney v. Cummings, 412 U.S. 735, 754 (1973)* However, this Court has generally held that voters having a common residence within the same municipality constitute a "politically salient class". See *Kenai Peninsula Borough v State,* 743 P.2d at, 1370-73 [voters within the Unified Municipality of Anchorage a politically salient class]; *Hickel v Southeast Conference, 846 P.2d 38, 52-53 (Alaska, 1992)* [Voters within the Mat-Su Borough constiutte a politically salient class] This Court's analsyis has generally focused upon the municipal status rather than the class of municipality involved. A City is merely one type of muncipality authorized by Alaska

City residents was not sufficient to give rise to a cognizable claim for proportional representation under Alaska's Equal Protection Clause.

While the Trial Court offered no legal citation in supporting its ruling, this Court in *Kenai Peninsula Borough v State,* held that Anchorage residents constituting 51% of a district, was of a sufficient size to give rise to anti-dilution claims.[43] Similarly, in *In re 2001 Redistricting Cases,* this Court held that Anchorage residents constituting 60% of a district and Mat-Su's population equal to 80% of a district were of sufficient

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law, which also includes Boroughs and Unified Municipalities. AS 29.04.010- .60.

The Court made several findings which define and distinquish the political interests of Fairbanks City voters vis-a-vis Borough voters outside the City. These findings were based upon the Plaintiffs uncontroverted evidence. Specfically, The Court found that the City of Fairbanks is a First Class Home Rule Cityinside the Fairbanks North Star Borough, a second class borough. *Memo Decision, @ 112 n 169.* The service levels differ between City and non-City residents of the borough. The City provides local police, professional fire, curbside garbage pick-up, building code & enforcement, and paved streets. Outside the City, services are more limited: Trooper coverage, but no local police; volunteer fire service; road-service areas generally maintaining unpaved streets, no local building codes and trash servcies through a system of dumpster transfer stations. *Memo Decision, @ 112-3 n 170.* The City has independent taxing authority and recieves revenue sharing, operational and capital funding directly from the State, while FNSB residents recieve state assistance through a complex system of borough pass-thru and non-profit coprations in cooperation with the FNSB. *Memo Decision, @ 113 n 171.* The City and Borough have experienced conflict over annexation issues that appear before the legislature as well as differing approaches to such issues as air quality regulation.*Memo Decision, @ 113 n 172.* While the Borough may be socioeconomically integrated as a whole, these differences in political interests clearly make the voters within the City a politically salient class of voters distinct from the non-City borough voters.

43 743 P.2d at, 1373

size to give rise to anti-dilution claims.[44] The court found that at these populations would be sufficient to control a district.[45] These holdings are in accord with established presidence that in the absence of any evidence to the contrary, it is presumed, as a matter of law, that a salient class of voters will have effective control of a district when the class constitutes over 50% of the district in question.[46] Thus, there is no question that the City of Fairbanks, with population equal to 89% of a Senate District, has the ability to control a Senate Distict, and is of sufficient size to give rise to anti-dilution claims.

Of course, it is possible that other factors such as voting turn-out between various groups, rates of cross-over; voting group cohesion and differential barriers to voting experienced by various groups may raise or lower the necessary VAP a group requires to be "effective".[47] While substantial evidence was presented at trial respecting the Native VAP levels necessary, in various parts of the state, to constitute effective Native control of a district, there was no evidence presented by the Board to

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44 *44 P.3d at, 144*

45 *44 P.3d at, 144 n 7*

46 *Beer v United States, 425 U.S. 130, 141 (1976)* It should be noted that as to this point, the opinion was unanimous. Cf. Id., at 425 U.S., at 144 (White, J. dissenting) and Id., at 425 U.S. 158-161 (Marshall, J. dissenting).

47 *See generally* Trial Testimony of Dr. Arrington and Dr. Handley.

suggest that residents of the City of Fairbanks might exercise effective control of a Senate District with VAP levels below 50%. Thus, without any supporting evidence in the Board record or adduced at trial, the Court found that the City "effectively controlled" Senate District B, of which City residents comprised only 48.36%. [48] This was clear error, in that the absence of other evidence, the Court should have concluded that over a majority of City voters was necessary to provide effective control of a Senate District.

The only time that this Court has found that a municipal group had insufficient population to give rise to an anti-dilution claim is in the case of the Lake and Pennisula Borough in the *In re 2001 Redistricting Cases.*[49] The population at issue in that case only comprised 11% an ideal district.[50] The Court in that case noted that "the Lake and Peninsula Borough falls **far** short of having enough population to support an election district."[51] (emphasis added) Of course, the present case is clearly distinquisable from the circumstances of the Lake and Pennisula Borough in 2001. Specifically, at 11% of an ideal district, the Lake and Pennisula Borough could not control a legislative

48 *Memo Decision, @ 113.*
49 *In re 2001 Redistricting Cases, 44 P.3d at, 145*
50 In *2001*, the ideal district size was 15,673, and the population of the Lake and Peninsula Borough was 1,823. *In re 2001 Redistricting Cases,* No. 3AN-01-8914 CI (Memorandum and Order; 2/1/2002) at 21 and 111.
51 *In re 2001 Redistricting Cases, 44 P.3d at, 145*

district, whereas at 89% of an ideal senate distict, the City of Fairbanks has ample population to control a legisaltive district under any scenerio. That distinction does not alter the general rule stated in *Hickel,* "The division of a borough (or a city) which otherwise has enough population to support an election district will be an indication of gerrymandering. There must be some legitimate justification for not preserving the govenrment boundaries in such a case." [52] (emphasis added) Since the Trial Court was mistaken respecting the the sufficincy of population to give rise to a anti-dilution claim, the Court should clearly reverse and remand the matter.[53]

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52 Id., citing *Hickel, 846 P.2d, at 50 n 20*

53 Of course, the Trial Court never reached the issue of whether there was justification for the splitting the City of Fairbanks into two Senate Districts. Boardmember Jim Holmes never offered any justification for splitting Fairbanks City. Rather, he stated his priority was putting the farmers in Rosie Creek (HD 5)and Salcha (HD 6) together. (Log. 10;18:33-10:19:35. But, of course, he had no idea how many farmers were in these areas. See also Log No 10:28:37- 10:31:17. In any case, common sense would suggest that the number of Fairbanks area farmers would be less than the population of the Lake and Peninsula Borough, and, if he is taken at his word, Mr. Holmes was disenfranchising a large politically salient class (city voters) in favor of an improbably small group. It is more plausible, that Mr. Holm's "farmer justification" is pretextual, and that there is no justification for separating the City of Fairbanks into two Senate Districts.

