#48,51,52,53,54, 55,56,62,67,68

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

IN RE: 2011 REDISTRICTING CASES:)
)
)
Case No. 4FA-11-2209CI

Order Regarding Summary Judgment Motions

I. Background/Overview

This action commenced in Fairbanks and Juneau on 12 July 2011 with actions filed by the Riley plaintiffs, the Fairbanks North Star Borough plaintiffs, and the Petersburg plaintiffs pursuant to Article VI, Section 11 challenging the redistricting plan proclaimed by the Alaska Redistricting Board [Board] on 14 June 2011.[1] Those three cases ultimately were consolidated under the current trial court caption and number. The Fairbanks North Star Borough [FNSB] voluntarily dismissed its action.

The 2011 Proclamation Plan at issue in the original litigation, like all redistricting litigation since 1970, focused not only on the provisions of the Alaska Constitution, but also on the necessity of preclearance of any proclamation plan by the U.S. Department of Justice [DOJ] under Section 5 of the Voting Rights Act [VRA].[2] The extent of deviation from Alaska Constitutional mandates in order to satisfy the VRA was the major focus of the litigation. Experts testified regarding what was needed to satisfy the VRA.

Entities, including the FNSB, were permitted to file briefs as *amicus curiae.* A variety of issues were resolved on summary judgment motion practice. The remaining issues were tried to the court from 9 January 2012 to 17 January 2012. A written decision was rendered 3

[1] The will be referred to as the 2011 Proclamation Plan.
[2] 42 U.S.C. §1973 (2006).

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February 2012. The Alaska Supreme Court directed that the 2012 election proceed consistent with its 10 May 2012 order, which effectively utilized the Board's proclamation plan as modified by this court. That plan will be referred to as the 2012 Amended Proclamation Plan.

The Alaska Supreme Court ultimately remanded the matter to create a new redistricting plan consistent with the appellate direction, specifically to engage in the *Hickel* process.[3]

The constitutionality of the VRA was being tested before the U.S. Supreme Court in several cases, most notably *Shelby County, Ala. V. Holder.*[4] A decision was expected in that case in June 2013. The Board preferred to wait for that decision before adopting a new proclamation plan. This court disagreed and directed and required the Board to proceed with the *Hickel* process.[5]

Before the Board completed the *Hickel* process the U.S. Supreme Court decided *Shelby County.* That decision held that Section 4 of the VRA is unconstitutional and its formula could no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5. The Supreme Court did not rule on Section 5. Justice Ginsberg noted in her dissent that by declaring Section 4 of the VRA unconstitutional that Section 5 is "immobilized."[6] The parties, and this court, agree preclearance is not needed under Section 5. The fundamental rights set out in Section 2 of the VRA that apply to all jurisdictions remain intact.

The Board ultimately proclaimed a plan on 14 July 2013. For all purposes hereafter this shall be referred to simply as the 2013 Proclamation Plan. This plan is the first plan in some 40 years developed without the need for preclearance by DOJ. The upshot is that deviation from the

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[3] 846 P.2d 38, 51 n. 22 (Alaska 1992).
[4] 133 S.Ct. 2612 (2013).
[5] *See* the court's 30 May 2013 Order Regarding Hearing on Board Plan(s) and Proposed Board Time Frame.
[6] 133 S.Ct. 2612, 2633 (2013).

requirements of the Alaska Constitution mandated by preclearance, such as the ability of a population to maintain an ability to elect preferred candidates consistent with the previous or benchmark plan, is not now a legal basis to deviate from the Alaska requirements of contiguity, compactness, and socio-economic integration. Equal protection issues, however, remain a redistricting priority.

The absence of mandatory preclearance rationally suggests that Article VI considerations would narrowly focus the issues and minimize contention. That is not the case. The parties seize upon population deviation percentages to justify varying, or not, from the constitutional mandates. The Board's *paean* about its plan having the lowest deviation in Alaska redistricting history is used to justify how it created its instant plan, including splitting municipalities and creating Interior districts. On the other hand, the Riley plaintiffs, ADP, and FNSB use deviation figures to create districts they argue are more compliant with the Alaska Constitution. Population deviation is thus the new VRA for supporting or attacking any particular plan.

The use of population deviation, both as a shield and as a sword, is not surprising. The competing interests for access and control of the legislative branch runs through every redistricting plan since statehood, including both plans since the 1998 constitutional amendment created the Board. The Alaska experience is long enough to illustrate that the best intentions of the legislative and judicial branches to honor the constitution may well not reflect the voice of the voters. It is unlikely anyone involved in the 2001 redistricting litigation foresaw the sea change wrought by the Corrupt Old Bastards cases mentioned in earlier orders, but that scandal changed the political landscape for the 2011 litigation.

The practical inability to create predictable districts in response to standards external to the Alaska Constitution is vividly illustrated in the instant case. This court reluctantly approved House District 34 under the 2011 Proclamation Plan based on the VRA justification of not protecting an incumbent Native representative in order to create a Native "influence" district. This created tension with a compactness claim for House District 32 under that plan. Despite this legerdemain, the Native incumbent from Haines lost to a very young non-Native and relatively unknown political newcomer from Sitka. Such a result was the antithesis of the reasons advanced by Dr. Handley for creating that district. To paraphrase Emerson, the law is only a memorandum. We esteem the statute and the constitution. But the force of the law, and such life as the law may have, is in the character of living men. The voters in House District 34 clearly viewed the law that created their district as only a memorandum and acted according to the dictates of their own character.

No judge or justice currently sitting on any Alaska court has reviewed a plan without VRA Section 5 consideration. The Alaska Constitutional guidance has not changed, but the language and focus is significantly different in analyzing the 2013 Proclamation Plan than in analyzing the 2011 Proclamation Plan and the 2012 Amended Proclamation Plan. The decisions made here, and on appeal, will chart the political organization of Alaska for the duration of this census period. The decisions are based on controlling law. Any elections, of course, will be based upon the controlling will of Alaskan voters.

II. Current Issues

The Board adopted the 2013 Proclamation Plan on 14 July 2013. Under Article VI, Section 11, qualified voters could apply within 30 days for relief from the superior court. Procedurally it is not clear whether the 2013 Proclamation Plan is a new plan that opens up the

ability of any qualified voter to seek relief in any superior court or whether the 2013 Proclamation Plan is merely the latest iteration of the 2011 Proclamation Plan and relief is available only to the extant parties and only in this court. This court finds the 2013 Proclamation Plan is a new plan as envisioned by the Alaska Constitution and the constitutional enforcement provisions were open for 30 days for qualified voters. Only the Alaska Democratic Party [ADP], with specified voters, filed a separate challenge. The Riley plaintiffs filed relief in the instant case.

The ADP case was filed on 13 August 2013.[7] The Board appeared. The case was assigned to this court and *sua sponte* consolidated with the instant case pursuant to Civil Rule 42.[8] The court reviewed the claims made by Riley and the ADP, the responses of the Board, and identified the issues as follows:

Fairbanks

(1) Compactness issues in House Districts 3 and 5.

(2) Socio-economic issues due to the split of the University of Alaska-Fairbanks in House Districts 4 and 5.

(3) Whether the higher deviations from the ideal district population in House Districts 1-5 are justified.

(4) Compactness and contiguousness issues in Senate District B.

(5) Whether higher deviations from the ideal district population in Fairbanks Senate Districts are justified.

[7] *See* 4FA-13-2435CI.

[8] *See* the court's 28 August 2013 Order Regarding the Board's Motion for Compliance, Consolidation of Cases, and Initial Briefing Schedule.

Mat-Su

(1) Socio-economic integration issues in House Districts 9 and 12 by combining areas outside the Mat-Su Borough with the Mat-Su Borough.

(2) Whether the plan affords proportional representation to voters residing inside and outside the Mat-Su Borough.

Kenai

(1) Socio-economic integration issues in House District 32 by combining areas outside the Kenai Peninsula Borough with the Kenai Peninsula Borough.

(2) Whether the plan affords proportional representation to voters residing inside and outside the Kenai Peninsula Borough.

Rural Alaska Districts

Socio-economic integration issues in House Districts 40, 39, 37, and 6.

Truncation

Whether the Board considered improper factors in deciding the truncation of senate terms.

The parties were directed and required to file simultaneous motions for summary judgment. The *amicus* entities were allowed to present briefs at the time of the reply. The pleadings closed on 1 October 2013.[9] The court now rules on all of the parties' motions for summary judgment. These issues are discussed in order of priority.

III. Standards of Review & General Principles

Rule 56 of the Alaska Civil Rules of Procedure provides that summary judgment should be granted if there is no genuine dispute as to material facts, and if the moving party is entitled to

[9] ADP filed its pleadings late. It relied upon the "human frailties" of its counsel for missing the deadline. The court accepted the late filings over the objection of the Board.

summary judgment as a matter of law.[10] The moving party has the burden of showing that there are no genuine issues of material fact.[11]

Once the moving party has met the burden, the non-movant "is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that [he] could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists."[12] Any allegations of fact by the non-movant must be based on competent, admissible evidence.[13] The non-movant may not rest upon mere allegations or denials, but must show that there is sufficient evidence supporting the claimed factual dispute to require a fact-finder to resolve the parties' differing versions of the truth at trial.[14]

This court has previously held that the standard of review is to ensure that the reapportionment plan under review is not unreasonable and is constitutional under Art. VI, Section 6 of Alaska's Constitution.[15] Whether a plan or a portion of a plan is constitutional is a question of law subject to *de novo* review. As to whether a plan or portion of a plan is unreasonable, the "Court must examine not policy but process and must ask whether the agency has not really taken a 'hard look' at the salient problems or has not generally engaged in reasoned decision making."[16]

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[10] Alaska R. Civ. P. 56; *e.g., Reeves v. Alyeska Pipeline Serv. Co.*, 926 P.2d 1130, 1134 (Alaska 1996); *Zeman v. Lufthansa*, 699 P.2d 1274, 1280 (Alaska 1985).
[11] *Id.*
[12] *Still v. Cunningham*, 94 P.3d 1104, 1108 (Alaska 2004)(internal quotation omitted).
[13] Alaska R. Civ. P. 56(c), (e); *Still*, 94 P.3d at 1004, 1008, 1110.
[14] *Christensen v. NCH Corp.*, 956 P.2d 468, 474 (Alaska 1998)(citing to *Shade v. Anglo Alaska*, 901 P.2d 434, 437 (Alaska 1995)).
[15] *See* the court's 1 February 2012 order.
[16] *Id.*

Here the court concludes that, unlike the 2011 litigation, there are no genuine issues of material fact that require an evidentiary hearing. Most issues are purely legal issues. To the extent any particular issue is based on facts supported by affidavits, the court takes the facts in the light most favorable to the nonmoving party for purposes of this analysis.

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> The Redistricting Board shall establish size and areas 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 given to local government boundaries wherever possible.

IV. Equal Protection

In *Kenai Peninsula Borough*, the court established that, "[i]n the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote'—the right to an equally weighted vote—and of 'fair and effective representation'- the right to group effectiveness or an equally powerful vote."[17]

A. One Person, One Vote- Deviations

The principle of "one person, one vote" is quantitative in nature.[18] "[A] State must make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[19] "Whatever the means of accomplishment, the overriding

[17] *Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1366 (Alaska 1987).
[18] *Hickel v. Southeast Conference*, 846 P.2d 38, 52 (Alaska 1992).
[19] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), *quoted in Kenai Peninsula Borough*, 743 P.2d at 1358; *and Hickel*, 846 P.2d at 47.

objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."[20]

"[A]s a general matter an apportionment plan containing a maximum population deviation under 10% falls within a category of minor deviations. The state must provide justification for any greater deviation."[21]

Although Federal law permits a ten percent overall deviation from the ideal district, the Alaska Supreme Court acknowledged that in urban areas in particular the population is sufficiently dense and evenly spread to allow minimal population deviations, especially in light of the newly available technological advances.[22]

In the 2001 redistricting cases, the Alaska Supreme Court found the overall deviation of 9.5% in the Anchorage House districts unconstitutional.[23] The Alaska Supreme Court upheld deviations of up to 5% in the Fairbanks or Kenai Peninsula districts.[24]

Equal protection under the concept of 'one person, one vote' is reflected in the deviations of each district. The overall deviation of the 2013 Proclamation Plan is 4.2%, which is the lowest deviation in Alaskan redistricting history. The 2010 Census reported the state of Alaska has 710,231 people. Thus the ideal house district would be 17,755 people.

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[20] *Id.*

[21] *Kenai Peninsula Borough*, 743 P.2d at 1366, *quoted in Hickel*, 846 P.2d at 48. The Alaska Supreme Court has recognized "several other state policies which may also justify a population deviation greater than 10 percent." In *Kenai Peninsula Borough*, the court noted that the state's desire to maintain political boundaries is sufficient justification, provided that this principle is applied consistently. The Alaska Supreme Court has also ejected other policies as inadequate justifications for population. In *Groh*, the court held that the:...mining potential in the [Nome] area and the need for a 'common port facility' did not justify a 15 percent overrepresentation where 'the makeup of the population both to the north and the east [did] not vary significantly from that of the adjoining villages within the Nome [election district] boundaries.' *Hickel* 846 P.2d at 48 (*quoting Groh*, 526 P.2d at 877).

[22] *In re 2001 Redistricting Cases*, 47 P.3d 141, 145-146 (Alaska 2002).

[23] *Id.*

[24] *Id.*

The Riley plaintiffs and the FNSB *amici* contend that Fairbanks House Districts 1-5 and Fairbanks area senate districts have unnecessarily higher deviations from the ideal district. The Riley plaintiffs also argue that two Mat-Su House districts, 9 and 12, have unnecessarily higher deviations. The court addresses each area in turn.[25]

1. Fairbanks House Districts 1-5

The overall deviation in the five Fairbanks House Districts is 0.92%. All of the districts within the FNSB have a deviation of less than one-half of one percent, with three districts having a deviation of less than one-fifth of one percent from the ideal district size. In other words, each district is less than 100 people either short of, or in excess of, the ideal district size of 17,755 people. House District 1 is 29 people short of an ideal district, with a 0.16% deviation. House District 2 is seventeen people short, with a -0.10% deviation. House District 3 is 82 people short. House District 4 has 31 people more than the ideal district size, with a 0.17% deviation. House District 5 has 82 people more than the ideal district size, with a 0.46% deviation.

