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1 **I. INTRODUCTION**

2 Amicus Curiae Bristol Bay Native Corporation (BBNC) submits this brief in
3 response to (1) the Board’s Petition to Implement the Proclamation Plan (as amended) and
4 (2) this Court’s Order to Show Cause why the Amended Proclamation Plan (adopted on
5 April 5, 2012) should not be adopted as the interim plan.
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7 The Supreme Court was clear in its remand order that the Board was to deviate from
8 the Alaska Constitution when it was “the only means available to satisfy Voting Rights
9 Act requirements.” Order ¶ 7. The goal is to adopt the plan that “includes the least
10 deviation reasonably necessary to satisfy the [VRA]” and not do “unnecessary violence to
11 the Alaska Constitution.” *Id.* Unfortunately, the Board did not do this. As described
12 herein, it did not choose the plan that was the most Constitutional and thus its deviations
13 are not strictly required by the VRA. Of far greater concern to BBNC however is the fact
14 that both of these plans appear to be retrogressive, meaning they do not contain the
15 requisite number of effective Native seats to comply with the Voting Rights Act (VRA),
16 and therefore violate the VRA. As a result, BBNC agrees with Calista that the Board has
17 now had two bites at the apple and it is time for this Court to assume jurisdiction, appoint
18 a master and facilitate a resolution to this matter.
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1 **II. QUESTIONS PRESENTED FOR REVIEW**

- 2 1. Whether the Amended Proclamation Plan should serve as the interim plan for
3 the 2012 elections.
- 4 2. Whether this Court should approve of the Amended Proclamation Plan as
5 “compliant with the remaining steps in the Hickel process” as requested by the
6 Board’s Petition for Review.
- 7 3. Whether the Proclamation Plan (as amended) should serve as the interim plan
8 for the 2012 elections.

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11 **III. STATEMENT OF FACTS**

12 **A. The Hickel Process**

13 The Board’s first noticed meetings took place on March 26, 2012, nearly two weeks
14 after the Supreme Court issued its decision. Its first task was to “create” one map it called
15 Hickel 01. The Board did not in fact create a new map but simply took the Proclamation
16 Plan and “incorporate[d] any aspects of the current plan where no Voting Rights Act
17 justifications existed.” (ER 131 -- Ex. B, 3/26, 40:20-22) In so doing it left intact District
18 40 because they claimed it was “not built on Voting Rights Act grounds” even though it
19 was clearly identified throughout this process as a Native district for purposes of meeting
20 the VRA benchmark.³ (ER 131-132 -- Ex. B, 3/26, 41:25-42:5). Later keeping the North

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24 3 This means that the one district in which the one rural Board member, Green,

1 Slope Borough totally intact is described only as “traditional,” (ER 198 -- Ex. B, 3/28,
2 29:7-10) Similarly, the Board left intact District 38 and its population groupings of the
3 urban Fairbanks districts (Ester and Goldstream) that gave rise to this litigation in the first
4 place. Given that the superior court had already determined District 38 was
5 unconstitutional (December 23, 2011 order), it was incumbent upon the Board to amend
6 that district as well. They made minor adjustments but otherwise assumed throughout
7 the remand that Ester and Goldstream would stay right where they are, even if other
8 population groupings were more constitutional and equally or more complaint with the
9 VRA.
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12 Next, the Board had analyzed this map that it *knew* did not comply with the VRA.
13 (ER 169 -- Ex. B, 3/27, 36: 15-20) In other words, it took the unnecessary step of having
14 its expert review a map it already knew was noncompliant. After she confirmed what the
15 Board already knew (ER 193 -- Ex. B 3/28, 8:13-16), the Board did not proceed to adjust
16 Hickel 01 but threw it out and went back to a plan created in 2011 called the “PAM-E”
17 plan. (ER 192, 197, 199 and 281 -- Ex. B, 3/28, 4:14-17, 22:7-13, 32:15-24, 33:10-14;
18 Ex. B, 3/30, 27:14-16) This plan was of course formulated before the Board’s remand
19 and according to the expert’s now-discredited advice to begin creating a map based upon
20
21

22 resides, was left untouched and considered sacrosanct throughout the process. BBNC
23 pointed this out to the Board and received no response. (ER 576 and 592-3 -- Landreth
24 Decl. ¶ 2 and Ex. 10) Plans submitted by Calista and others that altered this district were
not considered.

1 VRA compliance first. The Board spent a great deal of time working from the Pam-E
2 map and for a short period was convinced it was the only alternative to the Proclamation
3 Plan. (ER 197, 198, 212 -- Ex. B 3/28, 25:23-26:1 and 82:10-19).

4 When engaging in its *pro forma* "review" of third party plans, the Board purported
5 to disregard any maps submitted by third parties that did not start from Hickel 01. For
6 example, the Board disregarded a map submitted by the RIGHTS coalition (discussed
7 below) because it did not "start" from Hickel 01. (ER 241 -- Ex. B, 3/29, 23:6-11) . The
8 RIGHTS coalition had instead argued that its map was Constitutional (or at least
9 contained the fewest possible deviations from the Alaska Constitution) and complied with
10 the VRA but because it did not start from a map that everyone already knew was
11 noncompliant (Hickel 01), the Board threw it out. (ER 241 -- Ex. B, 3/29, 23:17-22) The
12 Board also disregarded the map submitted by AFFR for the same reason, even though
13 AFFR's cover letter specifically stated it began with the Board's own Hickel 01 map.
14 (ER 249 -- Ex. B, 3/29, 56:20-25; *see also* ER 578-9 and 588-90 -- McKinnon Decl. ¶ 11
15 and Exhibit 9) In sum, the Board disregarded each third party map and sent *none of them*
16 to its VRA expert, Dr. Handley, for analysis. The sole arbiter of Constitutionality and
17 VRA compliance was the Board's counsel.

22 **B. The Public Process**

23 BBNC raised numerous concerns with the Board's process during the first round of
24

1 redistricting.⁴ The process offered on remand was even worse. First, the Board's
2 approach to public involvement was that since it was a public agency people could send
3 emails at any time. (ER 214 -- Ex. B, 3/28, 90:10-14 and 93:24-5) Second, the Board
4 made it clear that the process it intended to follow was to draw a "Hickel plan," have its
5 expert test that plan for VRA compliance, and then if it did not, to change that plan until it
6 did have one that complied with the VRA. (ER 125 -- Ex. B, 3/26, 14:12-22) In other
7 words, a plan was only truly considered if the Board's expert reviewed it for VRA
8 compliance. However, the Board never intended to have the expert review any third
9 party plans.
10
11

12 **Chairman Torgerson:** ... But part of our reason for asking for a vacation
13 of this was [the court] basically opened the entire process back up again,
14 even to interested individuals, besides the parties and amicus, anybody
15 could submit another plan. We were to act, in my opinion, like a court, as
16 to determine whether or not third-party plans are constitutional, which is
17 something the board, at least in my opinion, does not want to get into. So we
18 have had several inquiries from different groups as to whether or not we
19 would accept third-party plans. And basically the response that was given
20 was we're a public agency, so if you want to submit things, e-mail of plans
21 or whatever, you're welcome to do that. But it wasn't my intent that the
22 board would consider third-party plans.