In any case, "in the context of discrimination against a political group, the intent requirement is minimal." *Hickel v Southeast Conference, 846 P.2d 49 n 18.* Rather, Senate districts which meander and ignore political subdivision boundaries and communities of interest will be suspect under the Alaska Equal Protection Clause." *Kenai Peninsula Borough v State, 743 P.2d at 1365 n 19.* "District boundaries which meander and selectively ignore political subdivisions and communities of interest are indicative of constitutional violation." Id. *at 1369 n 32.* As noted above, the Board offered no serious justification for splitting the City of Fairbanks. It should be noted that the treatment of Fairbanks was very different than the treatment of Juneau, whose population is slightly less than Fairbanks with 31, 275. The two Juneau House Districts (HD 31 and 32) were paired to form a single Senate District (SD P)

3. **The Trial Court Erred In Failing In Holding That the VRA Excused Violation Of Borough's Rights To Proportional Representation/ Split Borough Excess Borough Population.**

The Riley Plaintiffs also alleged the Proclamation Plan violates the guarantee of fair and effective representation contained in Alaska's Equal Protection Clause because it unnecessarily split the excess population of the Fairbanks North Star Borough in two districts (HD 6 and 38), thereby diluting the effective voting strength of borough voters.[54] In a pre-trial order, the Court agreed with the Plaintiffs and held that the splitting of the Borough's excess population indicated intentional discrimination against a geographic region (i.e. the FNSB)[55] and that the burden of

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The Trial Court's inability to find partisan motivation for the Fairbanks configuration cannot be supported by the record. The plan, drafted by a Republican dominated Board, paired Fairbanks two democratic Senators. Memo Decision, at 53 And if the City had not been split into separate Senate Districts, the Democratic Senators could not have been paired, because Sen. Thomas lives outside the city in HD 3. Equally, a simple review of the map demonstrates that if HD 5 and 6 were not paired with each other, which was Mr. Holm's main concern, the Democratic Senators could not have been paired because HD 5 would have to be paired with either HD 4 (containing Sen. Paskvan) or HD 3 (containing Sen. Thomas). Additionally, Mr. Holm testified that he was very concerned about protecting Rep. Wilson and Sen. Coghill, both Republicans, and to insure that "they were not drawn out of their districts" Log Nos. 10:57:55l- 11:00:28. Mr. Coghill had not similar interest in protecting the Democratic incumbents. id. And finally, Mr. Holm only consulted Republicans regarding redistricting. Log Nos. 10:39:35-10:45:32. And of course, there was uncontroverted testimony that Chairman Torgerson intended to "pay back" the Democrats for the 2000 redistricting. Test. Of J. Hardenbrook, Log Nos. 12:19:45- 12;22:12 Taken together, the clear preponderance of the evidence supported a finding of partisan motivation rather than the more implausible goal of creating a Fairbanks Farmer District.

54 Plt. Complaint, Para 19

55 Jt. Exc. 211, at n 5

proof shifted to the Board to establish that such decisions were made for legitimate, non-discriminatory purposes.[56] In the same pre-trial order, the Trial Court held that its prior decision holding that HD 38 was not socio-economically integrated as required by Art. 6, Sec. 6 of the Alaska Constitution[57] also shifted the burden of proof to the Board to "provide legitimate non-discriminatory reasons for its configuration of HD 38."[58] The Board asserted a "VRA excuse defense": i.e. the need to comply with the Voting Rights Act was a "legitimate non-discriminatory" reason for both violations of the Constitution.[59] No other excuse was offered to justify the violations.

The Court's post-trial Memorandum Decision, however, found that the Board "did not violate the geographic proportionality rights of the voters of the FNSB by splitting its excess population," because "the Board had valid, non-discriminatory reasons for splitting (FNSB's) excess population between two districts including compliance with the federal VRA and the population equality requirements for urban areas of Article VI, Section 6 of the Alaska Constitution."[60] However, in that same decision, the Trial Court found that the VRA did not excuse HD 38's violation of the

56 Jt. Exc. 209, 212..
57 Jt. Exc. 148
58 Jt. Exc. 212
59 42 U.S.C. 1973C (2006)
60 Jt. Exc. 110. The Court also found that the configuration of HD 37 is not necessity under the VRA. Jt. Exc. 132.

socio-economic integration requirement of Art. 6, Sec. 6 of the Alaska Constitution because "the configuration of Proclamation House District 38 is not necessary under the VRA."[61]

This Court has consistently held that the VRA excuses a violation of Alaska's Constitutional redistricting requirements only upon a showing that the violation was necessary to comply with the VRA.[62] In particular, necessity is the applicable standard when considering whether the VRA excuses violations of the fair and effective representation requirements of Alaska's Equal Protection clause.[63] While the

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61 Jt. Exc. 132

62 *Hickel v Southeast Conference, 846 P.2d, at 51—52;* [Southeast Native Districts invalid for lack of compactness and socioeconomic integration where such configuration not "necessary" to comply with VRA]; *In re 2001 Redistricting Cases, 44* P. 3d, 143 [An otherwise non-compact district may be justified upon a finding that the district's configuration is "required" by the Voting Rights Act.];*Kenai Peninsula Borough v State, 743 P.2d at, 1361.*[Board failed to make showing that population deviation greater than 10% was "necessary" to comply with VRA]; See also, *In re 2001 Redistricting Cases, 44* P. 3d, 146 [VRA does not require a state to avoid retrogression of minority voting strength if doing so would create a maximum population deviation exceeding ten percent]

63 *In re 2001 Redistricting Cases, 44* P. 3d, 146-147 [Board proved "necessary" to divide Borough house districts between differing Senate districts to allow configuration of adjacent Native effective districts under VRA]

To some extent, the Trial Court was obviously trying to "harmonize" the Alaska Constitution and the VRA as the Court did in *In Re 2001Redistricting Cases*. See Jt. Exc. at 43. However, the present case is clearly distinguishable. Splitting Mat-Su voters between two different Senate Districts in 2001 was necessary in order to configure adjacent rural areas in the Ahtna and Doyon into Native effective Districts. *44* P. 3d, 146-147. But in that case, Mat-Su population was not submerged into rural Native effective districts, and there was no underlying diminution of Mat-Su voting strength because the Mat-Su voters continued to effectively control an appropriate number of Senate Seats. Id. See *In re 2001 Redistricting*

Trial Court articulated the correct standard, it clearly misapplied the standard relative to its review of the split in FNSB population between two house districts on several points.

First, the Trial Court failed to make a findings respecting necessity when it considered the FNSB's split population issue. Specifically, the Trial Court merely held that "The Board added 5,5000 people into Proclamation House District 38 in order to comply with the federal Voting Rights Act."[64] The Court never found that this was "necessary'. Indeed, as noted above, the Court affirmatively found "the configuration of Proclamation House District 38 is not necessary under the VRA."[65] (emphasis added) It is axiomatic that if the configuration of HD 38 added 5,500 FNSB residents into the district, but the district was not necessary under the VRA, the addition of the

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Cases, No. 3AN-01-8914 CI (Memorandum and Order; 2/1/2002) at 21 and 117. Thus, the 2001 Mat-Su Senate pairing issue was about "harmonizing" compliance with the VRA when there was no underlying violation of Mat-Su voters' right to fair and effective representation. In the present case, excess FNSB population is divided between two districts for the express purpose of diluting their vote. The majority of FNSB excess population is placed in a district that is designed to be a rural Native effective district, which necessarily means that it will not be controlled by FNSB voters, while the remaining FNSB excess population (approximately 2500) placed in HD 6 is "far to small" to exercise effective control of any district. While attempts to "harmonize" State Constitutional law and Federal law are laudable, that may only be accomplished where conflicts are indirect or inferential. In the present case, the conflict is direct and irreconcilable. In this circumstance, harmony is not a realistic goal.

64 Jt. Exc. at 109

65 Jt. Exc. 132

5,500 FNSB residents into the district was not necessary for any purpose.[66] The failure of the Trial Court to consider whether the addition of the FNSB population was "necessary" in the context of the split population issue was clear reversible error, particularly where the Court otherwise found HD was not necessary for VRA compliance.

Second, the Trial Court incorrectly applied the notions of rebuttable inferences resulting form the splitting of the FNSB's excess population. The Trial Court correctly stated that, as a matter of law, "failure to keep all of a borough's excess population in the same house district provides some evidence of discriminatory intent."[67] And the Court correctly noted that such a division creates a rebuttable inference of discriminatory intent.[68] As previously stated, the Court found compliance with th eVRA to be a "valid and non-discriminatory reasons" to split FNSB's excess population.[69] However, as noted above, those reasons are only "valid and non-discriminatory" if the the VRA required such a configuration. As noted, the Trial

66 It would be mere speculation to suggest that some FNSB population may be needed to be added to a rural district under some other unknown configuration that may meet the "necessity" test.