The Board comments that these deviations are far less than those previously upheld by the Alaska Supreme Court in 2002, and less than the deviations in both the original 2011 Proclamation Plan and the 2012 Amended Proclamation Plan. The Board notes that the Riley plaintiffs did not challenge any of these deviations as being unnecessarily high or failing to contain a population as near as practical to the ideal district size in previous plans. The Board

[25] These issues come from the following briefing: On 12 September 2013 the Board filed the following motions for summary judgment: a motion for summary judgment regarding Riley plaintiffs' claim House Districts 1 through 5 have unnecessarily higher deviations from the ideal district, a motion for summary judgment regarding the Riley Plaintiffs' claim that Senate Districts A, B, and C have unnecessary higher deviations from the ideal district, and a motion for summary judgment regarding the Riley plaintiffs' claims that House Districts 9 and 12 have unnecessarily higher deviations from the ideal district. On 12 September 2013 the Riley plaintiffs filed a global motion for summary judgment in which some of these issues were discussed. On 26 September 2013 the FBSB *amici* filed a motion for summary judgment regarding Riley plaintiffs' claim that House Districts 1 through 5 have unnecessarily higher deviations from the ideal district and a motion for summary judgment regarding Riley plaintiffs' claim Senate Districts A, B, C have unnecessarily higher deviations from the ideal district.

also notes that the 21 June 2012 Gazewood & Weiner Plan (G&W Plan) had much higher deviations in the Fairbanks districts than those they now challenge.[26] The Board ultimately argues that House Districts 1-5 contain "a population as near as practicable" to the ideal district size in accordance with Article VI, Section 6 of the Alaska Constitution.

The Riley plaintiffs acknowledge that the Fairbanks House Districts have a low deviation, but argue that achieving Alaska constitutional standards respecting deviations is not necessarily met by creating the lowest possible deviations. The Riley plaintiffs state that population deviations between districts is not considered in the abstract without regard to the other requirements of the same section of the Constitution. The Riley plaintiffs argue that the Board should work to reduce deviations with compact and contiguous districts because a plan exhibiting low deviations between non-compact districts is a deficient plan. The Riley plaintiffs contend that nothing in the Board's record demonstrates that they actually considered the practicality of low deviations verses the other Article VI, Section 6 requirements of the Alaska Constitution. The Riley plaintiffs ultimately argue that the Board pursued low deviations without regard to the other constitutional requirements, specifically compactness.[27]

The FNSB similarly argues that the Board did not achieve the low deviations they boast about while creating districts that comply with the Alaska Constitutional requirements of compactness, contiguity and relative socio-economic integration. FNSB contends that deviations among districts, and even among plans, are not to be judged on a comparative basis to other redistricting cycles because the Board is charged with the responsibility for creating compact, contiguous, and relatively socio-economic districts as near as practicable to the ideal based upon

[26] The overall deviation of the Fairbanks area in the Gazewood & Weiner Plan is 2.38%, while the Board's is less than one percent at 0.92%. House Districts 6 through 10 in the G & W Plan contain population from the FNSB and have deviations of 2.44%, 0.06%, 0.66%, 1.00%, and 0.93% respectively.

[27] The Riley plaintiffs' cite the Board's 7 July 2013 meeting where the Board considered deviations 17 times.

conditions that exist in the current redistricting cycle. The FNSB discusses a 7 July 2013 Board hearing where Board Member Holm admitted that population could be shifted to create more compact districts, but chose to move forward with the "anvil" in House District 5. The FNSB contends that there is no way to know whether the deviations in the Fairbanks' districts are too high because the districts that are being analyzed are constitutionally infirm. The FNSB ultimately argues that the Board must justify any variance from the ideal district size, and that the Board has not attempted to do so.

The Board argues that the Riley plaintiffs are not really challenging the deviations in the Fairbanks districts, but are really challenging the compactness of the districts. The Board also argues that the Riley plaintiffs preferred redistricting process changes depending on their particular claim. For instance, when the Riley plaintiffs argue about compactness, they argue that the Board focused too much on deviations; when the Riley plaintiffs argue about Fairbanks Senate Districts, they argue the Board should have focused on lower deviations; and when the Riley plaintiffs argue about geographic proportionality concerns, they argue that the Board should have prioritized maintaining Borough boundaries.[28] The Board additionally argues that the Riley plaintiffs misrepresent and misquote Board meetings. The Board contends that Board Member Jim Holm simply noted that the residents of Ester and Goldstream had insisted on being in a house district with Fairbanks, and had presented hours worth of evidence at trial about the connections these communities have with the western Fairbanks area. The Board contends that the discussion in question regarding the group of census blocks highlights the reasoned decision-making process the Board applied to redistricting in every area of the state.

[28] The civil rules permit a party to demand relief in the alternative or of several types. CR 8(a).

This court noted previously that while the Board's intent to achieve low deviations is commendable, it must live in harmony with the other constitutional requirements.[29] This court explained that the Alaska Supreme Court's instruction did not imply that justification for deviating from the lowest possible deviation would not be accepted, it simply stated that the Board must try to achieve low deviations.[30] The court finds the argument that the Fairbanks districts have "unnecessarily higher deviations" to be mistaken. The real argument seems to be, and is sometimes argued by the parties despite the title of their briefs, that the deviations are really too low or that it is unclear whether the deviations are too low or high because the other constitutional concerns were not properly addressed. The court finds that the Riley plaintiffs and FNSB *amici* are really focused on compactness, the pairing of Fairbanks Senate districts, and the split of the University of Alaska- Fairbanks campus.

The court agrees with the FNSB *amici* that it is not fruitful to compare the deviations of this plan to prior plans, especially since the prior plans were subject to VRA considerations. However, the court finds that the Board's deviations are very low, lower than necessary to pass constitutional muster under the *In re 2001 Redistricting Cases.*[31] Low deviation numbers alone, however, do not necessarily mean districts with such low deviation numbers are otherwise constitutionally infirm – the court will still look at constitutional *troika* of compactness, contiguity, and socio-economic integration. If the districts pass muster then low deviation numbers do not compel a contrary result.

The plaintiffs and the *amici* did not point to another third-party plan with lower Fairbanks house district deviations with the current redistricting data and requirements. The plaintiffs' own

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[29] *See* the court's 3 February 2012 Order.
[30] *Id.*
[31] 44 P.3d 141 (Alaska 2002).

G&W Plan even has higher Fairbanks House District deviations. The court therefore finds that there is no genuine issue of material fact that the deviations of Fairbanks House Districts 1-5 are not unnecessarily high. The court will address the plaintiffs and *amici*'s other constitutional concerns regarding the Fairbanks area throughout the opinion.

2. Senate Districts A, B, & C

The Alaska Constitution requires that Senate districts be comprised of two contiguous House districts.[32]

Senate District A is comprised of House Districts 1 and 2 and contains the entire population of the City of Fairbanks. Senate District A contains 35,464 people and a deviation of -0.13% from the ideal Senate district size and is short 46 people. Senate District B is comprised of House Districts 3 and 4 and contains 35,459 people and has a deviation of -0.14% and is short 51 people. Senate District C is comprised of House Districts 5 and 6 and contains 35,644 people and has a deviation of 0.38% from the ideal Senate district and has an excess of 134 people.

The Board reiterates the same arguments with respect to the Fairbanks House Districts, mainly that the Riley plaintiffs never complained about deviations that were higher in previous plans and that their own G &W Plan has higher deviations.[33]

The Riley plaintiffs argue that the Board could have achieved a lower deviation had it accepted their settlement proposal and switched the pairings from House Districts 3 and 4, creating Senate District B, and House Districts 5 and 6, creating Senate District C, to pairing House Districts 3 and 6 to create a senate district and pairing House Districts 4 and 5 to create a

[32] Alaska Const. Art. VI, Section 6.

[33] In the G &W Plan Fairbanks area Senate Districts C, D, and E have deviations of 2.19%, 3.39%, and 0.36% respectively.

senate district.[34] This proposed change would reduce the current deviations in senate districts by 0.06%. The issue really is not about the deviations of the subject house districts, but rather how senate districts are created from those house districts. The Riley plaintiffs were willing to accept the house districts if the senate paring could be switched. This is what FNSB asserts when discussing switching the senate pairings: "The house districts do not have to be redrawn; both 3 and 5 and 4 and 5 are contiguous in the 2013 Proclamation Plan."[35]

The Board argues that the Riley plaintiffs, who requested that the Board make their settlement proposal part of the record, offered no legitimate reason for the proposed switch in pairings, and instead threatened to make allegations of partisan gerrymandering if the Board rejected their proposal. The Board contends that it rejected the Riley plaintiffs' settlement proposal because there was no legitimate, legal basis for switching the senate pairings. The Board argues that the Riley plaintiffs have no legitimate legal basis for their challenge, and instead attempt to punish the Board for exercising its discretion in choosing between alternative plans.

The Riley plaintiffs argue that the record before the Board indicates that the Board generally did not take a "hard look" at the deviations between the senate districts in general and did not use a "reasoned decision making process." The Riley plaintiffs contend that their settlement offer presented the Board with an opportunity to reduce deviations in the Fairbanks Senate districts, but note that it was rejected. The Riley plaintiffs claim Board Member Brodie admitted that the Board never considered or otherwise attempted to reduce deviations between

[34] Settlement overtures are generally not admissible evidence. ER 408. The record reflects the Riley plaintiffs conveyed a settlement offer to counsel for the Board that they contend was not presented to the Board. The Riley plaintiffs contend counsel for the Board told them to make the offer in writing. They did and thus it became part of the record in this case.

[35] Brief of FNSB Amicus, page 3.

senate districts. The Riley plaintiffs argue that Mr. Brodie urged the Board to deny the settlement offer on the grounds that it would give the Riley plaintiffs a perceived political advantage, citing the following Board transcript, "He [referring to Mr. Walleri, counsel for the Riley plaintiffs], just looked at the political makeup of the senate districts where his clients [Mr. Riley and Mr. Dearborn], the biggest advantage they possibly can without any altruistic feelings of the state redistricting process."[36] The Riley plaintiffs state that Mr. Brodie urged his fellow Board members to deny the lower deviation configuration on political grounds in an effort to deny the Riley plaintiffs a perceived political advantage. No other board member offered any other reason for selecting the senate configurations with the higher deviation, so that the only articulated reason in the record is a partisan motivation. The Riley plaintiffs also argue that while the G&W Plan does have higher deviations, it does not excuse or justify the Board's failure to take a hard look at reducing deviations. The Riley plaintiffs additionally argue that there is a possibility that there is an animus towards the Riley plaintiffs and/or their attorney which impacted their decision.[37]

The FNSB also argues that the Board has failed to offer a legitimate, non-discriminatory justification for failing to pair house districts in the Fairbanks region in a manner that could have resulted in lower deviations and communities of interest.[38]

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[36] 18 July 2013 Hrg. Tr.

[37] The Board argues that there is no shred of evidence to support this contention. The Riley plaintiffs argue that this is an issue for trial. The court disagrees. This is hotly contested litigation spanning several years. The parties have interacted in administrative and court proceedings. Relationships have been tense at times in court, but no more so than in other litigation requiring the courts to review administrative decisions, such as Fish and Game administrative review regarding subsistence issues. The contention that counsel may not like each other does not militate an evidentiary hearing regarding an administrative decision. That review is done on the record, including evidence proffered in support of the several motions for summary judgment. The record does not create a genuine issue of material fact that such animus influenced decision making by the Board and therefore no trial issue exists.

[38] The FNSB *amici* never describes the community of interest they are referring to. The court addresses the split of the UAF campus below.

As this court has already noted, "the choice among alternative plans that are otherwise constitutional is for the Board."[39] The court has yet to see such a specific settlement offer discussed in an Alaskan redistricting case, but will treat the Riley plaintiffs' settlement offer as an alternative constitutional map that was proposed to the Board by a third party.[40] The court starts by stating that it is clear that the Board focused on low deviations in all of the house districts and that this resulted in low deviations in senate districts as well. The court does not find that rejecting a proposed senate pairing that has a 0.06% lower deviation to be of constitutional consequence.

The parties make accusations about a "perceived political advantage" depending on how these Fairbanks districts are paired but not one party has identified such a concern with any specificity. The partisan advantage remains vague and undefined.[41] The court also notes that there is no evidence to support a finding that the settlement offer was rejected because the Board does not like the Riley plaintiffs and/or their counsel. The Riley plaintiffs are correct when they state that the fact that G&W Plan or other plans have higher deviations does not relieve the Board from its obligation to achieve lower deviations. However, the court notes the plaintiffs have not pointed to a plan submitted to the Board that reflects that lower deviations could be achieved, other than their own desired senate paring. The court ultimately finds that while the Riley plaintiffs' senate pairing could have been used, it is simply another way to harmonize

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[39] *See* the court's 2 February 2013 decision.

[40] The court notes that the following groups submitted plans to the Board: Calista Corporation, Alaskans for Fair and Equitable Redistricting (AFFER), Joe McKinnon, and the Mat-Su Borough. The Ketchikan Gateway Borough submitted a Southeast regional plan, and the South Lakes Community Council submitted a map for the South Lakes area of the Mat-Su Borough.

[41] In the original litigation in this action there were several specific claims of gerrymandering for political advantage. The pairing of the "two Joes" [Thomas and Paskvan] was a good example. Another was testimony concerning threats of "payback" made at the Triangle Bar in Juneau. No such allegations are made in the current posture of the case.

constitutional interests that was ultimately not chosen by the Board.[42] It some people's opinion the Riley plaintiffs' senate pairing may be better or worse, but ultimately it is up to the Board to create constitutional and legal senate districts. The court believes that the Board did so in the Fairbanks area. The court ultimately finds that the Fairbanks area senate district deviations are not unnecessarily high.

3. Split of the UAF Campus

The Riley plaintiffs argue in passing[43] that the University of Alaska is a community of interest and its division creates a clear inference under *Kenai Peninsula Borough* of discriminatory treatment.