23 (ER 126 -- Ex. B, 3/26, 21:9-25) The message from the Board was therefore: you can
24 send us whatever you want but we have no intention of considering it. As a result of this,
25 no plans were submitted in the first part of the week. (ER 213 -- Ex. B, 3/28, 89:20-21)

26 4 Post-Trial Brief of Amicus Curiae Bristol Bay Native Corporation at 3-10
27 (January 23, 2012).

1 Then, on day 3, the Board discussed the fact that it had received plans from the Calista
2 Corporation and Board Member Greene commented that she would like to review what had
3 been sent in. (ER 198 and 212 -- Ex. B, 3/28, 26:9-23 and 85:9-11). Upon hearing this,
4 apparently AFFR and the RIGHTS Coalition hurriedly submitted their own plans with the
5 hope that they would be considered. (ER 240 -- Ex. B, 3/29, 18:22-25) The Chairman
6 opposed "opening up" the process. (ER 213 -- Ex. B, 3/28, 86:14-18, 88:5-10) And
7 although the Board's counsel did do a perfunctory and subjective analysis as to why each
8 was unconstitutional, as it had promised the Board never sent any third-party plans to its
9 expert. (ER 288 -- Ex. B, 3/30, 55:20-23) This ensured that no third-party plans would
10 be accepted, in whole or in part, regardless of their compliance with state and federal law.
11

12
13 Third, the Board allowed only one week of meetings so as to accommodate the
14 absence of their counsel and then the vacation of their expert. On the first day, March 26,
15 the Board noted that its counsel had been unavailable for a week (ER 126 -- Ex. B, 3/26,
16 18:23-24), and then in response to questions about whether its expert would be as difficult
17 to pin down as last time, Mr. Bickford responded: "[Lisa] is available through the 31st.
18 Then she has a vacation planned." (ER 124 -- Ex. B, 3/26, 13:18-19) Presumably
19 because of this, no plans or adjustments were considered after the 31st.⁵
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23 5 Incidentally, the Board cannot use an excuse for this extremely short process the
24 need to secure preclearance before the June 1 candidate filing deadline since it knew it was
25 already too late to meet that deadline. (ER 209 -- Ex. B, 3/28, 71:6-7) In addition, the

1 Fourth, although the Board noticed meetings for the week of the 26th, it never
2 notified the public what dates the public record opened or closed. It only announced the
3 timeline for its actions on March 29th. (ER 237 -- Ex. B, 3/29, 7:10-20) Moreover, it
4 indicated during the meetings that it had or would notice meetings for the following week,
5 April 2. (ER 325 -- Ex. B, 3/31, 62:22-235) Therefore it was not clear to the public
6 what the deadlines for comment were if any. Nevertheless, the Board did not include
7 within the record filed with this court any correspondence received from the Native
8 community nor even the final versions of the AFFR or Calista 3 plans.⁶

9 10 11 **IV. ARGUMENT**

12 **A. This Court Should Not Order that the Amended Proclamation Plan Serve** 13 **as the Interim Plan for the 2012 Elections**

14
15 Board knew it was more than two weeks earlier in this process than the Board was during
16 the 2001 redistricting process, and yet that was ultimately resolved. (ER 207 and 211 -- Ex.
17 B, 3/28, 63:10-18 and 80-19-20). Moreover, the Board has been dilatory with respect to
18 preclearance since it still has not submitted the either the Proclamation Plan (as amended)
19 or the April 5 Amended Proclamation Plan even though both were completed more than
20 one month ago.

21 6 In its response to Calista's Objections at the Superior Court, the Board argued that
22 Calista's plans were not part of the Board record (Consolidated Response at p. 16 n. 51).
23 However, this argument should be rejected and Calista's plans considered by this Court
24 because, as noted, the Board never provided an open or closing date of its record to the
25 public and any perceived lateness should not be held against a third party. Furthermore,
26 despite the fact that Calista's plans are called "settlement plans" it is not a party to the
27 litigation and its plans were not privately submitted for settlement. Rather, they were
28 publicly distributed and formally submitted to the Board in the only way the Board
allowed: by e-mail. Alaska Rule of Evidence 408 thus has no application.

1 Because the responses to both questions 1 and 2 are closely related, they will be
2 considered together. This Court should not approve the Amended Proclamation Plan, as
3 requested by the Board, nor order that it serve as the interim plan for the 2012 elections for
4 the simple reason that the Amended Proclamation Plan is not the most Constitutional plan
5 and it is certainly not the one that does the least violence to the Alaska Constitution.
6 Moreover, it is highly likely that the Amended Proclamation Plan is in fact retrogressive
7 and would violate the VRA. For both of these reasons, it is inappropriate and potentially
8 highly damaging to the Native vote, to implement this plan for the 2012 elections.
9

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11 As an initial matter, BBNC seriously doubts that the plan must be chosen before
12 May 14 as the Division of Elections has claimed. History dictates that the DOE has
13 moved such deadlines in the past and even moved primary elections into September.
14 BBNC understands that the Democratic Party is filing a brief that outlines both the history
15 of such adjustments and also states that the more appropriate time frame is the end of May,
16 rather than May 14. BBNC agrees with this assessment.
17

18 The primary problem with the Amended Proclamation is that its deviations from the
19 Alaska Constitution are not all required by the VRA. The goal of the *Hickel* process, that
20 is looking first to Alaska Constitutional concerns, is to end up with the plan that deviates
21 the least from the Alaska Constitution while also complying with the VRA. The Board
22 knows this and mentioned it almost every day. (ER 123, 125, 139, 1164, 244 and 287 --
23
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1 Ex. B, 3/26, 9:11-15, 14:19-22, 70:3-11; Ex. B, 3/27, 14:18-15:2; Ex. B, 3/29, 36:20-23
2 and 37:3-9; Ex. B, 3/30, 52:17-22) Because of its misinterpretation of the process, or its
3 misuse of it, or both, the Board did not end up with the most Constitutional plan possible.
4 At the very least, there is considerable doubt that the Board's plan in fact does "the least
5 violence" to the Constitution.
6