67 Jt. Exc. 108 citing *In re 2001 Redistricting Cases, 44* P. 3d, 146-147

68 Id. "In the context of discrimination against a political group, the intent requirement is probably minimal" and it must be assumed that the "likely political consequences" of a reapportionment scheme are intended. *Hickel v Southeast Conference,* 846 P.2d, at 49 n 18

69 Jt. Exc. 110

Court expressly held that the configuration used by the Board, particularly HD 38, was not necessary.[70] Thus, dividing the FNSB excess population into two house districts was not necessary and was therefore not justified by a 'valid and non-discriminatory reason".

More importantly the Trial Court ignored the "likely political consequences" which serves as circumstantial evidence of intentional discrimination.[71] It is undisputed --- and the Trial Court found--- that the Board intended to submerge non-Native white Democrats in the FNSB into a rural district that it intended to be effectively controlled by rural Natives.[72] To the extent that the Board intended that rural Native voters would have effective control over HD 38, it also intended the "likely political consequence" that FNSB voters would not have effective control of the district. In the words of Board-member Holm, who was the architect of the Fairbanks districts, the plan was to "shed 5,500 folks" from the FNSB into the rural district effectively controlled by rural Native voters.[73] Clearly, the Board intended to "shed" FNSB excess population into a rural Native district which would have dilute their

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70 Supra.

71 *Hickel v Southeast Conference,* 846 P.2d, at 49 n 18

72 Jt. Exc. 130 See also Test. Of Jim Holm Tr. 10;36:33 & 10:51:19

73 Test. Of Jim Holm Tr. 09:08:15 And of course, Mr. Holm testified that the folks was looking to shed were Democrats. Tr. 10;36:33 & 10:51:19

voting strength.

Third, the Trial Court never reached the interplay between proportionality, and rebutting an inference of intentional discrimination. While "strict proportionality is not a constitutional requirement .... the interest of individual members of a geographic group or community in having their votes protected from disproportionate dilution by the votes of another geographic group or community" is a significant constitutional interest."[74] "(U)pon a showing that the Board acted intentionally to discriminate against the voters of a geographic area, the Board must demonstrate that its plan will lead to greater proportionality of representation"[75] In this case, the Board could have harmonized and optimized the proportional representation rights of various areas rather than simply destroying FNSB's voters proportional representation.

The FNSB had about 8,700 "excess population" and the Board believed that it needed to move 5,500 people from a non-rural population into a Native effective rural

74 *In re 2001 Redistricting Cases, 44* P. 3d, 149-150 citing *Kenai Peninsula Borough, 743 P. 2d, at 1371*

75 Hickel, 846 P.2d at 49; S*ee also Kenai Peninsula Borough,* 743 P.2d at 1372

district.[76] It could not move all FNSB "excess population" into the rural area because it would destroy Native effective control over the district.[77] Thus, the Board split the FNSB population into two house districts.[78] Plaintiffs argued that the Board could have looked to other areas, which the Court mischaracterized as a "not-in-my-backyard" argument.[79] This mischaracterization misses the point that splitting the FNSB excess population into two house districts is unnecessary from the perspective of achieving overall proportionality.

If the Board needed 5,500 people from a non-rural area it could have taken the population from any other road connected Borough without destroying proportionality for those Boroughs.

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76 Jt. Exc. 109 the actual number is 8,806
77 Id.
78 Id.
79 Jt. Exc. 131.

Borough[80]	Total Pop.	Ideal Districts[81]	Excess Pop	# of Splits	Controlled Districts[82]	Split Pop.	Pop. Less 5,500	Ideal Dist. Less 5,500
Anchorage	291, 826	16.43	7, 746	1	16	6, 825	286, 326	16.13
Fairbanks	97, 581	5.5	8, 806	2[83]	5	7, 210	92, 081	5.19
Kenai	55, 400	3.12	2, 135	2[84]	3	1, 339	49, 700	2.81
Mat-Su	88, 995	5.01	220	2[85]	5	17, 772	83, 495	4.7

As the above chart shows, the plan splits borough excess population in Fairbanks, Kenai and Mat-Su between two house districts. However, the Kenai and Mat-Su Boroughs retain effective control of the number of districts roughly proportionate to their population. Fairbanks does not: i.e. the FNSB looses ½ of a house district.

Fairbanks has the largest "excess population" and is the only borough in which the splits reduce the proportionate number of districts that borough voters have

80 All data from the Split Report for the Proclamation plan. Plt. Exc. 2-4 (ARB 6584-6586)
81 All numbers rounded to the nearest hundredth.
82 Number of Districts with 50% or more of population from indicated borough.
83 Between HD 38 and 6
84 Between HD 35 and 36
85 Between HD 6 and 11

effective control. However, if 5,500 were taken from any of the other boroughs, those boroughs would continue to have population sufficient to retain effective control of the number of districts roughly proportionate to their population. Fairbanks is the only Borough that would necessarily loose proportional representation by the loss of 5,500 people.[86] While taking 5,500 people from any of the other road boroughs would necessarily require splitting population between two house districts, such a split may be justified because it would "lead to greater proportionality of representation," which is the preferred method of dealing with multiple splits of excess borough population.[87]

Finally, the Court ignored that the Board's purpose was, in fact, illegitimate as a matter of federal law. "To the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."[88] Strict scrutiny applies where race was "the predominate factor" motivating the drawing of district lines, and traditional, race neutral redistricting principles were subordinated to race.[89] Splitting of borough excess population violates Alaska's traditional

86 This is a mathematical certainty. The most underpopulated district in the plan is HD39 with 16,892 people. If the board had only put 5,500 FNSB residents in HD 38, the remaining population of Fairbanks were remaining borough population would be 92, 081. If that number were divided by HD 39's population, only five districts would have a majority of FNSB residents.

87 *Hickel*, 846 P.2d, at 49. See also *Kenai Peninsula Borough*, 743 P.2d, at 1372

88 *Bush v Vera*, 517 U.S. 952 (1996)

89 Id.

redistricting principles, which are race neutral. Three of the resulting Fairbanks Districts (i.e. HD 1, 2, and 38) as well as HD 37, violated Alaska's other traditional redistricting principles of compactness, contiguity and socioeconomic integration. As discussed above, the Board did not make an effort to draw a plan based upon compliance with the Alaska Constitution, but focused near single-mindedness in developing Native effective districts. This single-mindedness included purposefully putting Democratic leaning voters into HD 38, which is clearly using race and partisanship as proxies for each other. If the Board is to be taken at their word, race was the predominate reason for splitting the Fairbanks Borough population into two house districts, which gives rise to strict scrutiny under the Federal Constitution, and was an illegitimate purpose.

VI. CONCLUSION

The Court should Court should reverse and remand the plan to the Board to make corrections that 1) attempt to comply with the Alaska Constitution, 2) avoid splitting the FNSB excess population into two house districts, and 3) avoid splitting the City of Fairbanks into two Senate Districts.

Date: February 13, 2011

Michael J. Walleri
Attorney for Petitioners/ Plaintiffs
Alaska Bar No. 7906060

Certificate of Service
I certify that a true and correct copy of the foregoing was served by e-mail on this February 13, 2011 to:

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IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 REDISTRICTING CASES	Supreme Court No. S-14441 Superior Court No.: 4FA-11-2209 CI

PETITIONS FOR REVIEW FROM THE SUPERIOR COURT
FOURTH JUDICIAL DISTRICT
THE HONORABLE MICHAEL P. MCCONAHY, PRESIDING

EXCERPT OF RECORD
VOL I OF I

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Filed in the Superior Court of
the State of Alaska this _____
day of _____, 2012.