The Board argues that the law is clear that dividing a socio-economically integrated area does not violate the constitutional requirement that districts be socio-economically integrated so long as each portion is integrated, as nearly as practicable, with the district in which it is placed. The law does not protect "communities of interest." The Board contends that the House Districts 4 and 5 are both socio-economically integrated. The entirety of the UAF campus is contained within House District 5 of the Board's 2013 Proclamation Plan except for a small grouping of buildings located in the far northwest corner on the north side of Koyukuk Drive. All of the residence halls are located within House District 5. The small groupings of buildings located in House District 4 are part of a large census block that runs north until Yankovich Road, where 77 people reside.

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[42] In music harmony does not mean playing the *same* notes but rather playing different notes that achieve consonance and not dissonance. Thus in harmonizing competing plans, the Board does not necessarily have to choose a plan a plaintiff advances, or one the court may favor, but rather one that harmonizes with the constitution. This is not a binary system of choice.

[43] Riley plaintiffs' global motion for summary judgment, page 49-51.

The Board argues that the Alaska Supreme Court directly addressed this exact issue in the 2001 redistricting cycle, finding no merit to a similar argument regarding Anchorage neighborhoods, Eagle River and Chugiak, and the Delta Junction area. The high court explicitly held dividing a socio-economically integrated area does not violate the constitutional requirement that districts be socio-economically integrated so long as each portion is integrated, as nearly as practicable, with the district in which it was placed.[44] Socio-economically integrated areas have no constitutional right to be placed in a single district, for the only relevant inquiry is whether the districts in which the area is placed are socio-economically integrated. While Judge Rindner observed that respect for neighborhood boundaries in the redistricting process was an admirable goal, "it is not constitutionally required and must give way to other legal requirements."[45] He concluded that the Board's failure to strictly adhere to neighborhood boundaries did not provide a basis for overturning any portion of the Board's plan.[46]

The Board argues that the same analysis applies to the Riley plaintiffs' argument regarding the UAF campus which, in turn, requires the same conclusion. The UAF campus is wholly within the FNSB and is therefore socio-economically integrated with every portion of the FNSB. The buildings placed in House District 4 are part of a different census block than the rest of the UAF campus, and census blocks, which are created by the United States Census Bureau, cannot be fractured. All the residents halls which contain the population of the UAF campus are in House District 5, while the buildings place in House District 4 are all part of the International Arctic Research Center ["IARC"], and include the Akasofu Building, the Elvey Building, West

[44] *In re 2001 Redistricting Cases*, 44 P.3d 1091, 144-145 (2002).
[45] *Id. at* 1093.
[46] *Id. at* 1093-1094.

Ridge Research Boiling, the O'Neil Building, Irving Building I and Irving II, and Murie. These buildings are located on the north side of Koyukuk Drive.

The Alaska Supreme Court has specifically concluded that respecting neighborhood boundaries or protecting "communities of interest" is not constitutionally required and that it must give way to other legal requirements, such as minimal population deviations.[47] The Board contends that their choice to include the census block created by the Census Bureau with Yankovich Road and a handful of research buildings in House District 4 to keep the overall deviation in the FNSB below 1.0% was completely justified and wholly within the legal requirements of redistricting.

Although there is no evidence in the record to support that the UAF campus *is* a community of interest, that issue was not raised by the Board nor is it the basis for its decision to split the campus. Assuming the campus is a community of interest in the absence of objection by the Board, the court finds the decision to split the campus permissible and supported by the record. This is particularly true where the community, as here, consists of discrete census blocks. Elsewhere the court finds that the house districts in question are socio-economically integrated and therefore each part of the campus is in an integrated district. Although the continual reference to low deviation does not always justify every redistricting decision, it is a legitimate consideration. The court finds splitting the UAF campus in the context of this plan is supported by the record and reasons advanced by the Board and therefore passes constitutional muster.

[47] *Id. at* 1093.

4. Mat-Su Districts 9 & 12

The overall deviation of the districts which contain population from the Mat-Su Borough is 0.9%. House District 9 is short 16 people from the ideal district size, with a deviation of -0.09% and is the House District with the second lowest deviation of the 2013 Proclamation Plan. House District 12 is short 84 people from the ideal district, with a deviation of -0.47%.

The Board again argues that these deviations are lower than past plans and lower than the deviations in the G&W Plan.[48] The Board contends that it did discuss the compactness and socio-economic integration of House District 9 at the same hearing.

The Riley plaintiffs again argue that Alaskan constitutional standards respecting deviations are not necessarily met by the lowest possible deviation, because deviations are not considered in the abstract without regard to the other requirements of the same section of the Constitution. The Riley plaintiffs also argue that the Board's discussion of House District 9 particularly reflect a principle concern for low deviations without regard to whether districts were compact.[49]

The court finds the deviations in House Districts 9 and 12 are low but nevertheless constitutional for all of the same reasons discussed above: the Riley plaintiffs have not shown that lower deviations could be achieved and the Riley plaintiffs are really concerned about compactness and the split of the Mat-Su Borough. The court ultimately finds that the deviations of House District 9 and 12 are not unnecessarily high.

[48] The overall deviations in the Mat-Su area in the G & W plan is 2.56%. House District 11 has a -1.35% deviation, House District 12 has a 1.21% deviation, House District 13 has a -0.59% deviation, House District 14 has a 0.81% deviation, and House District 15 has a 1.17% deviation respectively.

[49] 7 July 2013 Board Meeting.

B. Fair and Effective Representation- Geographic Proportionality

The principle of "fair and effective representation" is qualitative in nature.[50] The Alaska Supreme Court has stated, "[t]hat the equal protection clause protects the rights of voters to an equally meaningful vote has been inferred from *Reynolds* in which the Supreme Court said that 'the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."[51] Alaska's equal protection clause imposes a stricter standard than its federal counterpart.[52]

The Alaska Supreme Court has ruled:

> In the context of reapportionment, we have held that upon 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...Because of the more strict standard, we do not require a showing of a pattern of discrimination, and do not consider any effect of disproportionality de minimis when determining the legitimacy of the Board's purpose.[53]

In the *2001 Redistricting Cases*, the Alaska Supreme Court remanded certain districts because the Board limited its view of the permissible range of constitutional options. It noted *Kenai Peninsula Borough* simply held the Board cannot intentionally discriminate against a borough or other salient classes by invidiously minimizing its right to an equally effective vote. If a plan does divide a municipality it will raise an inference of intentional discrimination, but such an inference may be overcome by a demonstration that the plan resulted from legitimate nondiscriminatory policies.[54] Although the examples given for legitimate nondiscriminatory policies in that case circle around in state law, certainly compliance with controlling federal law is an equally valid reason to overcome an inference of intentional discrimination.

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[50] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).
[51] *Kenai Peninsula Borough*, 743 P.2d at 1367 (*quoting Reynolds*, 377 at 565-66).
[52] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992); *Kenai Peninsula Borough*, 743 P.2d at 1371.
[53] *Id.*
[54] *In Re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002).

The 2001 Redistricting Cases also addressed excess population concerns in the context of combining a portion of the excess population from two different municipalities. This raised two issues. The first was whether the antidilution rule in *Hickel* would even allow such a district. The current guidance is a "need to accommodate excess population would be sufficient justification to depart from the antidilution rule."[55]

The second issue regarding excess population addressed by 2001 Redistricting Cases is whether neighborhoods joined with excess population would be sufficiently integrated. In that case the Alaska Supreme Court concluded that any of the subject urban neighborhoods would meet the integration requirements.[56]

The essence of the guidance from 2001 Redistricting Cases is that the Board must take a hard look at alternatives regarding drawing districts that minimize deviation as much as practicable and also take a hard look at complying with the antidilution rule. These hard looks do not preclude plans that do not strictly comply with these standards. Rather the Board may submit a plan that deviates from these requirements if required by state or federal law. Although the Board may desire a bright line test, the guidance continues to require the Board to make choices that are most in harmony with the Alaska Constitution even when required by necessity to deviate from state constitutional mandates.

Intentional discrimination can be inferred where a redistricting plan "unnecessarily divides a municipality." But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate non-discriminatory

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[55] *In Re 2001 Redistricting Cases*, 44 P.3d 144 (Alaska 2002).
[56] *Id.*

policies such as the Article VI, Section 6 requirements of compactness, contiguity, and socio-economic integration. The Board bears the burden of proof on this point.

The Riley plaintiffs and the ADP contend that the configuration of Mat-Su and Kenai House Districts violate the equal protection requirements of the Alaska and Federal constitution. The plaintiffs argue that the Board failed to afford proportional representation to voters inside and outside the Mat-Su Borough and the Kenai Borough by placing voters from the Mat-Su Borough with voters outside the Mat-Su Borough to create House District 9, House District 12, Senate District E, and Senate District F, and by placing voters from the Kenai Borough with voters who reside outside the Kenai Peninsula Borough to create House District 32. The court addresses each issue in turn.[57]

1. Mat-Su Borough

Under the 2010 census the Mat-Su Borough has a population of 88,995, equal to 5.01 districts. In the 2013 Proclamation Plan, this population is split between six districts- House District 7, 8, 9, 10, 11, and 12. The population in House Districts 7, 8, 10, and 11 is solely from the Mat-Su Borough. The Mat-Su Borough population in House 9 is 45% and then 27% is from the Delta Junction area, 4% from the Copper Basin area, and 24% from the Valdez/Prince William Sound area, mainly Valdez and Whittier. The population in House District 12 is 56% Mat-Su Borough voters and 43% from the voters of the municipality of Anchorage.

[57] These issues come from the following briefing: On 12 September 2013 the Board filed a motion for summary judgment regarding Riley plaintiffs' and the ADP's Geographic Proportionality Claims. On 12 September 2013 the Riley plaintiffs filed a global motion for summary judgment in which geographic proportionality issues were discussed. On 16 September 2013 the ADP filed a motion for summary judgment regarding Mat-Su and Kenai Peninsula Boroughs.

According to the Board, House District 9 is a result of the ripple effect caused by the Board's decision to add the excess population from the Municipality of Anchorage [MOA], which has enough population for 16.436 ideal house districts to population from the Mat-Su Borough to create House District 12.

The Board explained that they chose to take population from the east side of the Mat-Su Borough and combine it with "the most strongly integrated economic corridor in the state, the pipeline corridor, the Richardson Highway corridor from the south region of the North Star Borough to Valdez." The Board kept the Delta Junction area together which has always expressed their desire to remain together in a house district, and avoided pairing Valdez with Anchorage, an option the Board seriously considered in several different configurations, but ultimately decided against because of socio-economic integration concerns. The Board also included a number of Athabascan villages along the Richardson Highway that have strong, socio-economic ties to the eastern villages of the Mat-Su Borough. The Board recognized that by taking this population from the Mat-Su Borough, the Board would be splitting the Mat-Su Borough twice- once to create House District 9 and once to create House District 12. However, the Board felt this was the most reasonable choice that most closely followed the mandates of the Alaska Constitution in order to accommodate the excess population in the MOA. Had the Board pushed the excess population from the MOA south into the Kenai Peninsula Borough [KPB], the Board would have had to split the KPB at least twice. Since the KPB only had an excess population of 2,135 or 12% of an ideal district, the Board would have needed to include additional population from other areas outside of both the MOA and the KPB, thereby creating a ripple effect that would have resulted in different issues. The Board also noted that the Mat-Su Borough is the fastest growing area of the state, and contains areas that were among the fastest

growing in the country over the last decade, ensuring the Mat-Su Borough will have the population to effectively control that district throughout the decade.

The Mayor of the Mat-Su Borough Assembly submitted public comment and public testimony in favor of the Anchorage/Mat-Su combination, which has been a feature of both previous proclamation plans, which no party objected to or challenged.[58] The Mat-Su Borough Assembly also submitted a letter in support of the Board's 2013 Proclamation Plan, including House Districts 9 and 12. The Mat-Su Borough Assembly specifically emphasized "the partial district on the northern end of the Municipality of Anchorage is an excellent fit with the Mat-Su population south of the Palmer and Wasilla core areas. These contiguous areas are highly integrated in socio-economic terms. These citizens share electric and telephone utilities as well as the Glenn Highway as their primary transportation link."[59] The Board states that the Mat-Su Borough Assembly likewise supported the placement of 56% population from an ideal district within House District 12, thereby giving Mat-Su Borough voters control of a fifth house district.[60] The Mat-Su Borough Assembly also favored the senate pairings, especially the pairing of the historic Richardson Highway District, House District 9, with House District 10, a district containing 100% Mat-Su Borough population, and providing the Mat-Su Borough with a third Senator.

In their letter of support, the Mat-Su Borough Assembly emphasized:

> The remaining Mat-Su population is included in the historic Richardson Highway District, which also provides the Mat-Su with its third senator. The Richardson Highway District consists of socio-economically similar modest sized communities on the road system like the Eastern Mat-Su communities on the Glenn Highway. The 1994 and 2002 Redistricting Board Maps contained a

[58] *See* ARB00017350; ARB00017585; ARB00006079; ARB00006568; ARB00015127; ARB00015103.
[59] *Id.*
[60] *Id.*

> similar Richardson Highway District. The Richardson Highway District is more compact than the 2002 District which included FNSB communities. The pairing of the Northwest Mat-Su District with the Richardson Highway Districts keeps all the Mat-Su residents in three senate seats. This map serves the Mat-Su Borough better than any other options which paired Mat-Su Districts with an MOA district or a Fairbanks North Star Borough district to dilute the Mat-Su Borough impact in the Alaska Senate.

The Board notes that it did not receive objections or public comments against this option.[61]

The Board also argues that none of the communities outside the Mat-Su Borough have enough population to support their own house district, and therefore, must be added to other populations in order to create a house district as near as practicable to the ideal district size in order to achieve the cornerstone of redistricting- one person, one vote. The Board also notes that it did not divide the organized cities of Valdez, Whittier, the city of Delta Junction, the Delta Junction Highway, and the majority of the communities along the Richardson Highway.

The Board argues that it did consider several options for accommodating the excess population in the MOA. The available options were: (1) spread the population evenly over the 16 other MOA districts, thereby increasing the deviations in the other MOA districts; (2) push the population south to create a shared Anchorage/Kenai district, thereby breaching the Kenai Peninsula Borough a second time; (3) create a district which combined the excess population from Anchorage with Whittier, Valdez, and other communities along the Richardson Highway north to the Fort Greely area; or (4) push the population north to create a shared Anchorage/Mat-Su District.