7 There were plans submitted by three other groups – AFFR, the RIGHTS Coalition
8 and the Calista Corporation – yet all were discarded by the Board and none were reviewed
9 by the Board's expert. The process by which the Board discarded each is worth
10 describing. No third party was permitted to make a presentation or respond to Board
11 questions about its plan. Instead, each was reviewed solely by the Board's counsel who
12 provided his own brief and subjective analysis as to why each one was less Constitutional
13 than the Board's chosen plan. Below are three options and non-exhaustive bullet points
14 illustrating the ways in which each is compliant and more Constitutional than the Board's
15 Amended Proclamation Plan.
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18 *1. The AFFR Plan*

19 Because BBNC is a member of AFFR and has submitted comments to the Board
20 that it supported the AFFR plan above others, that plan will be reviewed first. (ER 576 and
21 592-3 -- Landreth Decl. ¶ 2 and Exhibit 10) Counsel to the Board, assisted in part by
22 Executive Director Mr. Bickford, identified numerous ways in which they felt the AFFR
23
24

1 plan was not Constitutional. BBNC will respond to these concerns briefly here but
2 ultimately the court – and not counsel to the Board – should be the one to determine
3 Constitutionality.

- 4 • Counsel alleges that the plan is retrogressive under the VRA. (ER 249 -- Ex. B,
5 3/29, 57:13-24) This was correct on March 29 due to an error in weighting the
6 populations, but a corrected version called AFFR 06 (and sometimes mistakenly
7 referred to as AFFR 7th Adjusted) was in fact submitted to the Board before it
8 adopted its own plan. The Board did not include the corrected plan in the
9 record before this court, nor have it analyzed by the expert for VRA compliance.
10 Mr. Joe McKinnon attests he submitted this corrected plan (including shape
11 files) to the Board on April 4, 2011 – the day before the Board formally adopted
12 its plan and proclamation. (ER 578-9 and 580-81 and 591 -- McKinnon Decl. ¶
13 11 and Exhibits 1-2 and 9).
- 14 • Counsel alleges that the Native VAP in District 35 is too low even though it is at
15 45.31%. (ER 250 -- Ex. B, 3/29, 58:17-24) Because this district contains
16 much of the old (current) District 6 which has the highest degree of racial
17 polarization, counsel alleges this District should instead be closer to 50%
18 Native. However, As even Dr. Handley recognized, the polarization is not
19 current throughout District 6, but is concentrated in six communities along the
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1 highway (Deltana, Dot Lake, Tok, Chistochina, Copper Center, Gakona and
2 Kenny Lake) and AFFR explained in its cover letter that since it had removed
3 these communities from its District 35 then the polarization would be less and
4 the Native VAP required would be lower. (ER 578-9 and 588-90 -- McKinnon
5 Decl. ¶ 11 and Exhibits 7 and 9). Moreover, the Board asked for analysis on
6 this issue, which was never done. (ER 250 -- Ex. B, 3/29, 58:22-24)

- 8 • AFFR's plan removes the above six communities and places them in highway
9 district 29 with which they are clearly more socio-economically integrated.⁷
10 (ER 578-9 and 580 -- McKinnon Decl. ¶ 11 and Exhibit 1)
- 11 • AFFR's District 35 is now far more compact and socio-economically integrated
12 than the Board's horseshoe shaped District 39 which extends from Diomedea to
13 McCarthy. (ER 578-9 and 580-82 -- McKinnon Decl. ¶ 9, 11 and Exhibits 1,3
14 and 7) Other corporations besides BBNC sent letters to the Board listing this as
15 one of the reasons they supported AFFR's plan. (ER 576 and 594-5 -- Landreth
16 Decl. ¶ 3 and Exhibit 11)
- 17 • AFFR's plan adds Eielson AFB to a rural district rather than Ester and
18
19

20
21 _____
22 ⁷ BBNC understands that AFFR has secured the services of an expert to analyze
23 whether its plan is socio-economically integrated, and to compare the level of integration
24 with that of the Board's plan but, given the highly accelerated timeline, they were unable to
25 finish their report early in order to comply with the May 8, 2012 deadline. BBNC will
26 submit this report, along with a proper motion for leave, as soon as it becomes available.

1 Goldstream as the Board has done. Counsel for the Board rejected this. (ER
2 250 -- Ex. B, 3/29, p. 58-59). However, as AFFR explained in their cover letter,
3 military turnout (11%) is far lower than the turnout in Ester and Goldstream
4 (36%) and therefore adding Eielson would have the impact of increasing Native
5 voting strength in District 38. (ER 578-9 and 588-90 -- McKinnon Decl ¶ 11
6 and Exhibit 9) Furthermore, since Eielson is closing in 3-4 years, that district
7 will not lose its effectiveness over time as it might if it were attached to Ester and
8 Goldstream. *Id.* The Board's own expert recognized the benefits of attaching
9 Eielson to District 38 (*see* trial Log Notes, Day 2, 12:31:50, 12:42:16-26), and
10 even this court acknowledged in its findings that Dr. Handley "would not be
11 concerned about adding military population to the rural district because it would
12 not harm the effectiveness of the Native vote." (Order Re: 2011 Proclamation
13 Plan, 2/3/12 at 95). Yet the Board has continually rejected this logical solution,
14 presumably because, as this court has already found on page 95 of its 2/3/12
15 order, Board member Holm advocated "keeping as much military population in
16 Republican areas of the FNSB districts, which he knew would have the effect of
17 enhancing the civilian Republican vote."
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- 22 • The Board alleges there are socio-economic integration problems with District
23 35 (mistakenly referring to it as 39). (ER 251 -- Ex. B, 3/29, 62:12-24) AFFR
24

1 had shifted four Inupiaq villages (Kobuk, Ambler, Shugnak and Kiana) and
2 placed them in 35 for population reasons, but the Board seemed concerned about
3 “mixing” Athabascans with Inupiaq, but this argument rings hollow given that it
4 pales in comparison to the way the Amended Proclamation Plan created
5 catch-all District 39 in which it clearly “mixed” Inupiaq with Athabascans.
6 (ER 578, 582 and 586 -- McKinnon Decl. ¶ 5,9 and Exhibits 3 and 7)