By: _____
Deputy Clerk

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Proclamation District Population Analysis

House District	Senate District	Total Population	Percent Deviation From Ideal (17,755)	Percent Alaska Native* Total Population	Percent Alaska Native* Voting Age Population
1		18,004	1.40%	7.89%	6.53%
2		18,023	1.51%	7.56%	6.35%
	A	36,027		7.72%	6.77%
3		18,116	2.03%	8.83%	7.06%
4		18,103	1.96%	18.72%	16.18%
	B	36,219		13.77%	12.15%
5		18,125	2.08%	12.99%	10.40%
6		18,396	3.61%	9.62%	8.18%
	C	36,521		11.29%	9.71%
7		17,766	0.06%	9.90%	7.89%
8		17,836	0.46%	10.06%	8.06%
	D	35,602		9.98%	8.35%
9		17,820	0.37%	9.84%	7.51%
10		17,800	0.25%	11.29%	9.16%
	E	35,620		10.56%	8.70%
11		17,826	0.40%	8.54%	6.91%
12		18,079	1.82%	6.62%	4.93%
	F	35,905		7.57%	6.25%
13		17,931	0.99%	11.96%	10.43%
14		17,806	0.29%	15.26%	11.96%
	G	35,737		13.60%	12.05%
15		17,797	0.24%	15.83%	13.10%
16		17,925	0.96%	16.36%	14.06%
	H	35,722		16.10%	14.35%
17		17,667	-0.50%	21.26%	17.96%
18		17,743	-0.07%	16.64%	14.63%
	I	35,410		18.95%	17.21%
19		17,642	-0.64%	11.99%	9.38%
20		17,755	0.00%	11.39%	8.84%
	J	35,397		11.69%	9.70%
21		17,702	-0.30%	9.93%	7.61%
22		17,809	0.30%	15.05%	12.27%
	K	35,511		12.49%	10.63%
23		17,693	-0.35%	10.27%	8.30%
24		17,924	0.95%	13.43%	10.49%
	L	35,617		11.86%	9.95%
25		17,678	-0.43%	11.94%	8.86%
26		18,072	1.79%	5.99%	5.28%
	M	35,750		8.93%	7.59%
27		17,778	0.13%	5.21%	4.16%
28		18,159	2.28%	12.58%	11.23%
	N	35,937		8.93%	8.10%
29		17,914	0.90%	11.45%	9.29%
30		17,988	1.31%	7.80%	6.64%
	O	35,902		9.62%	8.18%
31		18,251	2.79%	18.27%	13.30%
32		17,801	0.26%	17.93%	14.89%
	P	36,052		18.10%	15.58%
33		17,075	-3.83%	20.86%	17.24%
34		17,875	0.68%	36.96%	32.85%
	Q	34,950		29.09%	26.06%
35		17,486	-1.52%	19.66%	17.19%
36		17,095	-3.72%	78.26%	71.45%
	R	34,581		48.63%	43.75%
37		16,899	-4.82%	56.18%	46.63%
38		17,027	-4.10%	53.38%	46.36%
	S	33,926		54.78%	46.85%
39		16,892	-4.86%	72.50%	67.09%
40		16,953	-4.52%	71.15%	62.22%
	T	33,845		71.82%	65.05%

*Alaska Native race defined as people who identified themselves in the census as a single-race Alaska Native, or Alaska Native and White, or Alaska Native and any other race in the other multiple-race category, according to the guidelines of the U.S. Department of Justice

Prepared by the Alaska Redistricting Board

Plan Name: Workspace: AB Plans>>House Districts_Proclamation
Plan Last Edited on: 7/26/2011 10:07:59 AM

Political Subdivisions Split between Districts Report

7/26/2011
10:23:37AM

Section 1 Political Subdivisions List

In Aleutians East Borough				**There are**	**1 Splits(s)**		**in political subdivisions**	
For **Aleutians East(County) in Aleutians East Borough**				The population of *STFID:02013*		3,141	is split between	2 districts
	Part	1	**is in District**	36	Population:	2,114	Voting Age Population:	1,760
	Part	2	**is in District**	37	Population:	1,027	Voting Age Population:	1,010
In Anchorage Municipality				**There are**	**1 Splits(s)**		**in political subdivisions**	
For **Anchorage(County) in Anchorage Municipality**				The population of *STFID:02020*		291,826	is split between	17 districts
	Part	1	**is in District**	11	Population:	6,825	Voting Age Population:	5,025
	Part	2	**is in District**	12	Population:	18,079	Voting Age Population:	12,668
	Part	3	**is in District**	13	Population:	17,931	Voting Age Population:	12,069
	Part	4	**is in District**	14	Population:	17,806	Voting Age Population:	13,192
	Part	5	**is in District**	15	Population:	17,797	Voting Age Population:	13,912
	Part	6	**is in District**	16	Population:	17,925	Voting Age Population:	14,324
	Part	7	**is in District**	17	Population:	17,667	Voting Age Population:	11,801
	Part	8	**is in District**	18	Population:	17,743	Voting Age Population:	14,649
	Part	9	**is in District**	19	Population:	17,642	Voting Age Population:	13,560
	Part	10	**is in District**	20	Population:	17,755	Voting Age Population:	12,969
	Part	11	**is in District**	21	Population:	17,702	Voting Age Population:	12,984
	Part	12	**is in District**	22	Population:	17,809	Voting Age Population:	13,533
	Part	13	**is in District**	23	Population:	17,693	Voting Age Population:	12,994
	Part	14	**is in District**	24	Population:	17,924	Voting Age Population:	12,867
	Part	15	**is in District**	25	Population:	17,678	Voting Age Population:	13,122
	Part	16	**is in District**	26	Population:	18,072	Voting Age Population:	12,940
	Part	17	**is in District**	27	Population:	17,778	Voting Age Population:	13,431
In Bethel Census Area				**There are**	**1 Splits(s)**		**in political subdivisions**	
For **Bethel(County) in Bethel Census Area**				The population of *STFID:02050*		17,013	is split between	2 districts
	Part	1	**is in District**	36	Population:	6,702	Voting Age Population:	4,176
	Part	2	**is in District**	37	Population:	10,311	Voting Age Population:	6,619
In Fairbanks North Star Borough				**There are**	**1 Splits(s)**		**in political subdivisions**	
For **Fairbanks North Star(County) in Fairbanks North Star Borough**				The population of *STFID:02090*		97,581	is split between	7 districts
	Part	1	**is in District**	1	Population:	17,992	Voting Age Population:	12,671
	Part	2	**is in District**	2	Population:	18,023	Voting Age Population:	12,599
	Part	3	**is in District**	3	Population:	18,128	Voting Age Population:	13,524
	Part	4	**is in District**	4	Population:	18,103	Voting Age Population:	14,014
	Part	5	**is in District**	5	Population:	18,125	Voting Age Population:	14,178
	Part	6	**is in District**	6	Population:	1,537	Voting Age Population:	1,126
	Part	7	**is in District**	38	Population:	5,673	Voting Age Population:	4,468