The Board dismissed these options for the following reasons. First, overpopulating all of the MOA districts with 7,739 voters spread evenly over the other 16 districts was not a desirable

[61] The court notes that Mat-Su residents Katie Hurly and Warren Keough are plaintiffs in this case.

option, as it increased the deviations within the MOA by 2.72%, pushing the total deviation range within the MOA to over 4% which the Board considered unacceptable in an urban area under Alaska Supreme Court precedent. Second, creating an Anchorage/Kenai district was not a desirable option as that combination would require that the Board split the population of the KPB twice. Since KPB's excess population was only 12% of an ideal district, population from other areas outside the MOA and the KPB would need to be added, thereby creating a ripple effect that made any such district constitutionally troublesome and unworkable as a whole. The Board seriously considered a Valdez/Anchorage option in several different configurations, including configurations proposed by third parties. However, the Board did not find a district that the courts would likely not consider socio-economically integrated. The Board also had concerns that the district might not meet the compactness requirements due to the large appendage that had to be created to geographically combine Anchorage and Whittier into one district.

The Board ultimately chose to combine the excess population from the MOA with population from the Mat-Su Borough, even though it split the Mat-Su Borough twice, because it was the most reasonable option. The resulting House District 12 maximized socio-economic integration as the Mat-Su Borough and the MOA are closely tied geographically, economically, socially, and recreationally.

The Board states that the Mat-Su Borough still has four districts completely within its boundaries and a majority of the population in House District 12, thereby giving it effective control of five house districts, the amount justified by its population. The Board also argues that the Alaska Supreme Court has already approved a district that combines portions of the MOA with the Mat-Su Borough, noting "any neighboring areas north, east, or south of the combined

municipalities would meet the constitutional requirements of relative socio-economic integration."

The Riley plaintiffs characterize the surplus population within the Mat-Su Borough boundaries as largely *de mininus*, being roughly 1% of an ideal district, which is about 177 people. It is a mathematical certainty that "spreading" these 177 people over the five ideal districts that might be constructed in the Mat-Su would only increase deviation by .2%. The Riley plaintiffs argue that there was no reason to split the Mat-Su. The RIGHTS Coalition Plan submitted on 23 May 2011 and the G&W Plan submitted after the third remand, both demonstrate that it is completely feasible to draw five districts within the Mat-Su Borough boundaries. By unnecessarily dividing the Mat-Su Borough the Riley plaintiffs contend the court may infer that the Board intentionally discriminated against a politically salient class. Moreover, by deviating from its guidelines by failing to consider municipal boundaries, they also contend the Board deviated from its "reasoned decision making goal." As a result, they assert the law of this case provides that the Board has the burden of proof to demonstrate that it had a neutral non-discriminatory purpose in twice splitting the Mat-Su borders and that this purpose gave effect to a higher priority goal articulated in its guidelines, which the Board cannot do.

The Board seeks to justify its division of the Mat-Su in light of the need to accommodate the excess population of Anchorage. The Riley plaintiffs argue that there is nothing in the Board's findings that demonstrates that the Board considered the order of priority set forth in *Hickel* or the Board adopted guidelines when they considered the competing constitutional standards. The Riley plaintiffs argue that the Board elevated reducing deviations in Anchorage without consideration of whether the alternatives resulted in more compact and contiguous districts. The resulting House Districts 9 and 12 are not relatively compact, which not only fails

to comply with the process demands articulated in *Hickel* and *In re 2001 Redistricting Cases*, but misunderstands the substantive standard articulated by the court that requires districts with the lowest deviations also be compact and contiguous districts.

The Riley plaintiffs contend that the Board's Draft Plan D and the G&W Plan solved the excess population from Anchorage problem by combining the excess population from Anchorage and Kenai with Whitier, Valdez and Cordova or Whitier-Seward, Cordova. The Riley plaintiffs argue that the Board findings indicate that it failed to take a hard look at these options. The Riley plaintiffs also analyze the Board's other options. The Riley plaintiffs argue that the Board could have legally spread the excess population of MOA amongst itself, could have created an Anchorage-Kenai district that split the Kenai boundary only once, and could have created a larger Anchorage-Mat-Su District. The Riley plaintiffs agree that the Board should not have created an Anchorage-Valdez-Richardson Highway Option, however it argues that it should have been rejected based on compactness and socio-economic concerns, not just socio-economic concerns.[62]

The Riley plaintiffs also criticize the Board's reasoning for splitting the Mat-Su Borough twice because it is unconstitutional to consider that Mat-Su is the fastest growing borough. The Board is required to only focus on the census data and that the Board put the political support of the Mat-Su Borough Mayor over constitutional standards.

The ADP argues that it is unlikely any future redistricting board will see such a perfect match of population and geography as was presented to this Board in the Mat-Su Borough. The ADP contends that instead of creating five close to ideal districts entirely within the Borough, the

[62] The court notes that ADP argues that the Board did reject this option based on compactness concerns.

Board proceeded to draw just four. ADP argues that this dilution of the effective strength of Mat-Su voters was completely unnecessary and that under the Board's theory, Anchorage's excess population is not socio-economically integrated with any other available population and only Mat-Su population can be combined. The ADP points to its own McKinnon Plan and the Calista Option 4 which creates an Anchorage-Valdez, Richardson Highway District to accommodate Anchorage's excess population.[63] ADP acknowledges that the Board considered this option, but rejected it based on socio-economic concerns. The ADP argues that there is no evidence whatsoever that such a district would not be socio-economically integrated, but then goes on to admit that there may be a socio-economic problem in the upper reaches of the district near the Delta area. The ADP contends that the Board did make a good faith effort to investigate whether Anchorage was or was not integrated with the Richardson Highway area. The ADP also argues that the Board did not evaluate the Delta area's integration with Mat-Su and that it seems unlikely that the Delta area has any significant integration with the Farmer's Loop, Fishhook, or Lazy Mountain areas of the Mat-Su that is paired within House District 9. The ADP alleges that the Board has not even made findings related to the socio-economic integration of the Borough's Glenn Highway communities with that area. For all anyone could tell from the record, Delta area residents' only ties to the Mat-Su may very well be that they drive through it on their way to Anchorage. ADP also comments that while the Mat-Su Borough mayor spoke in support of the Borough being split and paired with Anchorage, the opinions of elected public officials may or may not be an indication of community opinion, but they provide little insight into whether a particular plan satisfies constitutional standards.

[63] It is important to note that the Calista 4 plan did split the Mat-Su Borough by including 500 residents in its Anchorage-Valdez-Richardson Highway District. However, Calista Consultant Tom Begich advised the Board that those 500 people could be returned to the Mat-Su and made up elsewhere if the Board's objective was to not split the Borough.

The Board replies that the extensive Board record demonstrates discussion and analysis regarding the Board's decision to split the Mat-Su Borough after considering other options. The Board states that it had seven draft plans of its own that dealt with the excess population differently, as did the third party plans submitted to the Board. The Board contends that public testimony provided insight to the various options, including the pros and cons of each option. For example, the Mayor of Valdez testified that his community had much stronger ties with the Richardson Highway than with Anchorage and noted several socio-economic factors regarding which Anchorage and other Southcentral communities differed from Valdez. The Mayor of the Mat-Su Borough testified to the many ways in which the Mat-Su Borough was socio-economically integrated with Anchorage. The Mat-Su Borough Mayor further testified that the Mat-Su Borough preferred that the configuration of their districts in the 2012 Amended Proclamation Plan remain intact.[64] The Board argues that it even questioned representatives from AFFER[65] and the Calista Corporation regarding how they dealt with the excess population issues and their rationale for their resulting different configurations. The Board admits they struggled with whether to adopt a Valdez-Anchorage-Richardson Highway District or to split the Mat-Su Borough twice, as well as how to best accommodate the excess population of KPB. The Board states they chose to split the Mat-Su Borough twice for all of the reasons stated on the record, including but not limited to: (1) Mat-Su Borough Mayor support; (2) Valdez did not support a Valdez-Anchorage House District; (3) the resulting house districts were more compact then if the Board had created a Valdez-Anchorage House District; and (4) the resulting house districts were more socio-economically integrated then other proposed options.

[64] The Board notes that the 2012 Amended Proclamation Plan, which neither plaintiff challenged, placed the population of the Mat-Su Borough into six house districts configured in almost exactly the same manner as the Board's 2013 Proclamation Plan.

[65] This group is Alaskans for Fair and Equitable Redistricting.

The court agrees with plaintiffs that it is possible to spread the *de minimus* .01 excess population of the Mat-Su districts throughout the Mat-Su districts. This has been accomplished by third party plans, including the G&W Plan and the McKinnon Plan.[66] Indeed on its face, this option jumps to the forefront. Under the antidilution rule, intentional discrimination can be inferred where a redistricting plan "unnecessarily divides a municipality." But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate non-discriminatory policies. The Board bears the burden of proof on this point.

The Board lists the need to accommodate the excess population of Anchorage as its non-discriminatory policy. The Alaska Supreme Court has already recognized excess population as a valid, non-discriminatory policy under the antidilution rule. Since accommodating excess population creates a domino effect, the Board had to look at other options. It is clear that the Board did look at many other options, as it had seven draft plans of its own, and questioned the representatives of third party plans as to what they did regarding excess population. The Riley plaintiffs even point to the Board's own draft Plan D as an example as to another way to deal with excess population. The plaintiffs' argument that the Board did not look at other options is not borne out by the record. The Board listed other options and explained why they ultimately did not choose those options. While the plaintiffs both disagree with the Board's choice, the plaintiffs both deal with the excess population in different ways. ADP promotes its plan and the option to create an Anchorage-Valdez-Richardson Highway District and argues that the Board merely stated that it was not socio-economically integrated without making enough findings.

[66] The court notes that the Riley Plaintiffs also pointed to a 2011 Rights Plan to demonstrate this option, but the court will not consider that plan as demonstrative of the option because the VRA was a major consideration in that plan.

However, the Riley plaintiffs also admit that this option is not socio-economically integrated and believes that it is also not compact. The fact that the plaintiffs disagree on what is the best option to deal with excess population demonstrates that there are various ways to approach the problem. The fact the plaintiffs would have chosen another option does not negate the Board's justification. The court finds the Board has met its burden and has given a valid non-discriminatory reason for splitting the Mat-Su Borough twice. Its choice passes constitutional muster.

The court finds the plaintiffs' arguments that it was inappropriate to consider the arguments of the Mat-Su Mayor and assembly to be mistaken. The Board is required to hold public hearings. If the Board does not incorporate the public comment when choosing between hard options there is no merit in having these hearings. The court notes that the plaintiffs have not pointed to any negative public comment that was submitted regarding the Board's ultimate choice other than their own arguments.[67] The court also finds that while the Board could have raised deviations throughout the state and kept boroughs together, raising deviations also violates equal protection. Deviations and proportionality are two sides of the same coin.

2. Kenai Peninsula Borough

Under the 2010 census the KPB had a population of 55,400, which is equal to 3.12 ideal districts. The Board chose to take excess population from the rural areas of KPB that are off the road system and add it to a single house district that contains Kodiak and other off the road, coastal communities to create House District 32. The population of House District 32 is therefore 75.2% from the Kodiak Borough, 7.6% from the KPB, 13.5% from Cordova in the Prince William Sound area, and 3.7% from Yakutat.

[67] The court again notes that Katie Hurley and Warren Keogh are Mat-Su residents and are challenging the plan.

The Board therefore created three house districts within the KPB boundaries with minimal deviations of 1.53%, 1.50%, and 1.22%. The Board then took the remaining excess KPB population and placed it into a single House District. The Board states that their decision avoided overpopulation of the house districts within the KPB jeopardizing the one person, one vote requirement, which the plaintiffs concede is the first priority of redistricting.

The Board states that House District 32 also closely resembles House District 35 in the Board's 2011 Proclamation Plan and 2012 Amended Proclamation Plan which included population from the KPB, specifically, Seldovia, Halibut Cove, Nanwalek, and Port Graham with Kodiak, Cordova, and Yakutat and notes that no party challenged House District's 35 population.

The Board argues that after discussion and deliberation, it chose to take the 12% excess population from Tyonek, Beluga, Seldovia, Nanwalek, Halibut Cove, and Port Graham, and placed it into a single House District along with other off the road coastal communities. The Board's legitimate, non-discriminatory reason for placing the voters of the KPB in House District 32 was to accommodate the KPB's excess population. The Board placed all of the KPB's excess population into a single district, negating any inference of intentional discrimination.

The Board admits that they struggled with where to place the portion of the KPB located across Cook Inlet from the Kenai Peninsula where Tyonek and Beluga, with 379 people, are located. Historically, this section of the KPB has been placed in different regions, sometimes with the rest of the KPB, other times with an Aleutian Chain or Kodiak district. The Board received public comments that Nanwalek and Port Graham do not like being in a House District

with other KPB communities. Other options split the KPB twice, placing Tyonek into a Bristol Bay district and placing Halibut Cove, Nanwalek, and Port Graham with the other coastal communities outside the KPB such as Cordova. If the Board had moved Tyonek back into a district with other KPB communities, it would have created deviations between 6 and 7 percent.[68] The Board argues that none of the communities in House District 32 outside the KPB have enough population to support their own house district.

The Riley plaintiffs and ADP argue that if Kenai's surplus population of 2,130 was evenly spread over the three Kenai districts wholly within the Borough, the deviation would be below 4%.[69] The Riley plaintiffs and ADP contend that Board findings do not explain why the Board felt it was necessary to split the Kenai and it is therefore impossible for the court to review such reasons on the record. While the G&W Plan also split the Kenai, it did so to deal with the surplus population of Anchorage. However, the Board's final plan does not use the surplus population of the Kenai Borough to deal with any other surplus population nor to create a compact district. The Riley plaintiffs ultimately argue that the Board did not follow the correct process when redistricting by "balancing" the constitutional standards as opposed to considering the constitutional standards using the ordered priority set out in prior case law and the Board's own guidelines. The Riley plaintiffs cite the following examples: by giving priority to reducing deviations in Anchorage without consideration of whether the alternatives resulted in more compact and contiguous districts and elevating municipal boundaries over compactness in making the false choice to not split the Kenai borough boundaries twice.