- 8
- 9 • The Board alleges AFFR District 38 may not be socio-economically integrated,
10 compact or contiguous. (ER 251 -- Ex. B, 3/29, 63:2-14) However the
11 Board’s own District 37 has more serious problems in this regard (stretching
12 from Mekoryuk to the tip of the Aleutians). Comparing AFFR’s District 38 to
13 the Board’s District 37 (ER 578 and 585 -- McKinnon Decl. ¶ 8 and Exhibit 6)
14 shows just how nonsensical this allegation is. Moreover, their District 35 is
15 even worse – stretching from the Lake and Peninsula Borough, jumping to
16 Kodiak, jumping again to pick up Nanwalek and Port Graham on the Kenai
17 Peninsula (ER 285 -- Ex. B, 3/30, 45:4-13) and then jumping again around
18 another district (29) to continue through Prince William Sound and Yakutat (ER
19 84 -- Ex. A, p. 61).
 - 20 • AFFR’s District 37 is also clearly more socio-economically integrated in that it
21 keeps the Bristol Bay fishing communities together and importantly keeps the
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1 Native incumbent Rep. Edgmon, who lives in Dillingham, with the communities
2 he has represented for years. (ER 578 and 585 -- McKinnon Decl. ¶ 8 and
3 Exhibit 6) The Board's Amended Proclamation Plan, on the other hand, cuts
4 off Dillingham so as to place Rep. Edgmon in an inland district (36) and
5 conversely attaches all the Bristol Bay fishing communities to Bethel; this
6 bizarre configuration essentially flips the Yup'ik constituency of Rep. Herron
7 with the fishing communities of Rep. Edgmon, seemingly placing each
8 Native-preferred legislator in an unfamiliar district that will be very difficult for
9 him to win. (ER 578, 583 and 585 -- McKinnon Decl. ¶ 6,8 and Exhibits 4 and
10 6). This deliberate targeting of Native legislators contravenes the mandates of
11 the VRA that BBNC and many other *Amici Curiae* brought to the attention of
12 this Court during the last petition.
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- 16 • The Board wondered whether AFFR's district 38 had a high enough Native VAP
17 at 35% to make it effective, but it said it would "want further analysis" to be
18 sure; it never sent it out for any such analysis. (ER 250 and 251 -- Ex. B, 3/29,
19 60:19-62:1). The Board had also noted throughout its proceedings that there
20 was in fact no "magic number" for Aleutians districts (ER 194 -- Ex. B, 3/28,
21 13:9-17) and it was not sure if the non-polarized Aleutians District had to have
22 35, 36 or 37% Native VAP to be effective. (ER 241 and 248 -- Ex. B, 3/29,
23
24

1 25:5-9 and 52:5-8) Therefore discarding this on this basis seems out of line with
2 its own standards.

3 In sum, the Board summarily rejected AFFR's plan on the grounds that it was less
4 Constitutional when even a cursory glance at the two maps side by side (on the record
5 pages cited here) demonstrates this was clearly not the case. They ensured this map could
6 not be adopted by refusing to send it to their expert for VRA analysis even though they
7 could not definitively say it was or was not complaint with the VRA.
8

9
10 *2. The RIGHTS Plan*

11 BBNC is not affiliated with the RIGHTS coalition, but there are several ways in
12 which the RIGHTS plan seems to be as Constitutional or more so than the Amended
13 Proclamation Plan. This list is non-exhaustive and BBNC notes here only the most
14 obvious:
15

- 16 • The Board claims that District 39 is non-compact and not socio-economically
17 integrated (ER 242 -- Ex. B, 3/29, 27:6-13) but this configuration is almost
18 identical to District 39 in the Amended Proclamation Plan. How it can be
19 unconstitutional in the RIGHTS plan but constitutional in the Board's plan is not
20 clear (compare ER 454 to ER 89 -- Ex. H p. 30 to Ex. A p. 66).
- 21 • The Board alleges that District 38 (which it mistakenly refers to as the Bethel
22 district even though it does not contain Bethel) is not socio-economically
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1 integrated (ER 242 -- Ex. B, 3/29, 28:13-15), yet its own plan contains a very
2 similar district in 36. (compare Ex. H p. 23 and Ex. A p. 62)

- 3 • In a very odd exchange, the Board suggests that District 37 is not compact (ER
4 243 -- Ex. B, 3/29, 30:11-15), but again it is very similar to the Board's own
5 District 37 (compare ER 454 to ER 86 -- Ex. H p. 30 to Ex A p. 63).
- 6
7 • The Board raised compactness concerns over District 36 (ER 243 -- Ex. B, 3/29,
8 31:6-10) but this district was apparently drawn to unite Yup'ik speaking coastal
9 villages and thus was geared toward socio-economic integration. In any event,
10 the Board knew this could be "argued either way." (ER 243 -- Ex. B, 3/29,
11 31:16-18)
- 12
13 • The Board is concerned that District 31 may not be socio-economically
14 integrated (ER 243 -- Ex. B, 3/29, 31:19-21 and 32:9-10) but the Board's own
15 plan contains a District 36 that unites similar parts of the Kenai Peninsula and
16 Prince William Sound. (compare ER 454 to ER 85 -- Ex. H p. 30 and Ex. A p.
17 35)
- 18
19 • The Board suggests Districts 10 and 5 are not compact but both seem to
20 resemble districts we have now under the current benchmark, so it was not clear
21 how this defeated the entire plan.
22

23 In sum, the Board summarily rejected the RIGHTS plan even though the districts it
24

1 questioned were very similar to the Board's own plan. Again, they ensured it could not be
2 adopted by refusing to send it to their expert for analysis of VRA compliance.

3 *3. The Calista Plans*

4 Perhaps the most curious rejection of all the plans occurred with those submitted by
5 the Calista Corporation. Throughout the remand process, and even after the Board
6 adopted but had not finalized its Amended Proclamation Plan, Calista submitted several
7 alternatives, all aimed at making only minor changes to the Board's own districts but
8 making a significant impact on Constitutionality and VRA compliance at the same time.
9 In other words, even if the Board was dead set on keeping the majority of their own plan,
10 there was no reasonable basis upon which to reject Calista's modifications. Quite simply,
11 Calista's Plan 3 (also called the 4/10 settlement plan) raised the Native VAP from 45.72 %
12 to 46.42% and, by pairing it with a closing military base instead of a burgeoning suburban
13 area, made it more likely to remain an effective district over the long term. Calista Plan 3
14 is also clearly more Constitutional in that it reduced the population deviations in the urban
15 Fairbanks districts from .6 to .4 and had only 2 districts that exceed +/- 5%. Yet despite
16 the fact that Calista Plan 3 is more Constitutional and would have ended this litigation by
17 removing the Plaintiffs from District 38, BBNC understands, upon information and belief,
18 that the Board refused to even consider it. At the very least, it is clear it was never sent to
19 Dr. Handley for analysis.
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1 Overall, the Board rejected: (1) the AFFR plans even though the Districts were
2 often more compact or socio-economically integrated; (2) rejected the RIGHTS plan even
3 though the districts bore a striking resemblance to the Amended Proclamation Plan; and (3)
4 rejected Calista's plans even though they (and especially the 3rd) presented fewer (and
5 lower) Constitutional deviations, more VRA compliant Native VAP and would have ended
6 this litigation. At the very least, this raises serious concerns about whether the Board has
7 in fact adopted the most Constitutional plan, that is, the one that does the least violence to
8 the Constitution.
9