In Haines Borough			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Haines(County) in Haines Borough**			The population of *STFID: 02100*		2,508	is split between	**2**	districts
	Part	**1**	**is in District**	**32**	Population:	16	Voting Age Population:	13
	Part	**2**	**is in District**	**34**	Population:	2,492	Voting Age Population:	1,996
In Hoonah-Angoon Census Area			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Hoonah-Angoon(County) in Hoonah-Angoon Census Area**			The population of *STFID: 02105*		2,150	is split between	**2**	districts
	Part	**1**	**is in District**	**32**	Population:	591	Voting Age Population:	490
	Part	**2**	**is in District**	**34**	Population:	1,559	Voting Age Population:	1,236
In Juneau City and Borough			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Juneau(County) in Juneau City and Borough**			The population of *STFID: 02110*		31,275	is split between	**2**	districts
	Part	**1**	**is in District**	**31**	Population:	18,251	Voting Age Population:	13,459
	Part	**2**	**is in District**	**32**	Population:	13,024	Voting Age Population:	10,480
In Kenai Peninsula Borough			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Kenai Peninsula(County) in Kenai Peninsula Borough**			The population of *STFID: 02122*		55,400	is split between	**5**	districts
	Part	**1**	**is in District**	**28**	Population:	18,159	Voting Age Population:	14,225
	Part	**2**	**is in District**	**29**	Population:	17,914	Voting Age Population:	13,075
	Part	**3**	**is in District**	**30**	Population:	17,988	Voting Age Population:	13,954
	Part	**4**	**is in District**	**35**	Population:	535	Voting Age Population:	444
	Part	**5**	**is in District**	**36**	Population:	804	Voting Age Population:	591
In Matanuska-Susitna Borough			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Matanuska-Susitna(County) in Matanuska-Susitna Borough**			The population of *STFID: 02170*		88,995	is split between	**6**	districts
	Part	**1**	**is in District**	**6**	Population:	6,771	Voting Age Population:	4,993
	Part	**2**	**is in District**	**7**	Population:	17,767	Voting Age Population:	12,782
	Part	**3**	**is in District**	**8**	Population:	17,836	Voting Age Population:	12,526
	Part	**4**	**is in District**	**9**	Population:	17,820	Voting Age Population:	12,588
	Part	**5**	**is in District**	**10**	Population:	17,800	Voting Age Population:	12,559
	Part	**6**	**is in District**	**11**	Population:	11,001	Voting Age Population:	7,828
In Petersburg Census Area			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Petersburg(County) in Petersburg Census Area**			The population of *STFID: 02195*		3,815	is split between	**2**	districts
	Part	**1**	**is in District**	**32**	Population:	3,202	Voting Age Population:	2,456
	Part	**2**	**is in District**	**34**	Population:	613	Voting Age Population:	468
In Prince of Wales-Hyder Census Area			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Prince of Wales-Hyder(County) in Prince of Wales-Hyder Census Area**			The population of *STFID: 02198*		5,559	is split between	**2**	districts
	Part	**1**	**is in District**	**33**	Population:	1,229	Voting Age Population:	1,002
	Part	**2**	**is in District**	**34**	Population:	4,330	Voting Age Population:	3,133
In Southeast Fairbanks Census Area			**There are**	**1**	**Splits(s)**	**in political subdivisions**		
For **Southeast Fairbanks(County) in Southeast Fairbanks Census Area**			The population of *STFID: 02240*		7,029	is split between	**2**	districts
	Part	**1**	**is in District**	**6**	Population:	4,797	Voting Age Population:	3,518
	Part	**2**	**is in District**	**39**	Population:	2,232	Voting Age Population:	1,662
In Valdez-Cordova Census Area			**There are**	**1**	**Splits(s)**	**in political subdivisions**		

For	**Valdez-Cordova(County) Census Area**	**in Valdez-Cordova**		The population of *STFID: 02261*		9,636	is split between	**3**	districts
		Part	**1**	**is in District**	**6**	Population:	5,290	Voting Age Population:	4,013
		Part	**2**	**is in District**	**35**	Population:	2,697	Voting Age Population:	2,077
		Part	**3**	**is in District**	**39**	Population:	1,649	Voting Age Population:	1,198

In Yukon-Koyukuk Census Area **There are** **1** **Splits(s)** **in political subdivisions**

For	**Yukon-Koyukuk(County) Census Area**	**in Yukon-Koyukuk**		The population of *STFID: 02290*		5,588	is split between	**2**	districts
		Part	**1**	**is in District**	**38**	Population:	2,069	Voting Age Population:	1,505
		Part	**2**	**is in District**	**39**	Population:	3,519	Voting Age Population:	2,531

Section 24 Report Summary

There are **14** **Splits in** **14** **Counties**

		More than one split:	Splits with no Population
Counties with Splits:	14	5	0
MCD/Townships with Splits:	0	0	0
Voting Districts with Splits:	0	0	0

ARB00006586

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

In Re 2011 Redistricting Cases	Superior Court No. 4FA-11-2209-CI

POST-TRIAL BRIEF OF AMICUS CURIAE BRISTOL BAY NATIVE CORPORATION

Pursuant to the court's orders of December 27, 2011 and January 23, 2012, Bristol Bay Native Corporation (BBNC) respectfully submits this brief as amicus curiae.

I. INTRODUCTION

As BBNC is not a party – it has little access to documents, other than what was posted on the Internet, and no access to exhibits or a trial transcript (if any) – this brief may necessarily be deficient in proper citations and for that BBNC apologizes. Moreover, BBNC does not have access to the numbered Board record provided to the trial court and therefore could not ascertain whether documents attached to the accompanying affidavit are in fact part of the official stamped Board record provided to the court. None of the documents attached to the affidavit should be new as all were made available to the Board, with the exception of the

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draft letter, which merely serves as a summary of what information was shared with the DOJ via teleconference.

BBNC recognizes that redistricting is always a challenging process, to put it mildly, and this cycle was perhaps even more so because of the often talked-about migration from rural to urban areas. To that end, BBNC is grateful to the members of the Redistricting Board for their tireless efforts both on behalf of the Native community and on behalf of all Alaskans. To be candid, before the trial, BBNC did not have a clear picture of this case nor "on whose side" we would come out but now having listened to the entire trial and reviewed as much of the record as is available on the Redistricting Board's website, BBNC offers the following.

BBNC agrees with the Redistricting Board on two issues. First, it is very clear that the Voting Rights Act supercedes the requirements of the Alaska Constitution. *See In re 2001 Redistricting Cases,* 44 P.3d 141, 143 n.2 (Alaska 2002). The only question is whether a specific action was necessary to comply with the VRA. *See Id.* at 143 (remanding to the Board to find whether the current configuration is "required by the Voting Rights Act"); *see also Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1361 (holding that a district was not "necessary" under to comply with the VRA). While we agree with that standard, BBNC takes issue with the use of the devil-made-me-do-it "VRA excuse" as described below, particularly in light of the fact that at least two plans the Board had before it (the TB

and PAME plans) also met the benchmark. Second, BBNC agrees with the Board and the court that the proper benchmark is 8 effective seats, 5 in the House and 3 in the Senate. Influence seats no longer "count" toward the benchmark and both experts agreed that benchmark 38 was effective with the exception of the unusual 2010 election. Having no evidence to the contrary, BBNC takes no issue with this standard. Rather, as described below, BBNC's concerns relate to (1) the fatally flawed process that resulted in the Proclamation Plan and (2) the reliance on the VRA excuse when other plans were available.

II. ARGUMENT

A. The Board should not be permitted to claim that no other plan satisfied the benchmark.

As described briefly in its motion to participate as amicus, BBNC has a history of being involved in redistricting and the 2011 cycle was no exception. BBNC was a participant in the group referred to throughout the proceedings as AFFR but BBNC also attended numerous meetings of the Redistricting Board and submitted testimony and conducted a teleconference with the DOJ in its own capacity. Contrary to what was suggested at trial, AFFR was not simply labor unions but a diverse group including five Native corporations. Landreth Decl. ¶ 2, Ex. A.

Without a doubt, the proceedings of the Board did not allow for *meaningful*

public participation. There are two reasons for this: (1) the complete lack of any guidance as to a benchmark standard for almost the entire process; and (2) when the Board finally did have their expert present the benchmark, she was wrong. The end result was even sophisticated organizations like BBNC did not truly have a handle on what was going on or the opportunity to craft and present plans that met the *correct* benchmark.