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[68] The Board cites the McKinnon Plan, which over populated the KPB House Districts which resulted in house district deviations as follows: 4.05%, 4.05%, and 3.93%.

[69] The parties cite the McKinnon Plan as an example.

The Board replies that the extensive Board record demonstrates discussion and analysis regarding the Board's decision to split the Kenai Borough after considering other options. The Board states that it had seven draft plans of its own that dealt with the excess population differently, as did the third party plans submitted to the Board.

The Board also argues that the plaintiffs did not challenge similar districts in the Board's 2011 Proclamation Plan and in the Board's 2012 Amended Proclamation Plan. The Board cites the 2001 round of redistricting, where the trial court rejected challenges to an amended plan, which has been reconfigured upon remand that could have been made against the original plan but were not.[70]

The court will first address the Board's argument that the plaintiffs' claim is untimely and should be dismissed because they are challenging districts that are similar to districts in the Board's 2011 Proclamation Plan and in the Board's 2012 Amended Proclamation Plan. The court finds that this situation can be distinguished from the 2001 round of redistricting because the VRA was deemed unconstitutional after the time the amended plan was drafted and before the current plan was created. The court finds the VRA requirements to have had such an impact on the 2011 Proclamation Plan and 2012 Amended Plan that it will allow the plaintiffs to bring challenges to the current plan, regardless if they resemble districts in the 2011 Proclamation Plan and 2012 Amended Plan.

The court again agrees with plaintiffs that it is possible to spread the excess population of the KPB throughout the KPB districts. This has been accomplished by the McKinnon Plan, which was still able to achieve low deviations in the KPB area. Under the antidilution rule,

[70] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1090 (Alaska 2002).

intentional discrimination can be inferred where a redistricting plan "unnecessarily divides a municipality." But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate non-discriminatory policies. The Board bears the burden of proof on this point.

The Board lists the need to accommodate the excess population of the KPB as its non-discriminatory policy. The Alaska Supreme Court has already recognized excess population as a valid, non-discriminatory policy under the antidilution rule. Since accommodating excess population creates a domino effect, the Board had to look at other options. It is clear that the Board did look at many other options, as it had seven draft plans of its own, and questioned the representatives of third party plans as to what they did regarding excess population. The court does find that the Board met its burden and has given a valid, non-discriminatory reason for splitting the KPB.

VI. Compactness

The term "compact" as used in the Alaska Constitution means "...having a small perimeter in relation to the area encompassed."[71] "'Compact' districting should not yield 'bizarre designs.'"[72] The compactness inquiry looks to the shape of a district. As the *Hickel* court ruled:

> Odd- shaped districts may well be the natural result of Alaska's irregular geography. However, "corridors" of land that extend to include a populated area, but not the less- populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to other wise compact areas may violate the requirement of compact redistricting.[73]

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[71] *Id.* (*quoting Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring)).
[72] *Id.* (*quoting Davenport v. Apportionment Comm'n of New Jersey*, 124 N.J. Super 30, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div. 1973)).
[73] *Hickel v. Southeast Conference*, 846 P.2d 38, 45-46 (Alaska 1992).

When analyzing compactness, the court should "look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[74]

The Riley plaintiffs argue that House Districts 3, 5, 9, 12, and 32 are not compact. ADP and FNSB also contend that House Districts 3 and 5 are not compact.

A. House District 3

The Riley plaintiffs contend that House District 3 is an elongated district running in a northwest-southeast orientation on the eastern side of the Fairbanks North Star Borough. It includes a portion of Chena Hotsprings Road (Fabian Dr. to Nordale Road) on the northwestern border, and runs to Old Valdez Trail (south of North Pole).

The Riley plaintiffs argue that Board Draft Plan D and G&W Plan clearly demonstrate that a more compact North Pole district could be configured.

ADP also argues that House District 3 is not compact. ADP describes House District 3 as an elongated district that stretches northwesterly from the North Pole area to the Badger Loop area to Chena Hot Springs Road, its northern boundary. ADP describes House District 3 as House District 5's companion in non-compactness. ADP argues that the elongated nature of House District 5 is completely unnecessary. The population lost from the North Pole area into House District 5's anvil appendage is what forces it into its elongated compact shape.

ADP attached an affidavit from Leonard Lawson who was an expert witness on GIS redistricting software during the trial in 2012. Mr. Lawson examined the effect of removing the 811 people from the North Pole area on House District 3's compactness. Mr. Lawson placed the

[74] *Id. Quoting Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring.)).

811 people back into North Pole into District 3 and set off the increased population by moving 732 people out of the district from the Chena Hotsprings Road area at its northern border. ADP argues that this is a more compact approach.

FNSB similarly argues that House District 3 is a long, thin district that reaches up to the north to grab population, and there is a protrusion in the northwest corner of the district that allows it to be joined with House District 4.

The Board argues that House District 3 is visually compact without any strange appendages or corridors of land. House District 3 contains the entire City of North Pole. The Board points out that this court had previous concerns about the Board's decision to separate the area around Badger Road from the rest of the North Pole community. The Board notes that House District 3 rectifies the court's earlier concern and reunites these socio-economically integrated areas. The Board goes on to argue that while the Riley plaintiffs claim that Board's Draft Plan D contains a more compact district, the most compact district does not automatically trump a relatively compact district. Additionally, the Board's Draft Plan D split the North Slope Borough from the Northwest Arctic Borough, and took the North Slope Borough all the way down the Canadian border to Lime Village. The Board abandoned this plan in favor of Calista Corporation's draft plans after hearing public testimony about how the Alaska Native communities, including the Tanana Chiefs Conference and Doyon preferred the rural district configurations in Calista's plans over the Board's Draft Plan D.

ADP asserts the Board could create a more compact district by adding the area adjacent to the western boundary of the City of North Pole from House District 5 and placing it in House District 3. In order to adjust for the inclusion of 811 people, the ADP then suggests that the

Board remove the northern portion of House District 3. The Board argues that what the ADP fails to acknowledge is that this leaves House District 5 more than 800 people short, and requires placement somewhere of the 732 people taken out of the Chena Ridge area. The Board also argues that such narrow sighted redistricting that fails to consider a map as a whole is unworkable. As Board Member Holm noted, drawing districts is like squeezing a balloon - you push one side and the other pops out.[75] The Board notes that this is perhaps the very reason the Alaska courts, including this court, have identified the proper standard for compactness as relatively compact.

This court agrees with the difficulty of analyzing a single district for compactness without an awareness of how minor changes to achieve perfectly compact districts may cause large differences elsewhere in the plan. Of the five districts at issue for compactness, House District 3 is visually the most compact. It appears that the northwest boundary of the district was drawn in order to establish senate house contiguity with House District 4, but that perception does not invalidate the district. As noted earlier, the Riley plaintiffs and FNSB do not contend this district needs to be withdrawn if only the senate districts were repaired. The record supports that the Board considered various alternative for this district, including a plan that split the North Slope Borough, but, after input from the Tanana Chiefs Conference and Doyon, adopted a district proposed by Calista. This court finds the House District 3 is relatively compact and passes constitutional muster.

[75] A better analogy is the so-called butterfly effect. In chaos theory this is the sensitive dependency on initial conditions in which a small change at one place in a deterministic nonlinear system may cause large differences in a later state. The essence of this effect is that a seemingly minor event may result in a significantly different outcome than would have occurred without it.

B. House District 5

This is the "anvil" district. The Riley plaintiffs contend that House District 5 is a large district whose population is on the western side of the FNSB, including Chena Ridge and Chena Pump Roads. The District jumps across the Chena River to include Fort Wainwright Artillery Range, and back across the Chena River to pick up an anvil-shaped appendage containing a slice of the Richardson Highway and Rozack Rd to Holland Aviation Street west of the City of North Pole that protrudes into House District 3 up to a portion of Bradway Road (Lakloey Dr. to Benn Lane). The Riley plaintiffs state that the anvil-shaped appendage contains an estimated 811 people. The Riley plaintiffs argue that the irregular anvil-shaped appendage clearly juts into an area that is more closely associated with the adjacent areas in House District 2 or 3, however, the removal of the anvil-shaped appendage from House District 3 would require the elongation of House District 3 in either the southeastern or northwestern direction.

The ADP also argues that House District 5 is not compact. The ADP contends that House District 5 is divided into three separate parts. The first includes the Chena Ridge to South Van Horn area. It is north of the Tanana River and west and south of the City of Fairbanks. The second part is in the North Pole area which has a population of 811. This part of the district is an "appendage" off of the main body of House District 5. It has been described as an "anvil." These first two parts are separate pockets of population that have no land connection between them. The third part of the district is the Tanana Flats area south of the Tanana River. It is totally unpopulated. All three of these parts border the Tanana River which connects them. Despite its large size, House District 5, without the North Pole appendage, would be reasonably compact in the view of ADP. It would follow the western and then the southern border of the borough until it intersects the Tanana River. It would then follow the Tanana River north

creating a natural boundary along its eastern border until it went ashore south of the City of Fairbanks following that border to the north.

The district's northern boundary generally follows the Parks Highway corridor. Without the appendage, these boundaries make sense to ADP. What does not make sense to ADP is the Board's decision to disregard the natural boundary that the Tanana creates on the east. By ignoring that natural boundary and taking 811 people from the North Pole area it created an appendage on a district that has more than 95% percent of its population elsewhere. Such an appendage attached to an otherwise compact area may violate the requirement of compact redistricting. The ADP asserts the Board ignored the natural course of the Tanana River. If the Board had just followed the river until it had reached the South Van Horn area, the appendage would have been eliminated. The Board could have then easily taken the necessary 811 people from the area where the other 95% of the district's residents live.

ADP suggests it is difficult to imagine that the Board could not have found an additional 811 people in that densely populated area. Crossing rivers to connect populations living on opposite sides is frequently necessary. Redistricting in Alaska would be impossible without it. Had the Board crossed the river just once to connect the unpopulated Tanana Flats to a Fairbanks population base, House District 5 would not likely be an issue to ADP. However, what the Board did was to jump it twice from the same side of the river to connect separated populations on the other side. In doing so, it bypassed the population in between. ADP goes onto argue that there is no evidence in the record that the Board intended to gerrymand or that it was the effect of their actions. The court agrees. However, the compactness requirement does not depend on intent or effect. It is a standard that must be followed in every case. Whatever the Board's intent, this district is a perfect example of the potential problem identified in *Hickel* that

"politicians would attempt to carve out little pieces of geography and move them around the map for apportionment purposes."

FNSB similarly argues that the inclusion of the Tanana Flats in House District 5 allows for the contiguous pairing with House District 6, and allows for an otherwise non-contiguous house district that included population to the north of the Tanana River. The FNSN contends that this district can be distinguished from the similar district in the 2011 Proclamation Plan because it House District 5 now crosses the river to pick up a substantial amount of population.

The Board argues that House District 5 is nearly identical in shape to House District 5 in the original 2011 Proclamation Plan that was unsuccessfully challenged by the Riley plaintiffs. The Board therefore argues that the plaintiffs' claims should be denied as untimely.[76] The Board states that House District 5 is wholly within the FNSB and the majority of its population is located in the South Van Horn area, the residence halls at UAF, and the Chena Ridge and Chena Pump areas west of the City of Fairbanks. It also contains the Tanana Flats, referred to as the "bombing range" by Fairbanks residents, which is an unpopulated area the military uses for testing and training. The Board argues that House District 5 is visually compact and that any oddity comes from the shape of the Tanana Flats. This court has previously found that the unpopulated area of the Tanana Flats cannot stand on its own and needs to go somewhere. The Board argues that House District 5 in the 2013 Proclamation Plan is even more visually compact than the configuration in the original proclamation plan because the current House District 5 excludes the College area north of the UAF campus and follows along the Parks Highway to the

[76] As discussed above the court will not dismiss any claims that could have arguably been brought earlier in the case, due to the large impact the VRA had on the earlier plans and the fact that it no longer applies to the current plan.

border of the FNSB, and includes the community of South Van Horn. The Board contends that these subtle changes rounded out the northeast border of House District 5.

The Board explains that the anvil shaped appendage is the result of the ripple effect from creating House District 1 and 2 with population from the City of Fairbanks, maintaining the integrity and boundaries of the City of North Pole, and the irregular geography of the Tanana River and the Tanana Flats, which had to be placed somewhere. In summary, the Board contends the "anvil" is simply the result of the ripple effect, irregular geography, census blocks, and the need to create a district of equal size, and is therefore constitutionally compact. The Board also argues that their districts are more compact than the districts in the Riley plaintiffs' proposed plan and McKinnon Plan.

The 2011 Amended Proclamation Plan had the dread "Kawasaki Finger" that existed for no constitutional reason and which this court found unconstitutional forthwith. A significant difference in the current House District 5 anvil is that there is a total absence of any partisanship at play. Indeed, ADP frankly states there is no evidence of gerrymandering. The issue then becomes whether the "anvil" shape in House District 5, and its formation by crossing the Tanana River twice, violates our constitutional requirement of compactness. It is a very close legal call. Visually the anvil sticks out as non-compact. But, after rigorous scrutiny, this court finds it does not cite the principle of relative compactness. The barrenness of the Tanana Flats was discussed at length in the previous trial, and was the subject of various GIS demonstrations. It simply does not lend itself well to being appended to any population areas. The anvil draws attention to itself by its shape, but under *Hickel*, this court does not find it is an example of where "politicians would attempt to carve out little pieces of geography and move them around the map for apportionment purposes." The record supports the Board's decision to create this district,

including crossing the Tanana River twice. Therefore this court finds despite the obvious visual non-compactness of the anvil, that House District 5 is relatively compact under controlling case law and therefore passes constitutional muster.