10
11 Now, however, there are also serious questions with respect to whether the Board's
12 District 38 is even VRA compliant given that they have never asked their expert to perform
13 precinct analysis on this district to be sure. BBNC understands that the Riley Plaintiffs
14 have asked their expert, Dr. Chase Hensel, to analyze Amended Proclamation District 38.
15 He asserts that the Board's expert, Dr. Handley, has calculated Native turnout in this
16 district incorrectly thus leading to the wrong results. She cites an overall turnout average
17 for Alaska Native voters of 45.6% compared to 41.2% for non-Native voters. (Hensel
18 Rep. at 2) However, when Dr. Hensel performed a homogeneous precinct analysis he
19 discovered that in fact non-Native voters have a 5.10% higher turnout rate than Natives in
20 this particular district. (Hensel Rep. at 2) This leads to a relative turnout difference of
21 27%. (Hensel Rep. at 2-3). Because turnout is one of the factors used in the equation to
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1 determine whether a district is effective, if the turnout number is wrong, so is the
2 percentage required to be effective. BBNC has grave concerns that 38 is in fact not an
3 effective Native district. For all these reasons, the court should not accept the Amended
4 Proclamation Plan nor order that it serve as the Interim Plan for the 2012 elections.
5

6 **B. The Court Should Not Order that the Proclamation Plan (As Amended)**
7 **Serve as the Interim Plan for the 2012 Elections**

8 Although the Court has suggested using the Amended Proclamation Plan, the Board
9 itself has moved to use the Proclamation Plan (as amended) as the interim plan instead.
10 Not only is the Proclamation Plan unconstitutional in both process and in terms of four of
11 its districts (as found by the superior court in its February 3, 2012 order), but also BBNC
12 has since learned that this plan is retrogressive and violates the VRA.
13

14 As BBNC described in a brief before the superior court at the close of trial, there
15 were numerous problems with the expert and her opinions during the original redistricting
16 process in 2011. BBNC raises these due process issues here not to raise them as any kind
17 of claim per se, but to illustrate why the Native community may not have strenuously
18 objected to the original Proclamation Plan when it was presented to the Department of
19 Justice last August. In sum, there was a complete lack of any guidance as to a benchmark
20 standard (that is the number of effective Native seats) for almost the entire process, and
21 when the Board finally did have their expert present the benchmark, she was wrong. (The
22
23
24

1 public would not know this until many months later, after preclearance.) The end result
2 was even sophisticated organizations like BBNC did not truly have a handle on what was
3 going on or the opportunity to craft and present plans that met the *correct* benchmark.

4 The relevant timeline is quite telling.⁸ The Census data was released on March 15.
5 Parties began submitting draft plans on March 31. Dr. Handley was in Afghanistan for
6 three weeks in April. Dr. Handley was not hired until sometime in late March or April.
7 The available information, including census data, was not sent to Dr. Handley until around
8 April 8. Dr. Handley signed a contract with the Board in late April or early May. Dr.
9 Handley had a teleconference with the Board around May 17. On or around that date, she
10 informed the Board that the standard for effectiveness had changed from 35 percent to
11 about 42 percent. At a public meeting on May 24, Dr. Handley delivered a powerpoint
12 presentation informing the public that the standard was four effective House districts and 2
13 equal opportunity districts, and three effective Senate districts. At that same meeting,
14 third parties presented adjusted plans. Testimony was closed on that same day. The
15 Board issued its Proclamation Plan on June 13. Dr. Handley did not finalize her report
16 until August 4. In late August or September, Dr. Handley learns from the DOJ that the
17 benchmark is 5 effective House seats and 3 effective Senate seats.⁹ In other words, the

22
23 ⁸ The Superior Court's February 3, 2012 Memorandum Decision contains a
24 summary of each meeting of the Board at pages 13 to 29.

25 ⁹ Handley Depo. 96:11- 97:14. Because her deposition was not included with the

1 Board's own expert had given the Board and the public a magic number of nine effective
2 seats, when it was in fact eight. At the same meeting, she learned that the DOJ no longer
3 considers influence districts in the benchmark and that equal opportunity districts have no
4 place in Section 5 analysis.¹⁰ She did not inform the Board or the public of this
5 information.¹¹
6

7 Therefore, the Board took what was supposed to be a ninety-day process and turned
8 it into a four-day process, four business days being the entire time between the
9 announcement of the (wrong) benchmark and the final due date for third parties to submit
10 plans. In effect, this took away the right of public participation as all the numerous public
11 meetings (with the exception of the May 24th one in Anchorage) were held *before* the
12 announcement of the standard. Even worse, the public only learned this standard was
13 incorrect after preclearance of the Proclamation Plan. The first time that BBNC learned
14 that "equal opportunity" and "influence" districts did not count (that is that the DOJ
15 formally told the Board this) and that the proper standard was not 9 seats but 8 was during
16 trial in January 2012. Had BBNC known then what it knows now, it surely would have
17 urged objection from the DOJ.
18
19
20

21 When this matter was remanded to the Board and they considered anew the
22

23 excerpt of record, the relevant pages are attached here with as Attachment A.

24 10 Attach. A, Handley Depo. 144:16-22 and 146:2-16.

25 11 Attach. A, Handley Depo. 149:15-24 and 150:24- 151:5.

1 Fairbanks districts and in so doing also changed District 38, BBNC and others had an
2 analysis performed on the critical District 38 to determine if it was in fact an “effective”
3 Native district. It is not.