This is highly relevant to the court's inquiry primarily because throughout its briefing, and indeed throughout trial, the Board argued that no other plan met the benchmark.[1] It reiterates this argument at page 36 of its Trial Brief. The court should not consider this argument to be a defense, or evidence that the Proclamation Plan was the only viable alternative, because the evidence has revealed that the public was never told the correct benchmark. Thus, it would have been nearly impossible for them to present compliant plans.

The relevant timeline is quite telling. The Census data was released on March 15. Parties began submitting draft plans on March 31. Dr. Handley was in Afghanistan for three weeks in April.[2] Dr. Handley was not hired until sometime

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1 Order on the Riley/Dearborn Plaintiffs' Motion for Summary Judgment on the Compactness of Districts 1, 2 and 37 at p. 6 ("The Board argues that they looked at other private party plans for alternative solutions, but they were all retrogressive."); ARB's Reply to Petersburg's Opposition to Board's Cross-Motion for Summary Judgment at 16; ARB's Opposition to Plaintiff's Motion for Partial Summary Judgment re:Compactness at 23 ("The Riley Plaintiffs' argument completely ignores the undisputed fact that none of these alternative plans complied with the federal Voting Rights Act.");

2 Handley Depo. 10:18-22.

in late March or April.[3] The available information, including census data, was not sent to Dr. Handley until around April 8.[4] Dr. Handley signed a contract with the Board in late April or early May.[5] Dr. Handley had a teleconference with the Board around May 17.[6] On or around that date, she informed the Board that the standard for effectiveness had changed from 35 percent to about 42 percent.[7] At a public meeting on May 24, Dr. Handley delivered a powerpoint presentation informing the public that the standard was four effective House districts and 2 equal opportunity districts, and three effective Senate districts.[8] At that same meeting, third parties presented adjusted plans. Testimony was closed on that same day.[9] The Board issued its Proclamation Plan on June 13.[10] Dr. Handley did not finalize her report until August 4. In late August or September, Dr. Handley learns from the DOJ that the benchmark is 5 effective House seats and 3 effective Senate seats.[11] At the same meeting, she learned that the DOJ no longer considers influence districts in the benchmark and that equal opportunity districts have no place in Section 5 analysis.[12] She did not inform the Board or the public of this

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3 Bickford cross examination
4 Sandberg cross-examination
5 Handley direct examination
6 Handley Depo. 37:16-23.
7 Bickford direct examination
8 Ex. J-45.
9 Torgerson direct.
10 ARB 0006017.
11 Handley Depo. 96:11- 97:14.
12 Handley Depo. 144:16-22 and 146:2-16.

information.[13]

When the standard was finally revealed, it was wrong. This is no mere mistake of nomenclature, despite the Board's and Dr. Handley's efforts to downplay it. In fact, the error regarding the continuing viability of influence districts meant that third parties submitting plans were creating an extra district. Although this may be only a one seat difference, in a situation like Alaska's where the geography and far-flung population make redistricting extremely difficult, one seat can make or break a plan. The Board's own expert had given the Board and the public a magic number of nine, when it was in fact eight.[14] In fact, from the record it seems that the Board and even the court were under the impression that influence districts were still relevant in December 2011.[15]

BBNC itself and at least one person from AFFR (Kay Brown) told the Board directly that influence districts were no longer required as a matter of law. Landreth Decl. ¶3, Ex. B; see also Handley Depo. 83:12-21. Nevertheless, because the Board insisted that an extra influence district was required, all plans attempted to include it in order to comply with the Board's guidance.

The second major flaw in Dr. Handley's analysis was the inclusion of the

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13 Handley Depo. 149:15-24 and 150:24- 151:5; Torgerson cross examination; Handley cross-examination.

14 Handley Report at p. 2; Handley direct examination

15 Order Denying Petersburg's Motion for Summary Judgment and Granting the Board's Cross Motion for Summary Judgment at p. 10 (December 12, 2011).

mysterious "equal opportunity" districts. She specifically instructed the public on May 17 that the benchmark for the House was four effective and two equal opportunity districts. Ex. J-45 (Handley's Notes for May, 17 Presentation at p. 2-3). BBNC, like many third parties, was totally unfamiliar with this term in the redistricting context and had no idea what percentage of Native VAP was required to create an equal opportunity district. BBNC shared this concern directly with the DOJ on a teleconference conducted in September 2011. Landreth Decl. ¶5. Thus to the degree that any plan submitted after May 17 had two districts that were not at the "effective" percentage of 42 percent, this is very likely due to the confusion regarding equal opportunity districts. Much later, Dr. Handley admitted that she had been wrong about her inclusion of equal opportunity districts.[16]

And although the Board has also attempted to downplay the significance of this error, it is in fact important because using a different term created the impression that a different percentages of Native VAP are required for these districts; indeed, by definition influence districts have lower percentages that effective districts, and *it was never made clear what percentage was required for an equal opportunity district.* It was only after her discussion with the DOJ, long after the public process had closed, that she determined the equal opportunity district was

16 Handley Depo. At 70:10-71:11; 76:4; and 79:16-20 and Handley direct examination.

in fact an effective district.[17] This begs the question, how were third parties supposed to know they had to create plans with five effective districts if even the Board and its expert did not know? Perhaps this explains why Kay Brown, then Executive Director of AFFR, requested Dr. Handley's notes after the presentation – because the information was not clear.[18] Even now it is not clear if the Board would have taken different actions if it had received correct advice.

Mr. Lawson testified to this very thing in both his direct examination and during the Plaintiffs' rebuttal case. During his direct examination, he said that the RIGHTS coalition plans he created probably did not meet the benchmark because he did not know the benchmark at the time he was writing it. He explained this problem in greater detail during the rebuttal case. Specifically, he said that before May 17, the RIGHTS coalition had no information on what the benchmark standard would be, and he described them as "sort of flying blind." (This incidentally echoes a letter BBNC drafted to the Board on June 7, but which they did not ultimately submit because it seemed too late to have any impact. Landreth Decl. ¶4, Ex. C) He then explains that he had one week, or *four business days*, after this new standard was announced to create a new plan. Mr. Lawson testified that the first time he heard the standard was 5 effective House districts, that the total benchmark was 8 and not 9, and that equal opportunity or influence districts did not

17 Handley Depo. 76:5-24.
18 Handley Depo. 57:2-12.

count was in late fall at the earliest – and perhaps even as late as Dr. Handley's deposition. This comports with BBNC's experience, as it only learned this information in the pleadings filed in late December and during the trial.

Quite simply, the Board took what was supposed to be a ninety-day process and turned it into a four-day process, four business days being the entire time between the announcement of the (wrong) benchmark and the final due date for third parties to submit plans. In effect, this took away the right of public participation as all the numerous public meetings (with the exception of the May 24th one in Anchorage) were held *before* the announcement of the standard. It strains credulity to think that the many communities across the state actually knew what they were looking at, actually had the necessary tools to evaluate the different maps, when no one had yet told the public the guiding principle, namely the benchmark that had to be met. This should explain for the court why on earth third parties were repeatedly submitting plans that did not meet the benchmark – they did not know what it was. For a process like this one to be meaningful, the public has to be told what the benchmark (and the percentages that help you meet it) is. When this finally did occur it was too little, too late.

BBNC understands that Dr. Handley is a highly respected expert, but the Board simply should not have hired someone who did not have the time to devote to Alaska and who could not provide the necessary analysis in a reasonable timeframe.

Instead, there seemed to be little consideration of the fact that Dr. Handley could not meet the deadlines, and that the public would not have access to the standard until very late,[19] despite the fact that BBNC expressed concerns about this in its public testimony. Landreth Decl. ¶3, Ex. B. An eleventh hour report that provides the public only four business days to develop a plan is hardly meaningful. When that eleventh hour report is wrong, the error is fatal. As a result, this court should not consider it in any way probative as to any claim or defense that no other third party plans met the correct benchmark.