C. House District 9

The Riley plaintiffs argue that House District 9 is not relatively compact. House District 9 comprises the eastern Mat-Su and areas east, northeast, and southeast of the borough. The district straddles the eastern boundary of the Mat-Su Borough. The district has two appendages: one jutting north to pick up Delta Junction and its environs, and a second jutting to the south to pick up Valdez and the northern coast of Prince William Sound. The Riley plaintiffs argue the second appendage dissects House District 32 destroying any sense of land-contiguity along the north shore of Prince William Sound in House District 32. The Riley plaintiffs argue that the 2013 Proclamation Plan has the most egregious protrusions which snake out of the borough to include Delta Junction, Valdez and Whittier with the Mat-Su districts.

The Board again argues that House District 9 is nearly identical in shape to House District 6 in the original 2011 Proclamation Plan and 2012 Amended Proclamation Plan that was never challenged by the Riley plaintiffs. The Board therefore argues that the plaintiffs' claims should be denied as untimely.[77]

The Board notes that House District 9 is also nearly identical in shape to House District 12 in the 2002 Amended Final Redistricting Plan, which the trial court and the Alaska Supreme Court found to be reasonable and constitutional in all respects. The Board contends that House District 9 is visually compact. While the left hand side is longer than the right hand side, the

[77] As discussed above the court will not dismiss any claims that could have arguably been brought earlier in the case, due to the large impact the VRA had on the proclamation and amended plans and the fact that it no longer applies to the current plan.

inclusion of the Mat-Su Borough fills it out. The southern border from Whittier to Valdez is compact, including various small islands and fjords along the coastline to create a relatively straight line. A review of the census blocks in House District 9 shows a large census block which cannot be fractured, exists between Whittier and Valdez where 9 people reside. The Board contends that it simply worked with the unique geography of the coastline and the census blocks created by the U.S. Census Bureau that cannot be fractured, to create a compact district. The Board argues that the configuration is a result of the ripple effect caused by the Board's need to accommodate the excess population of Anchorage.

Census blocks are the smallest geographic units used by the United States Census Bureau for tabulating its data. They cannot be fractured. Blocks are aggregated into block groups. Census blocks are the basic units that must be used in creating a plan. All parties used them in this process. Some census blocks have no population. The placement of zero, or low, population census blocks (such as a block containing 9 people) may create compactness issues. The census blocks themselves are beyond the ability of Alaskans to change.

It is a district that passes the visual test. It is roughly similar to a previous district for this same area. Excess population from Anchorage impacted the Mat-Su Borough and is responsible for the west side of the district. The southern boundary is also consistent with past guidance on compactness when open water is involved. The boundary from Whittier to Valdez does follow such open water. The court agrees that House District 9 is relatively compact and passes constitutional muster.

D. House District 12

The Riley plaintiffs argue that House District 12 straddles the Mat-Su/Anchorage boundary and has a rounded appendage jutting into House District 9 in a northeastern direction.

The Riley plaintiffs contend that the Mat-Su Borough, itself, is a compact semi-rectangular shape and that it is possible to construct 5 house districts completely within the borough's boundaries. However, the 2013 Proclamation Plan contains six districts with Mat-Su residents. This is only possible if two districts cross the Mat-Su borough boundaries to join populations to the Borough districts. Of course, joining one area outside the borough to a Mat-Su district mathematically requires a second area outside the borough be joined to a second Mat-Su district to avoid under population of that district. The Riley plaintiffs argue that a more compact plan for the Mat-Su is possible and cite the 23 May 2011 Rights Plan and the 1 July 2013 G&W Plan.

The Board again argues that House District 12 is nearly identical in shape to House District 16 in the original 2002 Amended Proclamation Plan upheld by the Alaska Supreme Court. House District 12 combines the MOA community of Chugiak with unincorporated cities of the Mat-Su Borough such as Butte and Knik River, and portions of Gateway, Kink-Fairview, and Lakes. The Board explains that the "rounded appendage" that the Riley plaintiffs complain about is a large, uninhabited census block. The Board also argues that House District 12 is more compact than the Mat-Su districts in the Riley plaintiffs' proposed plan.

The court agrees with the Board. This district also contains a large, uninhabited census block. The rounding impact of this block does not destroy the compactness of the district. As noted elsewhere, placing excess population from the Mat-Su Borough in other districts results in

such population being in two other districts, including this district. The result is close to the shape of a district previously upheld by the Alaska Supreme Court. The court finds House District 12 is relatively compact and passes constitutional muster.

E. House District 32

House District 32, which stretches from the western mainland shore of Cook Inlet within the Kodiak Borough, across the Gulf of Alaska to include the southern tip of the Kenai Borough, and includes portions of the northern cost of Prince William Sound, Cordova and Yakutat City and Borough. The most noticeable lack of compactness in House District 32 is directly related to the lack of compactness argument in House District 9. Specifically House District 9 drops down to include Whittier and Valdez, severing those communities from Prince William Sound, and arguably destroying the coastline contiguity between the Eastern and Western Prince William Sound coastlines within House District 32.

The Riley plaintiffs argue that the addition of the western coast of Cook Inlet within the Kenai Borough (which includes Tyonek and Beluga) creates an unnecessary appendage jutting to the north. The Riley plaintiffs argue that the Board's 13 June 2011 first final plan is actually more compact. The G&W Plan presented an option that united Prince William Sound coastline with the exception of Valdez. This area of Alaska presents serious challenges because of the irregular coastline around the relatively large Gulf of Alaska. The Riley plaintiffs contend that configuring the area around Cook Inlet and Prince William Sound is more manageable and allows Kodiak to be associated with its adjacent coast line in Southwestern Alaska. They also contend that configuring a district that associated the southern Kenai borough with other portions of the Kenai Borough and allows Yakutat to be associated with the rest of Southeast Alaska which results in a more compact district.

The Board argues that House District 32 is nearly identical in shape to House District 35 in the original 2011 Proclamation Plan and 2012 Amended Proclamation Plan. The Board therefore argues that the plaintiffs' claims should be denied as untimely.[78]

The Board argues that considering the unique geography of Alaska's southern coast, House District 35 is relatively compact. The Board explains that the communities in Prince Williams Sound are not connected by land. Cordova, Tatitlek, and Chenega are contiguous only by water. The Board argues that its decision to place Whittier in House District 9 with Valdez did not "sever" these communities and "destroy the contiguity between the Eastern and Western Prince William Sound coastlines within House District 32." Even if the Board has included Whittier in a district with Cordova, Chenega, and Tatitlek, these communities would have been contiguous only by water. The addition or subtraction of communities along Alaska's southern coastline does not change the unique geography of this region, comprised of archipelagos and ice fields.

Yakutat has always been a challenge for any plan. It is one of the communities that Alexander Baranov was not able to compel to yield to his will as he spread his influence from Kodiak to Cook Inlet, around northern Gulf of Alaska, and down to Sitka. Some plans propose having it associated with Southeast. Others, like the current plan, associate it along the Gulf of Alaska. The court finds the proposed House District 32 appropriately includes Yakutat with similar communities around the Gulf of Alaska. House District 9 does not disrupt this compactness. Cordova and Tatilek are still connected to Chenega and the non-road accessible communities on the Kenai Peninsula, such as Seldovia and Nanwalek, across Prince William

[78] As discussed above the court will not dismiss any claims that could have arguably been brought earlier in the case, due to the large impact the VRA had on the proclamation and amended plans and the fact that it no longer applies to the current plan.

Sound and the Gulf of Alaska. The inclusion of the western shore of Cook Inlet, to pick up Tyonek and Beluga, is a stretch, but it ties in the district with the Kodiak Island Borough, a Gulf of Alaska Borough that extends to and connects with the western shore of Cook Inlet. Overall, in the context of the history of districts on and around the Gulf of Alaska, the court finds House District 32 is relatively compact and passes constitutional muster.

VII. Socio-economic Integration

Election districts must be composed of relatively socio-economically integrated areas according to Article VI, Section 6 of the Alaska Constitution. The term socio-economic integration was explained by delegates of the Alaska Constitution Convention as:

> Where people live together and work together and earn their living together, where people do that, they should be logically grouped that way.
>
> .....
>
> It cannot be defined with mathematical precision, but it is a definite term, and it is susceptible of a definite interpretation. What it means is an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits. It has, as I say, no mathematically precise definition, but has a definite meaning.[79]

On 13 September 2013 ADP filed a motion for summary judgment regarding socio-economic integration. ADP argues that certain districts in northern Alaska are not socio-economically integrated because the Board placed certain Alaska Native villages in three house districts, House District 37, 39, and 40, and failed to place them in House District 6 with other villages in the Tanana Chiefs Conference. Alatna, Allakaket, Evansville, Hughes, and Kaktovik are placed in House District 40. Galena, Huslia, Kaltag, Koyukuk, Nulato, and Ruby are placed in House District 39. Anvik, Grayling, Holy Cross, McGrath, Nikolai, Shageluk, and Takotna

[79] *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983)(quoting *Groh v. Egan*, 526 P.2d 863,878 (Alaska 1974), quoting Minutes, Constitutional Convention 1836, 1873)).

are placed in House District 37. ADP refers to these villages as the "misplaced villages." ADP argues that in rural Alaska the lines that most reflect socioeconomic and political integration are the boundaries of the ANCSA regional corporations. ADP argues that the Board's plan does not reflect the economic development, education, healthcare, and housing patterns of the region.

ADP recognizes that it may be necessary to put a small percentage of the population from the TCC/Doyon region into other districts to stay within the 10% variance allowable under the federal equal protection standard. However, ADP argues that this wholesale dismemberment of the region in the 2013 Proclamation Plan was unreasonable and unnecessary. By increasing the population deviations in districts 37, 39, and 40 while staying within the maximum allowable variance of 10%, the Board could have included most of the misplaced villages in a single district that would include the vast majority of the other TCC/Doyon villages.

ADP argues that other plans provided better socio-economic integration, such as Board Options A, G, and the McKinnon Plan, which all had deviations under 10%. The Board rejected those alternatives and instead, focused on achieving a low overall deviation as suggested by the Calista Corporation. ADP argues that the Board sacrificed socio-economic integration over equal protection concerns.

The Board ultimately adopted the rural districts from Calista's option four plan, with some minor changes for population, leaving intact the TCC sub-regions wherever possible and keeping the village groupings together. Calista conferred with Alaska Native corporations, and took into consideration public comments received throughout the redistricting process.

The Board argues that the villages in question have no right to be placed in a single house district or any particular house district, as long as they are socio-economically integrated in the

district they are placed in. The Board contends that the Doyon region suffered substantial population loss, and the leaders from this region recognized that they did not have enough population to support a single house district. TCC and Doyon representatives testified that if the Board divided the Doyon region, it should keep the six sub-regions together as much as possible. Doyon specifically asked the Board to include the Interior villages of McGrath, Telida, Nikolai, Medfra, and Takotna in house district with Shageluk, Holy Cross, Anvik, and Grayling because of their socio-economic ties. The Board argues that it honored this wish by the adoption of the Calista Plan in the northern region, although modified slightly.

The Board argues that it is simply not possible to maintain all the Doyon Villages in one district when taking into consideration all of the constitutional requirements as well as the cornerstone of redistricting- one person, one vote. The Board also argues that the ADP simply ignores the Board record and the numerous public comments provided by the Alaska Native community.

Tom Begich, the socio-economic expert who worked with Calista to create their proposed maps, maintains that there are two substantive socio-economic arguments supporting the Board's village combinations: (1) traditional socio-economic relationships in rural Alaska, which equate to subsistence economy; and (2) future economic development based on mineral resources.

The Board made the following arguments to demonstrate that these districts are socio-economically integrated. The Yukon Koyukuk sub-region is centered around Galena, and is included in House District 39. The Board argues that there are many strong relationships between this sub-region and the other communities in House District 39. It is important to note that primary healthcare for these villages is provided through Galena, not Fairbanks, as

incorrectly alleged in the plaintiffs' motion and exhibits. Galena subcontracts with TCC in Fairbanks for outpatient visits, but Galena Health Center is the primary health care provider in this sub-region. In addition, there are long standing transportation relationships between House District 39 and the Yukon Koyukuk sub-region. There are also a number of undeveloped subsistence routes from Unalakleet to neighboring villages such as Kaltag. As part of their long range transportation plans, both Kaltag and Unalakleet identify the building of a road connecting the two villages as a high priority.[80]

The Lower Yukon and Upper Kuskokwim regions, placed in House District 37, are considered highly integrated with each other by TCC. The Upper Kuskokwim sub-region centered in McGrath, is connected to the Southcentral Foundation, based in Anchorage, while the Lower Yukon sub-region received its health care in Aniak, a village served through Bethel and the Yukon Kuskokwim Health Corporation. Both of these sub-regions are interconnected with mental health and education services. Both are also contained within one school district, which includes Lime Village, a community outside the TCC sub-region but within the same house district, House District 37. Lake Minchumina, through part of the Yukon Tanana sub-region, is also part of this school district and consequently, is included in House District 37. The Lower Yukon and Upper Kuskokwim are linked linguistically as well.

House District 6 is comprised of the entire Denali Borough, the eastern portion of the FNSB, and three TCC sub regions: Upper Tanana Yukon Flats, and Yukon Tanana, and the Ahtna Native communities along the Glenn Highway, the Richardson Highway, and the Alaska Highway. The FNSB serves as both an economic and transportation hub for these areas and is

[80] Both the Tribal Council of the Native Village of Unalakleet and the Klatag Tribal Council passed resolutions to focus on building this road between the two villages. The proposed road would follow the Iditarod Trial, connecting the two villages.

connected by road, air, or river transportation to all of these areas. Public testimony from the TCC and others establish the Athabaskan, Athna and Upper Tanana TCC villages in the southeastern portion of House District 6 are connected not only through common language and culture, but also through extensive intermarriage and shared commerce as well. The Alaska Native and non-Alaska Native areas are likewise inter-connected by an extensive highway network, and through that network, to the FNSB, which is the key economic center for road, air, and river-linked areas of Interior Alaska. The Denali Borough is also linked by road and commerce to the FNSB, and has been included, based on this level of interconnectedness, in House Districts with the FNSB and Interior Alaska in previous redistricting maps.