4 District 38 in this plan has a Native voting age population of 46.36% (Board’s
5 Petition for an Order Implementing the Proclamation Plan (as Amended) as the Interim
6 Plan, Ex. A at 67). The Board apparently looks only to the actual Native VAP percentage
7 to determine this district is “effective,” meaning that the Native community is able to elect
8 a candidate of its choice in this new district. However, this logic seriously flawed because
9 it fails to take into account the unique voting behavior in this district as required by the
10 DOJ regulations and in so doing the Board relies solely upon the percentage in order to
11 determine the effectiveness of the district. This is exactly what the DOJ counsels against:
12 “In determining whether the ability to elect exists in in the benchmark plan and whether it
13 continues in the proposed plan, the Attorney General does not rely on any predetermined or
14 fixed demographic percentages at any point in the assessment.” (76 Fed. Reg. 7471
15 (February 9, 2011)). Rather, the DOJ regulations dictate that there must be a “functional
16 analysis of the electoral behavior within the particular jurisdiction or election district.” *Id.*
17 The regulations specifically point out “differing rates of electoral participation” as one of
18 the factors that should be considered. District 38 (along with 37 and 36 below it) has the
19 highest percentage of limited English proficient speakers in the State. Naturally, this
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1 impacts turnout and general accessibility to the polls. More surprising is the fact that rural
2 voters in this district do not have early voting like the urban areas of the state do.¹² These
3 are just a few barriers to voting in this district that warrant something more than just a
4 cursory look at the percentage of Native VAP. The Board did not do this.

5
6 Had the Board taken a closer look at this district when it amended its Proclamation
7 Plan on remand, it would have discovered that this district is not effective at 46.36%. A
8 reconstructed precinct analysis clearly demonstrates this. To perform this analysis, one
9 examines all the precincts in the new district 38 in previous elections and counts the actual
10 votes cast to determine whether the Native candidate would have won in the new district.
11 Both Native-preferred candidates Diane Benson and Donnie Olson would have lost the
12 primaries in 2008 and 2006 respectively. Diane Benson would have received the exact
13 same number of votes, or 50%, as Ethan Berkowitz in the 2008 House Democratic
14 Primary. Donnie Olson, a longstanding member of the Bush Caucus with high name
15 recognition, would have lost the 2006 primary to Berkowitz by four percentage points.
16 (Mc Kinnon Decl. and Ex. A, filed herewith). In other words, District 38 of the
17 Proclamation Plan (as amended) is not effective because the Native-preferred candidate

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21

 12 The list of early voting locations (sometimes called absentee-in-person voting)
22 for the 2010 election can be found at:
23 http://www.elections.alaska.gov/doc/oep/2010/2010_oep_reg_4.pdf at pages 10-11. The
24 only village in the new 38 with early voting appears to be Kasigluk, while all others do not
have this option. As residents of suburban Fairbanks, Ester and Goldstream voters do

1 does not win. This in turn means that the Proclamation Plan (as amended) does not meet
2 the benchmark and violates the VRA.

3 Because District 38 is not effective, the Native-preferred candidate loses this
4 August and the benchmark of 8 *immediately and irrevocably* reduces to 7 and possibly
5 even 6 if the District's ineffectiveness correspondingly removes the effectiveness of its
6 Senate seat. In this sense, the interim plan is not interim at all because it will have a
7 permanent impact on the Native vote.
8

9 V. CONCLUSION

10 BBNC recognizes that time may be of the essence but it is not at such a critical stage
11 that this Court must simply accept what is placed in front of them for the sake of
12 expediency. In previous redistricting cycles, deadlines and even elections have been
13 moved back to allow the Board to finish its work on remand. Thus it is no reason to give
14 in to the full-court press to accept either of the two heavily flawed plans offered by the
15 Board. The Amended Proclamation Plan is not the one that deviates from the Alaska
16 Constitution the least and both it and the proclamation Plan (as amended) likely do not
17 comply with the VRA. The latter problem cannot be overstated – if the Board employs a
18 plan, even only an interim basis, that violates the VRA it will have the impact of
19 permanently and immediately reducing the impact of the Native voting strength in Alaska.
20 The Bush Caucus could be gutted in a matter of months of the sake of expediency. BBNC
21
22
23
24

1 urges this Court to consider carefully the impacts, and the likelihood of further litigation,
2 were such a course pursued. Instead, BBNC urges this Court, through a special master, to
3 assume jurisdiction and choose the plan that both complies with the VRA and does not do
4 unnecessary violence to the Alaska Constitution.
5

6
7 DATED: May 8, 2012

8 By: 

9
10 Natalie Landreth
11 NATIVE AMERICAN RIGHTS FUND
12 Alaska Bar No. 0405020

13 *Attorney for*
14 BRISTOL BAY NATIVE CORPORATION
15
16
17
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Certificate of Service

I hereby certify that on the 8th day of May, 2012, a true and correct copy of the foregoing document was served upon each of the following by first class and electronic mail:

Michael White
Nicole Corr
Patton Boggs, LLP
601 W. 5th Ave., Suite 700
Anchorage, Alaska 99501

Joseph N. Levesque
Walker & Levesque, LLC
731 N St.
Anchorage, Alaska 99501

Carol Brown
Association of Village Council
Presidents
P.O. Box 219
101A Main St.
Bethel, Alaska 99550

Marcia R. Davis
Calista Corp.
301 Calista Court
Anchorage, Alaska 99518

Jill Dolan
Fairbanks North Star Borough
P.O. Box 71267
Fairbanks, Alaska 99707

Scott A. Brandt-Erichsen
Ketchikan Gateway Borough
1900 1st Ave., Suite 215
Ketchikan, Alaska 99901

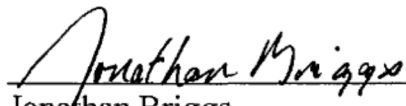
Thomas E. Schultz
715 Miller Ride Road
Ketchikan, Alaska 99901

Joseph H. McKinnon
1434 Kinnikinnick St.
Anchorage, Alaska 99508

Michael J. Walleri
Jason Gazewood
Gazewood & Weiner, PC
1008 16th Ave., Suite 200
Fairbanks, Alaska 99701

Thomas F. Klinker
Birch, Horton, Bittner & Cherot
1127 W. 7th Ave.
Anchorage, Alaska 99501

By: _____


Jonathan Briggs
Legal Administrative Asst.

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FOURTH JUDICIAL DISTRICT

3
4
5 IN RE 2011 REDISTRICTING CASES)
6)

7 Case No. 4FA-11-1935 CI
8
9
10

11 DEPOSITION OF LISA HANDLEY, Ph.D.

12 Washington, D.C.

13 Tuesday, November 22, 2011
14
15
16
17
18
19
20
21
22

23 Reported by:

24 John L. Harmonson, RPR

25 Job No. 43926

1 L. HANDLEY

2 anything about benchmark, but in fact that's what
3 gets you a preclearance letter, meeting the
4 benchmark or surpassing it.

5 Q. For example, in this situation, you're
6 not privy to any written communication from the
7 Department of Justice saying that the benchmark
8 required five effective districts?

9 A. The Justice Department did not write
10 that in the letter.

11 Q. And in your conversations with Steve
12 with the unidentified last name, he never told
13 you that you had to have five effective
14 districts?