B. The "VRA excuse" is not blanket protection.

Somewhat related to the first issue is the fact that the Board devotes considerable efforts to relying on certain districts as being required by the VRA. BBNC believes that the Board has taken this argument one step too far for two reasons. First, as described above, there were other complaint plans available but the Board seems to have rejected them due to unspecified "complaints from the Alaska Native community." While this is a factor to be considered in DOJ analysis and BBNC in no way suggests that input from affected communities is not relevant, to suggest that one region or one person has a kind of veto over a plan is unsupported.[20] In fact, if this is the case, why were the Aleutian Pribilofs Islands

19 Torgerson cross examination.

20 It was not explained during trial who or what complained and on what grounds and BBNC does not have access to the court exhibits to determine the basis.

Association's complaints about splitting the Aleutians not persuasive? Why were the Association of Village Council Presidents' complaints about carving up the Yup'ik regions not persuasive? The fact is that the Board's decision to adopt the Proclamation Plan over the two viable alternatives (not to mention what other alternatives could have been offered if the public had been apprised of the correct benchmark in a timely manner) represents a choice. To be sure, Board members testified that they adopted the plan they thought had the best chance of passing DOJ muster, but it must still be acknowledged that they had other options.

Second, and most importantly, BBNC takes issue with the Board's argument that House District 1 is somehow justified by the "ripple effect" of complying with the VRA.[21] As the court is no doubt aware by now, District 1 is in the middle of Fairbanks. It does not abut House District 38. While it is conceivable that a district could be affected by a Native effective district, such a situation only arises if the two districts meet or if both are rural and short on population. In that scenario, a domino effect could be a justification. Here, however, the Board was creating a district in one of the most populous areas of the State and could draw population from any direction. There is no basis, in logic or in law, for claiming that House District 1 was in any way required by the VRA. Such a holding that some direct causal link was not required, merely a "ripple," is an unjustified expansion of the

21 ARB's Trial Brief at 25-27.

Alaska Supreme Court's holdings and would undoubtedly cause mischief. In fact, on cross examination, Board member Holm seemed to indicate quite clearly that the VRA did not require District 1; he suggested instead he was trying to minimize population deviations. The Board seems to have little basis for asserting the "VRA excuse" for House District 1.

BBNC is also not entirely persuaded that House Districts 37 and 38 are absolutely required by the VRA. While BBNC understands that the Board had legitimate concerns about pairing incumbents given the possibility of a DOJ objection, and we share those concerns, we return to the fact that, according to testimony at least, the "TB plan" did not raise incumbent pairing concerns and yet passed the benchmark. To be clear, BBNC is not advocating any one plan over another – *in fact BBNC has not seen the TB plan as it cannot be located on the Board's website* (only Board Options 1 and 2 and third party plans are available) – and we are not suggesting that this plan is the ideal or only viable alternative. Rather, BBNC raises this to suggest that the Proclamation Plan was not necessarily the only solution. At a minimum, the court should consider remanding to the Board to explain in detail why the percentages in the TB plan were not satisfactory. This plan does not appear in Dr. Handley's final report and since it was created at the tail end of the public process, BBNC has no copy of it or memory of its discussion. In the end, districts 37 and 38 may be the only option, but at this point

it is not clear.

III. CONCLUSION

BBNC thanks the court and the agreement of the parties for allowing it to contribute to this process. While there are points with which BBNC agrees with the Board, namely the actual benchmark of 8 seats and the precedence to be afforded to federal law, BBNC has had and continues to have very serious concerns with the public process that resulted in no other plans meeting the benchmark. As explained herein, that is largely due to the fact that the public only heard of the Board's benchmark four business days before the close of public testimony and opportunity to present plans. Even then, this benchmark contained an extra seat which the public now discovers was not required. To those of us that attempted to follow this process quite closely, this is not a "red herring." Given these deficiencies, the Board should not be permitted to point to an absence of alternatives as evidence of the true lack of alternatives. Finally, BBNC is not persuaded that any precedent justifies the reliance on the VRA excuse for House District 1. However, with respect to House Districts 37 and 38, the record remains unclear. Therefore, BBNC respectfully requests that the plan be remanded to the Board to examine these three districts and to allow for meaningful public participation in the configuration of possible alternatives.

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

By: s/nlandreth

Natalie A. Landreth (#0405020)
Heather Kendall-Miller (#9211084)
NATIVE AMERICAN RIGHTS FUND
801 B Street, Suite 401
Anchorage, Alaska 99501
Phone: (907) 276-0680
Fax: (907) 276-2466

Certificate of Service

The undersigned hereby certifies that the on the 23rd day of January 2012, a true and correct copy of the **POST-TRIAL BRIEF OF AMICUS CURIAE BRISTOL BAY NATIVE COPRORATION and AFFIDAVIT OF NATALIE LANDRETH** was sent by electronic mail to:

Office of the Clerk, Fairbanks	4faclerk@courts.state.ak.us
Karen Erickson	kerickson@courts.state.ak.us
Kelly Krug	kkrug@courts.state.ak.us
Michael White	MWhite@PattonBoggs.com
Michael Walleri	walleri@gci.net
Thomas Klinkner	tklinkner@bhb.com

By: s/jbriggs

Jonathan Briggs
Legal Administrative Assistant

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

In Re 2011 Redistricting Cases	Superior Court No. 4FA-11-2209-CI

AFFIDAVIT OF NATALIE LANDRETH

STATE OF ALASKA)
) *ss.*
SECOND JUDICIAL DISTRICT)

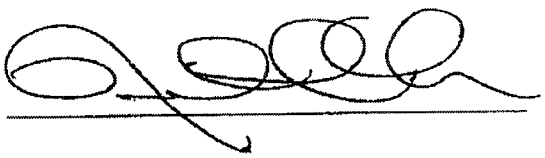
I, Natalie Landreth, being first duly sworn, state as follows:

1. I have personal knowledge of and can testify to the facts set forth below.
2. Attached hereto as Exhibit A is a true and correct copy of a webpage listing the members of Alaskans for Fair Redistricting.
3. Attached hereto as Exhibit B is a true and correct copy of testimony offered before the Redistricting Board by April Ferguson, General Counsel for Bristol Bay Native Corporation.
4. Attached hereto as Exhibit C is a true and correct copy of a letter drafted for BBNC to submit to the Redistricting Board after June 7, 2011. This letter was not submitted because the Board had already adopted its chosen plan and it was doubtful that the letter would have any effect at that time.

Native American Rights Fund
801 B Street, Suite 401
Anchorage, Alaska 99501
P: 907.276.0680 F: 907.276.2466

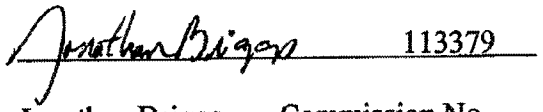
5. Along with April Ferguson, I participated in a teleconference with Arati Jain from the Department of Justice in September 2011. During this call, BBNC shared its concerns as outlined in Exhibit C as well as other concerns involving equal opportunity districts.

FURTHER AFFIANT SAYETH NAUGHT.



Natalie Landreth

SUBSCRIBED AND SWORN to before me at Anchorage, Alaska this 23rd day of January 2012.



Jonathan Briggs Commission No. 113379
Notary Public for the State of Alaska

Alaskans for Fair Redistricting

About AFFR

Alaskans For Fair Redistricting is a non-partisan group of Native organizations, unions, non-profits and individuals seeking a fair outcome for redistricting. AFFR is monitoring the Redistricting Board's process to ensure that it is open and transparent as required by law. On March 31, AFFR submitted a plan to the Redistricting Board for consideration.

