UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al.,	)	
Plaintiff,	)	
vs.	)	File No. 3:22-cv-00022-PDW-ARS
Michael Howe, in his official capacity as Secretary of State of the State of North Dakota,	)	
Defendant.	)	

TRANSCRIPT OF BENCH TRIAL
Volume II
Pages 1-200

Taken at
United States Courthouse
Fargo, North Dakota
June 13, 2023

BEFORE THE HONORABLE PETER D. WELTE
-- UNITED STATES DISTRICT COURT JUDGE --

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(The above-entitled matter came before the Court, the Honorable Peter D. Welte, United States District Court Judge, presiding, commencing at 9:10 a.m., Tuesday, June 13, 2023, in the United States Courthouse, Fargo, North Dakota. The following proceedings were had and made of record in open court with the parties present:)

THE COURT: We are on the record for the second day of trial in the case of the Turtle Mountain Band of Chippewa Indians, et al, versus Alvin Jaeger -- actually, versus Michael Howe, et al.

I will note that there's been a little bit of a change in configuration at counsel table, but my courtroom deputy, Lori, alerted me to that. I will note now that in addition to Mr. Gaber we have Nicole Hansen and Allison Neswood at counsel table, correct? Thank you. And then next to Mr. Sells, we have Samantha Kelty. So we'll just establish that for the record. And things look the same for the defendants.

I will note, counsel, that I have Document 109, which was filed yesterday, and it's a five-page document filed by Mr. Gaber on behalf of the plaintiffs, and it's plaintiffs' motion for leave to make an offer for proof. I am not pressing or rushing at all, Mr. Phillips, but I do want to ask you if the defendants intend to respond to that in writing at some

time.

MR. PHILLIPS: We do, Your Honor, and request maybe until tomorrow to do so.

THE COURT: That would be -- that would certainly be appropriate. I think that if you -- do you think you could have something filed by tomorrow morning, or do you want until tomorrow noon?

MR. PHILLIPS: We can file something by tomorrow morning.

THE COURT: All right. So let's address this at 9 o'clock tomorrow. Mr. Gaber, would that be satisfactory?

MR. GABER: Yes, Your Honor.

THE COURT: Thank you, Mr. Phillips.

Any other housekeeping that we ought to attend to before we dive right in, Mr. Gaber?

MR. GABER: I just wanted to introduce our colleague from the Native American Rights Fund, Allison Neswood, who will be conducting examination. She entered her appearance this morning, Your Honor.

THE COURT: Very good. And welcome, Ms. Neswood.

MS. NESWOOD: Thank you.

THE COURT: Thank you. And, Mr. Phillips, anything in the order of housekeeping?

MR. PHILLIPS: No, Your Honor.

THE COURT: All right. Let's dive right in with the

next witness then.

MS. HANSEN: Good morning, Your Honor.

THE COURT: Good morning. And this will be Nicole Hansen?

MS. HANSEN: That's correct.

THE COURT: And I understand that the first witness will be Collette Brown?

MS. HANSEN: That's correct.

THE COURT: All right.

MS. HANSEN: Plaintiffs call Collette Brown to the stand.

THE COURT: Ms. Brown, if you would come up and stop in front of Lori, we will have an oath administered.

COLLETTE BROWN,

having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you. Ms. Brown, if you were here yesterday, you saw that with regards to the chair and the microphone, if you can end up maybe 6 inches, or so, away -- 6, 8 inches away from that microphone and then just speak directly into it, that would likely work.

And, Ms. Hansen, if you have a difficult time with hearing her, I trust that the Court will be having a difficult time as well, so feel free to adjust accordingly.

MS. HANSEN: Thank you.

THE COURT: Oh, and Mr. Gaber will approach with a bottle of water, yes.

All right. Ms. Hansen, please proceed.