15 A. Yes, he did.

16 Q. He did?

17 A. Yeah. He said he counts eight, five
18 House and three Senate. Yes.

19 Q. And when did he tell you this?

20 A. At the meeting that the Alaska
21 Redistricting Board had with the Justice
22 Department.

23 Q. Now, did he say that you had to have a
24 minimum of five, or did he say that five would
25 make it?

1 L. HANDLEY

2 A. I don't remember his wording. I don't
3 think he said minimum.

4 Q. So he said that if you had five
5 effective districts, it would clear?

6 MR. WHITE: Five effective House
7 districts?

8 MR. WALLERI: Five effective House
9 districts, presuming no problem in the
10 Senate, that it would clear.

11 A. I don't want to mischaracterize what
12 he said. I'm pretty sure the word was he counts
13 five and three in the benchmark and five and
14 three in the proclamation plan.

15 Q. Is it possible to provide Steve's last
16 name?

17 MR. WHITE: I think it's Popick. I
18 think she mentions it in one --

19 MR. ARRINGTON: Popper --

20 MR. WHITE: Or Popick. It's in one of
21 the --

22 MR. ARRINGTON: Are you talking about
23 Steve Popick?

24 MR. WHITE: It starts with a P. She
25 mentions it once in one of the transcripts.

1 L. HANDLEY

2 Q. Native Native-preferred candidates?

3 A. Native Native-preferred candidates.

4 In Texas, for example, we had a
5 variety of Hispanic candidates who were clearly
6 the Hispanic-preferred candidates who had run
7 statewide and you could look at recompiled
8 election results.

9 Q. Now, in your report you continued to
10 make the distinction between effective and equal
11 majority districts, correct?

12 MR. WHITE: Equal opportunity?

13 Q. Effective and equal opportunity
14 districts.

15 A. I did.

16 Q. Okay. So this understanding that you
17 were using the wrong terminology for Section 5
18 analysis with regards to equal opportunity
19 districts, that must have come at some time after
20 August when you submitted your final report?

21 A. It would have come sometime after June
22 when I drafted the vast majority of the report.

23 Q. Well, I'm going to hand you another
24 exhibit here.

25 MR. WALLERI: We'll call this

1 L. HANDLEY

2 Q. And so is it your understanding that
3 at this stage of drafting, that you were still
4 making this distinction between effective and
5 equal opportunity districts?

6 A. Yes.

7 Q. And that remains in the plan that you
8 submitted in August?

9 MR. WHITE: The report?

10 Q. The report that you submitted in
11 August?

12 A. Yes.

13 Q. So is it fair to say that you did not
14 learn that you were using the wrong language
15 until after you submitted the report?

16 A. Probably. I don't know when I was
17 hired to do Texas. I know I -- I would say
18 probably. The discussion with regard to Texas
19 was actually a lengthy one, so the discussion
20 might have begun by this point but not gone all
21 the way up the channels to the top of the voting
22 rights section and made it all the way back down
23 again.

24 Q. I'm going to hand you another exhibit
25 here.

1 L. HANDLEY

2 district that Mr. Hebert wanted to have. So I am
3 assuming that your final report had not been
4 submitted and approved yet as the 9th?

5 MR. WHITE: Submitted to who?

6 MR. WALLERI: To the Board.

7 A. I don't know if that was the process.
8 I'm sorry.

9 MR. WHITE: You were somewhere,
10 weren't you?

11 A. Home safe and sound. I don't know
12 where I was in August.

13 Q. So I guess what I'm saying is that
14 by -- there was no discussion on 8/9 --

15 I guess the question is: When you
16 first learned that you were using the wrong
17 language to describe this equal opportunity
18 district in the Section 5 context, did you get
19 ahold of the Board and tell them this?

20 A. Not the Board.

21 Q. Who did you get ahold of? Did you get
22 ahold of anybody associated with the Board?

23 A. At some point I told Taylor and Mike
24 what I had learned in the Texas litigation, yes.

25 Q. And did you let Mr. Hebert know that,

1 L. HANDLEY

2 who was doing the DOJ submission?

3 MR. WHITE: Object to the
4 characterization.

5 Q. Or had the DOJ submission already gone
6 in?

7 A. No, I didn't.

8 Q. You didn't talk to him about that?

9 A. I didn't talk to who about what?

10 Q. Mr. Hebert, about the problem with the
11 language over equal opportunity as being a
12 Section 2 language as opposed to a Section 5
13 language.

14 A. I don't remember. I know we talked
15 about influence versus effective and equal
16 opportunity, but I don't remember.

17 Q. Do you know whether or not this ever
18 got communicated to the Board, the actual Board
19 itself, the problem over the language, the equal
20 opportunity language?

21 MR. WHITE: Object to the
22 characterization.

23 A. I don't know.

24 Q. Did you ever submit an amended report
25 or anything to the Board or to the Department of

1 L. HANDLEY

2 Justice or to the Board's staff talking about the
3 fact that the equal opportunity language was
4 inappropriate in a Section 5 analysis?

5 A. No.

6 Q. Now, you're familiar with
7 Mr. Arrington here, correct?

8 A. Yes.

9 Q. And in fact, you're working with him
10 on the Texas litigation, correct?

11 A. He's another expert for the Department
12 of Justice.

13 Q. And he's a recognized expert in Voting
14 Rights Act?

15 MR. WHITE: So stipulate.

16 A. Yes.

17 Q. In fact, he's pretty good, isn't he?

18 A. I don't really know his work, but
19 Justice Department likes him.

20 MR. WALLERI: I've got another. This
21 is Exhibit 10.

22 (Exhibit 10 marked for identification
23 and attached hereto.)

24 Q. This is an e-mail from you to
25 Mr. White. "I have been working in DC with the

- 1 4. This exhibit consists of a chart that lists the precincts in what would now be
2 called District 38 of the Board's Interim Plan. I received this data from the
3 Division of Elections website, which has election returns available.
- 4 5. Beside each precinct are columns showing the number of actual votes
5 received by the candidates in 2006 and 2008 Democratic primaries. For those
6 precincts divided between District 38 and another district, the votes were
7 prorated based on the percentage of population in each. Early voting,
8 absentee and questioned ballots which are not specifically attributed to
9 precincts in the tally were prorated to precincts district-wide based on
10 population in each.
- 11 12
- 13 6. I selected these elections because they were identified by Dr. Lisa Handley,
14 the Board's voting rights expert, as the only two statewide races involving
15 polarized voting. Each contest contained a Native-preferred candidate,
16 namely Diane Benson or Donnie Olson, running against a white-preferred
17 candidate, Ethan Berkowitz.
- 18 19
- 20 7. The chart indicates that if the 2008 Democratic House primary had been
21 conducted in the Board's Interim Plan District 38, Diane Benson would have
22 received 50% of the vote.
- 23 24
- 25 8. The chart indicates that if the 2006 Democratic Lieutenant Governor primary
26 had been conducted in the Board's Interim Plan District 38, Donnie Olson

1 would have lost to Ethan Berkowitz by four percentage points.