AFFR co-chairs: Vince Beltrami, Alaska AFL-CIO, and Carl Marrs, Old Harbor Native Corporation.

Organizations participating in AFFR include the following:

Alaska AFL-CIO
Alaska Conservation Voters
Alaska Women for Political Action (formerly Alaska Women's Political Caucus)
Alaskan AIDS Assistance Association (Four A's)
American Civil Liberties Union (ACLU) of Alaska
Anchorage Central Labor Council
APEA/AFT
ASEA/AFSCME
Bristol Bay Native Corporation
Chugach Alaska Corporation
Doyon, Limited
Independent Pilots Association
Koniag, Inc.
NEA-Alaska
Planned Parenthood of the Great Northwest
Tanana Chiefs Conference
YWCA

Exhibit A

My name is April Ferguson and I am Vice President and General Counsel of Bristol Bay Native Corporation. My comments will focus on the Board's two options and how it is determining which districts are Native.

Both board options 1 and 2 purport to have 4 majority Native House districts, 2 influence Native House districts, 2 majority Native Senate districts, and 1 influence Senate district. These have been called 4-2-2-1 plans. I understand that 4-2-2-1 is what we currently have. However, the current districts were based on pre-2006 law as well as on an analysis of electoral behaviors in the Native districts. In other words, not only has the population changed but so has the law and possibly the electoral behavior as well.

The Reauthorization of the Voting Rights Act in 2006 specifically clarified that the "ability to elect" is the standard to be used in evaluating the proposed redistricting plans. They are also now called "effective" districts and the concept of "influence" districts is gone. Based on this directive, the Department of Justice has stated in its guidelines (and I am quoting here):

> In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department's view this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district.

The DOJ then explains that this analysis often includes election history, voting patterns, voter turnout, registration, and crossover patterns, among other information. (page 7471 of the guidelines in the federal register).

In contrast this Board seems to have based its 4-2-2-1 plans on a fixed 50% majority district and 35% so-called "influence district." (I will call them "effective" as per the 2006 law.) This Board has not yet performed any analysis of what it considers to be Native majority or effective districts to make sure that they are in fact true majority and effective Native districts. In fact I understand the voting rights analyst hired by the Board will not return to the United States until April 24 and will not have an analysis completed until around May 12. Further, she herself testified in front of this Board on April 11th that 35% may not be the correct percentage to determine whether

Exhibit B

a district is a Native "effective" district. Therefore, she will not finalize her report until the very end of this process and there may be no opportunity for public comment on her analysis.

Both board options 1 and 2 were created without truly knowing whether the districts you have labeled "Native" are in fact effective Native districts.

For example, why is proposed district 6, at 32.49% Native VAP an effective Native district? There is the same problem with Senate district C at 33.92%. One district you label as a majority Native district (37) only has 43.68% Native VAP. Why is this considered a majority?

If one assumes an effective district is 35% Native VAP and a majority is 50% Native VAP, then both board options 1 and 2 have only 7 Native districts not 9 (5, 37, 38, 39, 40, and S, T). This is less than the 9 we currently have and likely retrogressive.

In conclusion, BBNC makes two requests. First, that the expert you have retained determine what is the actual "floor" for an effective Native district so that we know for sure that we are creating a plan that is not retrogressive. Second, that public comment be opened for several days following your receipt of the expert report so that those with questions or comments about her methods or conclusions can include them in the record.

Thank you.

Exhibit B

June 7, 2011

VIA ELECTRONIC MAIL
Alaska Redistricting Board
411 West 4th Avenue
Anchorage, AK 99501

Members of the Board:

While the Bristol Bay Native Corporation greatly appreciates your service to the Board and people of Alaska in this very difficult process, we have some very serious concerns about the rural and urban areas of the plan you have adopted.

First, as our Vice President and General Counsel April Ferguson noted in her testimony on May 6, this process has occurred in somewhat of a vacuum because the Board's chosen expert was not available until almost the very end. As a result, those who submitted maps and comments did so without the benefit of knowing what the benchmark was and even the Board itself was without guidance. Even now, the expert has not submitted any written reports or detailed information to allow the public to analyze her methods or conclusions. We are not even sure what the minimum percentage of Native VAP is required for an effective district in different parts of the State. At best this process has been a moving target and this has made it extremely difficult for the Native community to understand what is going on, much less participate in a meaningful fashion.

With respect to the expert's conclusions, BBNC does not agree with the benchmark (5-1-3-0). Specifically, we do not understand how there could be a third effective Senate seat created by combining two influence districts. This has been raised several times but never satisfactorily explained. Our analysis, shared by many others, is that the benchmark is likely 5-1-2-1, and if this is the case, alternative plans that would meet both the mandates of theVRA and the Alaska Constitution have been submitted. Information about how the Board's expert has reached this conclusion, including all data on which it has been based, should be made public. Instead, as this process as continued, the Board has shared less and less of the information provided by its expert and now it seems as though all discussions surrounding the benchmark are discussed in Executive Session. In fact, recently most discussions surrounding the VRA and its requirements have been conducted in private, likely violating the Open Meetings Act.

From what we know about the benchmark, it seems to have been applied inconsistently. For example, in testimony the Board's expert indicated she would not be comfortable with a Native VAP percentage below 35% in a particular Southeast district. However, that district is now at 33.9% which the expert approved in an email. Problems like this are why we do not understand the benchmark, the floor for an effective district, or the resulting plan in general.

Exhibit C

BBNC's interest is in a fair, balanced plan that meets the requirements of the VRA and the Alaska Constitution and does not reduce Native voting strength. In other words, we are not interested only in the rural plan. The composition and balance of the entire legislature is of profound importance to the Native community. Accordingly, we are extremely concerned about several aspects of the Board's Anchorage plan. First, Anchorage has sufficient population for 16.4 House seats and 8 Senate seats, yet there are currently only 6 Senate seats. In addition, the boundaries have been unnecessarily altered so as to combine incumbents in at least two House districts (the current 21 and 30). We supported the AFFR plan for Anchorage because it did not contain these defects and we do not understand why it has not been adopted.

There are very strange districts made up of very distant and different communities all over the State and Bristol Bay is no exception. The new Bristol Bay/ Eastern Aleutians district jumps across Shelikoff Straits, Kodiak, and Cook Inlet to claim the small Chugach communities of Nanwalek and Port Graham on the southern tip of the Kenai Peninsula. This is very strange and surely cannot be considered compact or contiguous under the Alaska Constitution. This is only one example but there are numerous issues like this. Of greater concern to BBNC is the fact that incumbent Bryce Edgmon has been placed in a district that now overlaps with incumbent Alan Dick. It is not clear why this is necessary.

When this Board reconsiders these issues, which is possible given that litigation is almost a certainty, we encourage you to make the following changes. First, the expert must be secured early and his or her report must be completed early so that the public will understand the benchmark and percentages required by law. Second, all information provided by the expert must be made public. Third, the public must be allowed an opportunity to comment on the expert's methods and conclusions, and this means allowing them sufficient time to hire their own expert to perform an analysis. Fourth, all Board discussions not involving actual litigation should be conducted in public and not in Executive Session. Finally, and most importantly, the Board should sufficiently explain its processes and proposals so as to enable the Native community understand; given the "moving target" quality of this year's process, it is safe to say that the vast majority do not understand what is happening here or how it will affect them. As a result, they are unable to provide meaningful input.

In sum, BBNC has numerous procedural and substantive concerns with the Board's plan and accordingly we do not support it. At the appropriate time, we will share our concerns with the Department of Justice and expect that other corporations may also take advantage of this opportunity. If, in the interim, the Board would like to discuss any of the concerns discussed in this letter, please contact our General Counsel, April Ferguson.

Sincerely,

Exhibit C