The TCC Yukon Flats sub-region is included in House District 6 and is also connected by air, river, and road to the FNSB. Virtually all of the Yukon Tanana TCC sub-region is also included in House District 6, and is linked by road, air, and water transportation routes to the FNSB. Out of the six TCC sub-regions, the three included in House District 6 are the only ones linked by road to the FNSB, which further strengthens their internal integration. All three of these sub-regions receive their mail service through the Fairbanks Section Center Postal Facility, unlike at least two of the other TCC sub-regions. These three sub-regions are also served by outpatient medical services through Fairbanks as compared to the other three TCC sub-regions not in House District 6, which either contract their outpatient medical services within their sub-region, or through Anchorage or Bethel. The three sub-regions in House District 6 are primarily served by air from Fairbanks, while the other three TCC sub-regions must connect through either Anchorage or Bethel.

The Board ultimately argues that the foregoing represents but a sampling of the available examples demonstrating the interconnectedness between the TCC sub-region villages and the other communities in the house districts in in which they are placed.

In ADP's reply it argues that whether the future economic development which the Board relies on in part to demonstrate socio-economic integration is speculative and that those arguments are best reserved for the 2020 and 2030 redistricting cycles. ADP also replies that the Board is applying too strict of a standard for deviations in rural areas where population is sparse.

ADP argues that is has shown that the misplaced villages are not socio-economically integrated in the districts they are in. The court disagrees. The court ultimately finds that just because the misplaced villages as the ADP refers to them could be *more* socio-economically integrated, does not mean that they are not socio-economically integrated enough where they are for constitutional purposes. The court agrees with the Board that it was reasonable to split up the Doyon villages due to the loss of population in the area and the need to keep deviations low. Therefore the court finds the districts at issue are integrated enough to pass constitutional muster.

VIII. Truncation of Senate Terms[81]

As a general matter, senators are elected to four year terms.[82] Senate terms are staggered so that one-half of the Senate is elected in each of the State's two year election cycles. New redistricting plans necessarily produce districts that are substantially different districts, so that "a need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either includes substantial numbers of constituents previously

[81] These arguments stem from the following motion practice: the Board's 12 September 2013 motion for summary judgment regarding re: Riley plaintiffs' objections to truncation plan for senate districts and the Riley plaintiffs' 12 September 2013 global motion for summary judgment.

[82] AK Const. Art. II, Section 3.

represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent."[83] The power to truncate is a "discretionary power," and thus subject to review for an abuse of discretion.

In the 1970 redistricting cycle, the governor, who was responsible for redistricting at the time, truncated all but two senators' terms because the redistricting plan called for substantial changes to many of the districts.[84] The Alaska Supreme Court upheld the truncation plan, finding the governor has the discretionary authority to require mid-term elections when necessary.[85] The Supreme Court reaffirmed its findings in *Groh v. Egan*, upholding the governor's plan to truncate four senators' terms whose districts either no longer existed or the new districts had vastly changed boundaries.[86] The Supreme Court found these were valid reasons for truncating the terms, again relying upon the "well established" discretionary authority of the governor to require mid-term elections when necessary.[87] In the 2000 redistricting cycle, the first redistricting cycle since the 1998 constitutional amendment establishing the redistricting board, the Board truncated the terms of seven sitting senators.[88] The Board relied on the "substantial change" criteria set forth in *Egan v. Hammond* and reaffirmed in *Groh v. Egan*.[89] No truncation challenge was raised and the redistricting plan was approved. This court has recognized "it is well established that redistricting may require truncation of senate terms."[90] Thus, even though there is no specific law expressly granting the

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[83] *Groh v. Egan*, 526 P.2d 863, 880-881 (Alaska 1974).
[84] *Egan v. Hammond*, 502 P.2d 856, 873-874 (Alaska 1972).
[85] *Id.*
[86] *Groh v. Egan*, 526 P.2d 863, 880-881 (Alaska 1974).
[87] *Id. at* 881.
[88] *See* the Board's Exhibit A to the 2013 Proclamation Plan.
[89] *Id. at* pg. 1.
[90] *See* this court's 3 February 2012 order.

Board the power to truncate a senator's term, that authority is plainly vested in the Board as the constitutionally ordained body responsible for redistricting.

The legal rub is defining "substantial change" for purposes of truncating senate terms. The is not a logic conundrum where the starting point may be Occam's Razor with the application of the principle of parsimony or succinctness. Although there is an attractiveness to proceeding with simpler theories until simplicity can confidently be superseded by more persuasive theories, the problem is defining the simplest or simpler theory. The razor cannot be applied in this legal context, particularly in the absence of a controlling and accepted legal definition of "substantial change."

Our law is not rigid and formulaic regarding measuring human conduct. Triers of fact are regularly called upon to decide, from the operative facts of particular cases, whether someone breached a duty of care in operating an automobile, whether damages are nominal or substantial, whether a good faith effort to perform under a contract is sufficient if the essential purpose is accomplished, etc. Unlike "reasonable care" in the tort context, "substantial change" in the context of redistricting truncation, grounded in statistics, probably does lend itself to a definite appellate definition. Such a dispositive definition would eliminate the need for a Board to decide such a threshold on its own and thus remove a subjective component from a process that is already exposed to intense political pressure. There is sound legal precedent for so doing. For example, in the realm of domestic relations law the court applies a subjective standard in determining whether a "substantial change in circumstance" has occurred since the entry of a decree that justifies modifying custody or visitation, but applies an objective standard in

determining whether a "material change" exists for modifying child support.[91] The former requires assessment of human conduct while the latter focuses on numbers.

Nevertheless, in the absence of a definition, in deciding what is "substantial change" for the purposes of truncation the court will look at the totality of the circumstances, including the overarching constitutional principles as well as the statistical data in assessing whether the discretionary power vested in the Board to truncate terms was property applied.

The scrutiny that follows necessarily focuses on two decisions of the Board. The first is the decision of the Board to pick a 25% constituency change as constituting a "substantial change." Although there may be a lack of precision in defining the term "substantial change" in the context of truncation, the definition of "substantial" is accepted as something of ample or considerable amount, quantity or size. This is consistent with other uses of "substantial" in the law, such as substantial damages versus nominal, and will be used herein.

The second focus is a "substantial change" from *what* plan. The Board chose to compare the 2013 plan to the 2012 Amended Proclamation Plan because that was the plan authorized by the Alaska Supreme Court for the purposes of the 2012 election and is the last plan that voters used. This analysis is the more straightforward of the two decisions and is addressed before turning to the substantial change percentage issue.

The Riley plaintiffs argue that the truncation plan should be invalidated because it compared the wrong plans. The Riley plaintiffs contend that the Board should be comparing this plan to the prior permanent plan and not the interim plan. The Board argues that using the 2002 redistricting plan as the benchmark for truncation ignores the concept of one person, one vote.

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[91] CR 90.3.

The Alaska Supreme Court ordered the state to use the 2012 Amended Proclamation Plan for the 2012 elections. The elections took place under this plan in 2012. The Board argues that if it were to use the 2002 redistricting plan as a benchmark, the Board would have to ignore the 2012 elections and the voices of the voters as though they never happened in favor of a grossly disproportionate plan the Alaska Supreme Court has already rejected.

The 2012 Amended Proclamation Plan is the correct benchmark for making truncation decisions.[92] No one denies that plan had flaws, but it was the plan approved for the 2012 election. It is the basis for the election of the sitting representatives and senators. It is the last approved plan. The decennial census recognizes the need to update census data. The 2001 benchmark is certainly not a valid reflection of the current Alaska population, particularly in Southeast Alaska. Equal protection can in no way be achieved under the 2001 benchmark. The 2012 Amended Proclamation Plan, albeit flawed, is the last court approved plan. Therefore the court finds that use of the 2012 Amended Proclamation Plan as a benchmark for determining substantial change for purposes of truncation was correct and proper.

Turning to substantial change itself, the Board argues that it only truncated those districts that had substantially changed from the 2012 Amended Proclamation Plan, the plan that was used for the 2012 elections. The Board argues that their truncation plan complies with the standards set forth in *Egan v. Hammond* and upheld in *Groh v. Egan*. The Board truncated four senators' terms, who but for redistricting, would not have had to stand for election until 2016. These four Senate Districts are C, G, P, and S. The Board unanimously voted to truncate all Senate seats whose constituency population had changed by 25% or more from the 2012

[92] Redistricting nomenclature, at least in Alaska, generally used the term "benchmark" as the plan adopted from the preceding election, but in application it most often was used to determine VRA issues. Since VRA issues, at least Section 5 preclearance issues, are no long present, the use of benchmark simply refers to the last approved plan.

Amended Proclamation Plan to the 2013 Proclamation Plan as a result of reconfigured district boundaries, or contained less than 75% of the same population. Senate District C had 46.8% of the same population as the 2012 Amended Proclamation Senate District, Senate District G had only 50.9% of the same population, Senate District P had 51.3%, and Senate District S had 54.3%. Due to the substantial change in the population of these Senate districts, the senators who currently represent these districts will have to run for election in 2014 instead of 2016.

The Board then assigned the term length for the new senate districts in the 2013 Proclamation Plan. Since the Alaska Constitution requires half the senators to stand for election every two years, fourteen senate districts will be up for election: the ten senators assigned two year terms by the Amended Proclamation Plan and the four senators whose terms must be truncated.

The Board contends that it chose to quantify a "substantial change" as a population change of 25% or more in a district that had been assigned four year terms in 2012. The Board states that it was not influenced by any ulterior or improper motives in choosing not to truncate Senate District B as the Riley plaintiffs allege. The Board argues that the Riley plaintiffs are again asserting baseless allegations of partisan gerrymandering in the face of clear facts to the contrary.

The Riley plaintiffs recite this Board's truncation history. They assert that in adopting its original plan two years ago, the Board required all Senate seats to stand for election in 2012, except in Senate District P, which had 86.8% of the previous Senate District population. In discussing the matter, the Board adopted a recommendation from the Board council to truncate all seats that had over a 13% change (i.e. 87% the same). As a result, all seats less than 85% of

the population of the former district were truncated, including two seats over 75%, i.e. Senate District L (77.7%) and Senate District T (78.1%). This plan was invalidated by the court and was followed by the Amended Plan, which truncated all senate seats except Senate District P, which slightly changed and was 86.7% the same. The Board truncated Senate District B (City of Fairbanks to allow only a two year term in 2012 despite the fact that Senate District B had changed less than Senate District P (i.e. 86.9%). The Riley plaintiffs contend that this inconsistency questions whether in considering the interim plan the Board employed any standard based upon the percentage of change that might reflect a reasoned decision-making process.

On its third plan, the Board met on 7 July 2013 and changed the standard from the 13% change to a 25% change. In making this decision, the Riley plaintiffs claim the Board clearly intended to affect only one district: i.e. Senate District B, which is the new North Pole/Ester district of which Republican Senator Coghill is the incumbent. The change allows Senator Coghill not to stand for election in 2014.

The Riley plaintiffs argue that the Board's 7 July 2013 meeting provides inferential evidence of overt partisan manipulations concerning the preservation of Senator Coghill's term of office. The Riley plaintiffs contend that it was clear that Senate District B was on the Board's mind and featured prominently in the discussions. However, the conversation became very confused because the Board was re-lettering the senate districts. During the hearing, Mr. Randy Ruedrich, former head of the Alaskan Republican party, interrupted the Board discussion to interject the following:

> Mr. Ruedrich: I would suggest that you allow us to either participate or take a recess so we can provide some clarity.

Board Member Brodie: I wouldn't be opposed to that. We seem to be working ourselves into a corner.

Mr. Ruedrich then went on to explain that the problem under discussion is an "artifact" of the re-lettering of districts in relation to the re-numbering of house districts. Mr. Ruedrich offered specific examples of the problems focusing on specific districts. In addressing Mr. Coghill's district, he stated, "You have the same problem in Fairbanks. If you change the 2, 3 the 1, 2, 3, 4 locations, the A (City of Fairbanks) would be back to where it's supposed to be and B (Ester/North Pole) would be – and I think all conversation goes away, it becomes straightforward."

The Riley plaintiffs argue that Mr. Ruedrich's comments about how the districts were "suppose to be" strongly infers a shared pre-determination as to outcomes. They contend the events that followed are consistent with such an inference because shortly thereafter the Board discussed Senator Stevens and he should have to run again. Again confusion predominated. The Chairman then announced that they should take a 15 minute break so "we can all kind of get educated and look at this again." The comment from the Riley plaintiffs perspective, was an obvious reference to accepting Mr. Ruederich's offer to "educate" the Board. After coming back on record, Board Member McConnochie appeared to understand the situation better, and made a clear and concise motion to truncate districts if they were less than 75% the same people, and noted that it would only affect Senate District B, which, under the new standard would not be truncated. The Riley plaintiffs argue that in substance, the Board went off record, conferred with the former chairman of the Republican party, and came back on the record to take action. The Riley plaintiffs therefore argue that the truncation plan should be invalidated because the Board violated the Open Meetings Act (OMA).

The OMA statute provides that all meetings should remain open to the general public and that actions taken contrary to the Act are voidable.[93] The Riley plaintiffs state that going off the record to confer with the former head of the Republican Party as to which incumbent Senators should have to stand for election clearly violates that act. In *Hickel*, the court declined to enforce similar violations of the Open Meetings Act because the court struck the plan down for other reasons. The Riley plaintiffs therefore argue that if the court does not invalidate the truncation plan on another ground, the court should invalidate the plan based on the open flagrant violation of the OMA.

The Riley plaintiffs additionally argue that the truncation plan should be invalidated because it was irrational. The Riley plaintiffs contend that it is obvious that the Board's actions were arbitrary and capricious to the extreme. When faced with truncation on three occasions, the Board applied at least two different standards, and inconsistently applied its standards to the second interim truncation plan. More disturbing, in their view, is the fact that the record shows clear manipulation in the third instance with a single district in mind by not requiring Senator Coghill to stand for re-election. The Riley plaintiffs argue that the court should consider the rather brazen and unusual involvement of Mr. Ruedrich interrupting the Board proceedings, and Board taking a break to get "educated" by him off the record as not only a violation of the OMA, but also as an inference that the Board selected the 25% for an improper political reason.

The Board reiterates that the only factors it considered in adopting its truncation plan were election cycles and population change. The Board states that it did not consider voting patterns of Ester/Goldstream, or any other area of the state.

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[93] *See* AS 44.62.310.