2 9. Attached as Exhibit B is a chart showing the actual number of registered
3 voters in the Fairbanks-Highway precincts (6818) versus the rural precincts
4 (5078) in the Board's Interim Plan District 38.

5
6 10. I have reviewed this document for accuracy and authorized the use of my
7 electronic signature to attest to it.

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s/jmckinnon

Joe McKinnon

Certificate of Service

I hereby certify that on the 8th day of May, 2012, a true and correct copy of the foregoing document was served upon each of the following by first class and electronic mail:

Michael White
Nicole Corr
Patton Boggs, LLP
601 W. 5th Ave., Suite 700
Anchorage, Alaska 99501

Joseph N. Levesque
Walker & Levesque, LLC
731 N St.
Anchorage, Alaska 99501

Carol Brown
Association of Village Council
Presidents
P.O. Box 219
101A Main St.
Bethel, Alaska 99550

Marcia R. Davis
Calista Corp.
301 Calista Court
Anchorage, Alaska 99518

Jill Dolan
Fairbanks North Star Borough
P.O. Box 71267
Fairbanks, Alaska 99707

Scott A. Brandt-Erichsen
Ketchikan Gateway Borough
1900 1st Ave., Suite 215
Ketchikan, Alaska 99901

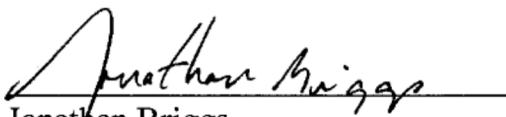
Thomas E. Schultz
715 Miller Ride Road
Ketchikan, Alaska 99901

Joseph H. McKinnon
1434 Kinnikinnick St.
Anchorage, Alaska 99508

Michael J. Walleri
Jason Gazewood
Gazewood & Weiner, PC
1008 16th Ave., Suite 200
Fairbanks, Alaska 99701

Thomas F. Klinker
Birch, Horton, Bittner & Cherot
1127 W. 7th Ave.
Anchorage, Alaska 99501

By:



Jonathan Briggs
Legal Administrative Asst.

BOARD INTERIM PLAN HD-38

2008 Dem. US House Primary

2006 Dem. Lt. Gov. Primary

Old Dist.	Precinct	Benson	Berkowitz	Berkowitz	Olson	Rollins	Rollinson
6	Aniak	22	23	13	8	7	0
6	Anvik	7	1	3	4	1	0
6	Grayling	12	6	8	5	7	3
6	Holy Cross	15	15	15	4	0	0
6	Manley Hot Springs	3	8	5	0	1	0
6	Marshall	27	21	14	10	12	4
6	McGrath	25	10	14	4	3	4
6	Minto	31	15	8	5	2	0
6	Nenana	25	20	11	7	14	3
6	Nikolai	7	5	11	7	14	3
6	Russian Mission	14	10	8	9	0	3
6	Shageluk	17	3	17	2	8	2
6	Takotna	4	3	2	0	0	0
6	Abs-Q-EV Prorated	51	34	27	10	8	4
7	Goldstream1	56	120	91	16	11	4
7	Abs-Q-EV Prorated	13	28	16	3	2	1
8	Anderson	14	5	3	1	3	1
8	Cantwell	18	11	12	5	1	1
8	Clear	7	10	4	2	4	1
8	Denali Park	33	36	24	5	10	5
8	Ester (77%)	100	136	119	28	18	4
8	Goldstream 2	126	153	125	22	21	7
8	Healy	35	57	24	7	12	3
8	University Hills (92%)	93	124	76	40	25	9
8	Abs-Q-EV Prorated	124	155	68	19	17	5
39	Alakanuk	35	34	9	49	8	2
39	Chevak	49	20	7	37	9	1
39	Emmonak	49	19	8	63	6	2
39	Hooper Bay	46	42	16	79	8	2
39	Kotlik	42	11	4	27	9	5
39	Mountain Village	49	26	8	69	3	3
39	Nunam Iqua	7	4	2	8	4	0
39	Pilot Station	20	17	12	51	4	5
39	Pitkas Point	9	2	3	13	3	1
39	Scammon Bay	18	27	2	30	2	0
39	St. Mary's	36	41	13	54	10	5
39	Abs-Q-EV Prorated	39	26	5	27	4	1
Board Interim Dist. 38 Totals		1278	1278	807	730	271	94
		50.0%	50.0%	42.4%	38.4%	14.3%	4.9%

Exhibit A

BOARD INTERIM DISTRICT 38:

		Registered Voters 4/3/2012	2010 Votes Cast Dem Primary	2008 Votes Cast Dem Primary	2006 Votes Cast Dem Primary
<u>Fairbanks-Parks Highway Precincts</u>					
6	Nenana	583	41	57	43
7	Goldstream No. 1	1082	113	186	138
8	Anderson	205	11	24	9
8	Cantwell	188	16	31	20
8	Clear	211	14	23	15
8	Denali Park	302	22	73	44
8	Ester (77%)	1174	132	251	188
8	Goldstream No. 2	1354	168	297	200
8	Healy	761	41	107	53
8	University Hills (92%)	<u>958</u>	<u>71</u>	<u>106</u>	<u>100</u>
		6818	629	1155	810

Rural Precincts

6	Aniak	341	22	51	36
6	Anvik	58	6	10	10
6	Grayling	113	25	23	28
6	Holy Cross	120	15	30	19
6	Manley Hot Springs	136	6	13	8
6	Marshall	210	23	63	43
6	McGrath	301	22	38	26
6	Minto	142	37	54	15
6	Nikolai	67	11	14	9
6	Russian Mission	169	20	39	22
6	Shageluk	64	19	23	31
6	Takotna	45	8	9	3
39	Alakanuk	290	45	85	70
39	Chevak	401	55	76	63
39	Emmonak	425	96	91	88
39	Hooper Bay	530	66	106	114
39	Kotlik	267	43	65	50
39	Mountain Village	420	97	90	90
39	Nunam Iqua	90	13	21	18
39	Pilot Station	332	55	48	83
39	Pitkas Point	48	11	15	23
39	Scammon Bay	224	28	39	35
39	St. Mary's	<u>285</u>	<u>71</u>	<u>92</u>	<u>83</u>
		5078	794	1095	967

Exhibit B