The allegations regarding the Board privately consulting with Randy Ruedrich are serious. The Board is obligated to fairly draft voting districts based upon the Alaska Constitution and principles of equal protection embodied in both federal and state constitutions. Under the Open Meeting Act the Board's work is, with limited exceptions, to be conducted in open session. The record of the Board's work is extensive and filed both with this court and the Alaska Supreme Court. The Board has an obligation to hear from citizens and groups. The record reflects the Board received input from many sources, including Ruedrich. The issues are whether a particular individual had unauthorized access to the Board and whether the Board abnegated its independent decision making authority.

The record in this case is expansive. For present purposes the court turns to the record of the Board Hearing on Sunday, 7 July 2013, ARB 16800-834. A variety of people where present, including Ruerdrich.[94] Breaks were taken throughout the day, including a break around 11:00 a.m. to allow the Board staff [referred to as its GIS "genius"] to figure out if and how to split the Mat-Su Borough.[95] Another break was taken around 11:43 a.m. for the Board to again work with its GIS person, this time regarding trying to understand what the Board did in Anchorage.[96] About 12:25 p.m. the Board takes another break to look at senate pairings after changing district numbers and expected to take another break when it came to truncation.[97] The Board recessed at about 1:14 p.m. to look at GIS maps reflecting work they just addressed, including the renumbering of the Anchorage districts and keeping in mind the goal of keeping districts as similar as possible in the proclamation districts.[98] Truncation became more of a focus thereafter.

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[94] Many people, including Ruerdrich, were present at many of the Board's meetings.
[95] ARB00016807.
[96] ARB00016812.
[97] ARB00016817.
[98] ARB00016819.

The next break around 2:00 p.m. was to have GIS work done on truncation for purposes of a conceptual map.

Subsequently the Board discussed truncation at some length. Specifically Senate District B was considered. It has a 77% of the same population under the proposed 2013 Plan. The Board was advised it was their discretion to decide how high a percentage is needed for truncation.[99] This is a correct statement of the law in the absence of a dispositive definition from the Alaska Supreme Court.

The truncation debate was complicated because some senators stood for only two year terms under the 2012 Amended Proclamation Plan used for that election year, which is a different debate than the percentage that constitutes "substantial change" but nonetheless a truncation consideration. Finding a solution was difficult. One Board member suggested just putting district numbers in a hat and drawing them, with the first ten numbers serving four year terms and the remaining five numbers serving two year terms. The debate was thorough and dynamic on truncation. Clarity and consensus were elusive, but the debate was vigorous.

The reference of Ruerdrich's participation is this exchange:

> Mr. Brodie: Yeah, he is. See if we had all the proclamation senate districts, we have two Ns instead of an R.
>
> So if we had all those districts in there with their twos and fours, and deciding whether or not they are truncated or not, then that lets us build our plan. And then we assign the new letters to it, because if we keep going back between – yes sir?
>
> Mr. Ruedrich: I would suggest that you allow us to either participate or take a recess so we can provide some clarity.
>
> Mr. Brodie: I won't be opposed to that. We seem to be working ourselves into a corner.

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[99] ARB00016822.

Mr. Ruedrich: I guess we have made comments in the past. Part of the process in the re-lettering creates an artifact that one – that would be somewhat disturbing.

A senator in Anchorage who ran for a four-year term who has 100 percent of their individuals back under this proposal is being truncated for two years, and a senator who ran for two years is being extended for four years.

That's an artifact of this process. So maybe it's a numbering problem of house seats as they translate to senate letters.

You have the same problem in Fairbanks. If you change the 2, 3, the 1, 2, 3, 4 locations, then A would be back to where it's supposed to be and B would be – and I think all of this conversation goes away, it becomes straight forward.

Mr. Torgerson: We're not extending anybody that is on a two-year seat. All we're sayin is they have to run for election and we have an option of two or four. They have to run again. We don't have the authority to extend somebody whose term is up to say you don't have to run anymore, you're automatically on a four year.

Mr. Ruedrich: This kind of does I think.

Mr. Brodie: I agree with what you said, but because of our lettering, it seems to indicate somebody has two years left to go when in fact they don't.

Ms. McConnochie: Help me see that, because I don't see that.

Mr. Brodie: Well, for example, in the one we have been working off of, proclamation senate district, there is no R because Eric has assigned people based on where the majority of their people were from in the last election.

So Senator Stevens, who would be in R, is now in P. And if you go to concept plan P, that indicates he has two years left in his term, when in fact he was only elected to a two year term.

So I think we need to maybe drop the concept letters and use the current ones, and then we'll be more able to tell which guys are staying and which guys are going.

Ms. McConnochie: Don't we still have the problem with what happened to the population and how it's figured out in N and P?

Mr. Brodie: Sure, but because we have given him a new number, based on last time's election, new letter, based on last time's election, he is artificially being given two extra years on his term.

Mr. Torgerson: No. He has to run for an election.

Mr. White: He is truncated so he wouldn't have to run.

Mr. Brodie: R is nowhere.

Mr. White: He now moves into Senate District P. Senate District P is only 51 percent the same as a different district.

What we don't have here is how much of Senate District R is the same as the district that he is in now. And I'm quite—I'm not even sure, and I need to give this some thought, you're truncating a term, but is it based on the incumbent or is it based on the district?

Mr. Torgerson: Well, this is probably pretty close, because Senator Stevens has District 37 or whatever it was, the Lake and Pen area last time. He did not have the Kenai.

So he has got a whole new district, a whole new house district, so somewhere around a 50 percent new district. And I understand the numbering, maybe P or R, but the facts are we're not extending anybody's – all we're saying in the four, two, four, two is what seat you would run for if you're not truncated or of you're not up for election.

Ms. McConnochie: So whomever occupies P has to run again. It doesn't matter.

Mr. Torgerson: It's 3:25. We'll take about a 15 minute recess. We can kind of all get educated and look at this again.

(There was a break).

Mr. Torgerson: The Alaska Redistricting Board. It's now 3:50. We'll call the meeting back to order. All members are present, or four members are present. We're represented by counsel.

Ms. McConnochie: Mr. Chair, thank you. I would like to get one thing off of the table so we don't have to deal with it any longer. I would like to have us agree that, for truncation purposes, if there is less than 75 percent of the same people in that individual district then they would be subject to truncation.

And in our current Board concept senate terms, B would be 77 percent and therefore not truncated.

Ms. Greene: I'll second the motion.

Mr. Torgerson: Thank you. Again, that's three-quarters of the district or more is the threshold that we're establishing, and in this case it only affects the one district, Senate District B. Is there a discussion on the motion? We'll do a roll call vote.

The court is mindful that there is no record of what happened during any recess. That is the motive rationale for the Open Meeting Act – to ensure that public bodies make substantive decisions in open session. The only evidence before the court is the record. It has reviewed the

record in the light most favorable to the non-Board parties and cannot conclude that Ruerdrich met with the Board off the record. He clearly wanted to provide "clarity," but there is nothing in the record to support an ex parte meeting. There were nine non-Board members present at the meeting, including folks aligned with the plaintiffs in this matter. No affidavit was submitted contending under oath such a meeting occurred. Ruerdrich was not deposed, nor were Board members. While the court agrees that an "inference" can be gleaned from the record of such a meeting, an inference is not admissible evidence that would call for an evidentiary hearing or create a genuine issue of material fact. Therefore the court cannot find that Ruerdrich met with the Board in violation of the Open Meetings Act.

The next issue is the "substantial change" figure of 25% adopted by the Board. Under the current status of the law, the Board is vested with discretion in setting this figure. The record reflects vibrant and comprehensive debate by the Board regarding how to determine this figure. The plaintiffs contend the figure of 25% was chosen to protect Senator Coghill who had a 23% change of population in his district.[100] There certainly was debate about using lower figures, such as 13%, but there is no evidence the Board abnegated its responsibilities to make this decision to Ruerdrich.

Does the record support the Board's discretion in adopting the 25% change in population figure for purposes of truncation? Applying the threshold definition as "substantial" as something of ample or considerable amount, quantity or size, then 25% of voters being included in a district where they had no say in the original election of the incumbent senator is certainly substantial. The objection for picking this number is that different numbers have been used in the past and an inference can be made that the number was selected to protect Senator Coghill.

[100] The Board actually used obverse figure by stating that 77% of the population in his district remained the same.

Regarding the later criticism the court finds that the record does not support such an inference. The consultation was wide ranging and it did include the percentages in Senate District B. But there is no evidence that the number of 25%, as constituting "substantial change" was not within the discretion of the Board or that it was designed to protect a particular incumbent.

The railroad had an unintended social consequence in American towns. It created divided towns. Somebody could not come from the "wrong side of the tracks" until there were tracks. It simply means people are on one side or the other of a line. No matter what number was selected by the Board somebody would be in or out of the truncation decision. Senator Coghill falls outside of the truncation threshold set by the Board. This fact does not obviate that the record supports the Board in selecting 25%, even taking all the facts, not inferences, in the light most favorable to the plaintiffs.

The court finds the Board's decisions regarding truncation are supported by the record and pass constitutional muster.

XI. Open Meetings Act

The Riley plaintiffs argue that they made a settlement offer on 11 July 2013. The Board met on 14 July 2012, but did not go into executive session, nor did the Board's attorney advise the Board on the record about the offer. Afterward, Riley's counsel called Board counsel and objected to the fact that the offer had not been communicated to the Board. Board counsel indicated that he had had discussed the matter with the Board Chairman and that the Board Chairmen had discussed the offer with each of the Board members individually. Board counsel indicated that this was a normal and customary way that the Board transacted business. Counsel for the Riley plaintiffs advised Board counsel that in his opinion, such a procedure—often called daisy chain communication—violated the State Open Meeting Act, and that the Board should

cure the violation by meeting and placing the matter on record. Board counsel requested that the offer be made in writing, and on 17 July 2013 the counsel provided the offer in writing, which was included in the Board record.

The court previously discussed the oddness of having settlement negotiations before the trier of fact.[101] The settlement agreement was made part of the record. This court treated it as another plan proposal and addressed the matter on the merits. These parties and counsel are seasoned redistricting litigants. Counsel for the Riley plaintiffs and for the Board participated in the 2001 litigation process upon which the current litigation has been modeled. Judge Ridner, like this court, addressed and resolved issues raised by pleadings both by summary judgment and by a trial. That also occurred in the earlier iteration of this litigation. On remand the plaintiffs again filed their objections to the instant plan. ADP filed its own objections. ADP has not raised an OMA objection. The parties no which issues to raise.

Although the Riley plaintiffs had OMA concerns in the earlier iteration of this litigation, they simply did not plead an OMA violation for the 2013 plan and therefore it is not an issue the court should consider. However, the court notes that even if there was a OMA violation in relation to the settlement offer, it was cured by making the settlement offer part of the record.

The only other OMA issue that may be cognizable in the absence of pleading such violation is the allegations regarding Ruerdrich meeting with the Board off the record to "clarify"

[101] Settlement overtures are generally not admissible evidence. ER 408. The record reflects the Riley plaintiffs conveyed a settlement offer to counsel for the Board that they contend was not presented to the Board. The Riley plaintiffs contend counsel for the Board told them to make the offer in writing. They did and thus it became part of the record in this case.

either consistent district numbering/lettering or to influence truncations decisions.[102] The court already addressed this argument on the merits and concludes, based on this record, there was no such violation on the merits. The court declines to address any other OMA issue as not being plead and not otherwise addressed by consent of the parties.

X. Conclusion

The court ultimately, finds that the Board complied with the Alaska Supreme Court's 28 December 2012 Order. The court accepts the 2013 Proclamation Plan.

The court rules as follows on each of the summary judgment orders:

A. The Board's motion for summary judgment regarding the Riley plaintiffs' claim that House Districts 1 through 5 have unnecessarily higher deviations from the ideal district is GRANTED.

B. The Board's motion for summary judgment regarding the Riley plaintiffs' claim that Senate Districts A, B, and C have unnecessarily higher deviations from the ideal district is GRANTED.

C. The Board's motion for summary judgment regarding the Riley plaintiffs' claim that House Districts 9 through 12 have unnecessarily higher deviations from the ideal district is GRANTED.

D. The Board's motion for summary judgment regarding the Riley plaintiffs' and ADP's geographic proportionality claims is GRANTED.

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[102] The court had discretion to conform the pleadings where issues not raised by the pleadings are addressed by implied or express consent of the parties. CR 15(b). The settlement offer and the Ruerdrich involvement were addressed by the parties on the merits.

E. The Board's motion for summary judgment regarding the Riley plaintiffs' objections to truncation plan for senate districts is GRANTED.

F. The ADP's motion for summary judgment regarding compactness is DENIED.

G. The ADP's motion for summary judgment regarding geographic proportionality is DENIED.

H. The ADP's motion for summary judgment regarding socio-economic integration is DENIED.

I. The Riley Plaintiffs' global motion for summary judgment is DENIED.

For purposes of appellate review, this order shall be treated as a final order although a formal judgment has not yet entered. The court specifically directs the parties not to file motions for fees and costs, and for the entry of final judgment, until after appellate review and any remand issues, if any, are resolved. It is the intent of the court to resolve such issues only upon the final resolution of the case.

This court has reviewed the proposed redistricting plan under the modern equivalent of Emerson's memorandum of the law. The Alaska Supreme Court will do the same. But the character of Alaska voters will ultimately be the force of the law as they give it life by their election decisions.[103]

DATED at Fairbanks, Alaska, this 18 of November, 2013.

Michael P. McConahy
Superior Court Judge

I certify that on 11/18/13
copies of this form were sent to:
CLERK:

4FA CLERK
C BROWN
J DOLAN
J GAZEWOOD
J LAVESQUE
J MCKINNON
J HOTHO
LAW CLERK MPM
M MAY
M DAVIS
M WALLERI
M WHITE
N CORR
N LANDRETH
SCOTT B
T KLINKNER
T SCHULZ

[103] Consistent with the expedited nature of this action, any motion for reconsideration must be served and filed no later than 26 November 2013. Oppositions to any such motion for reconsideration are allowed and must be filed no later than 3 December 2013. Any such pleadings are limited to five pages. Additionally this court will not issue a stay in the event a party wants to seek extraordinary review. A stay must issue from the Alaska Supreme Court.