DIRECT EXAMINATION

BY MS. HANSEN:

Q. Good morning, Ms. Brown.

A. Good morning.

Q. Will you state your name for the record, please?

A. Collette Brown.

Q. Where do you live, Ms. Brown?

A. I live in Warwick, North Dakota.

Q. Could you come a little closer?

A. I live in Warwick, North Dakota.

Q. Is that on the Spirit Lake Reservation?

A. That is on the Spirit Lake.

Q. And what county is your home in?

A. Benson County.

Q. About how long have you lived in the Spirit Lake Reservation?

A. I lived there 45 years.

Q. Your whole life?

A. My entire life.

Q. And what about the home where you live now? How long have you lived there?

A. Well, my daughter just turned 21, so -- 20 years old.

She's 20 years now.

Q. And are you a member of a federally recognized tribe?

A. I am. I'm a part of the Spirit Lake Tribe.

Q. What's your racial or ethnic background?

A. Native American.

Q. And where do you work, Ms. Brown?

A. I work at the Spirit Lake Casino and Resort.

Q. Do you -- what entity do you work for?

A. I work for the Spirit Lake Gaming Commission, which is -- the Spirit Lake Gaming Commission is the entity of the Spirit Lake Tribal Council, and they -- the Spirit Lake Tribe Council and the Spirit Lake Gaming Commission are one and the same. They operate and regulate the Spirit Lake Casino and Resort.

Q. What's your position at the Gaming Commission?

A. I am the Gaming Commission executive director.

Q. And what do you do in your role as the executive director?

A. I am the liaison between the tribe and the casino.

Q. Now, in your experience, who lives on the Spirit Lake Reservation, generally?

A. Generally, all the enrolled members of the Spirit Lake Tribe.

Q. Now, what North Dakota state legislative district do you currently live in?

A. District 15.

Q. And are you eligible to vote at your current address in

North Dakota elections?

A. I am.

Q. How often do you vote?

A. I vote every election.

Q. Since when?

A. Since I was 18.

Q. Did you vote in the 2022 midterm?

A. I did.

Q. Do you intend to continue voting in North Dakota elections at your current address?

A. I will continue voting.

Q. Now, tell me about your current representatives in the state legislature.

A. Current representatives, we have two House representatives, Kathy Frelich and Dennis Johnson; and Senator Judy Estenson.

Q. Are any of them members of federally recognized tribes?

A. No.

Q. Now I want to talk about your run for office. Have you ever run for public office in North Dakota?

A. I did this last election.

Q. Tell me about that.

A. So in April I put in my name, along with Heather Skadsem. Her and I put in our names to run for District 15. She ran for House; I ran for Senate. And we were successful in the primary

or the -- yeah, the primary, and then the general we weren't, so we tried.

Q. Is Ms. Lawrence-Skadsem a member of a federally recognized tribe?

A. She is.

Q. What tribe?

A. The Spirit Lake Nation.

Q. And who were your opponents?

A. Our opponents were Kathy Frelich and Dennis Johnson and Judy Estenson.

Q. Were any of them members of federally recognized tribes?

A. No.

Q. So when you ran for District 15 Senate, did you recruit any other candidates, maybe Ms. Lawrence-Skadsem?

A. We tried to get a third. Unfortunately, a lot of the enrolled membership was hesitant and had a lot of other jobs to do, and I think a lot of them really didn't understand the position, so a lot of them declined.

Q. So why did you personally run to represent District 15 in the Senate?

A. So in 2019, when I first started lobbying the legislature, the charities actually called upon the tribe to lobby the system against the historical horse racing expansion that was coming, so we assisted the charities against that bill.

And when we -- when I was speaking to the

legislature, I noticed that there was nobody in the legislature that looked like me aside from Ruth Buffalo, and I felt like none of them understood where I came from or understood the reservations' needs, aside from maybe Joan Heckaman and Senator Marcellais and maybe Ruth Buffalo or Representative Nelson. There may be a -- maybe been a handful of people that understood the poverty and the -- I want to say that reservation has pandemic needs constantly.

Not only that, we have the constant murder and missing indigenous women, and not only women but people. We have constant challenges that face us all the time, and we are under -- under-represented there, and I think our voices need to be there.

And not only that, we don't have anybody standing up for us there, because in 2017 the e-tabs came about, in January, and I feel that came out because of the whole Dakota Access Pipeline that was going through with the Standing Rock situation, and we weren't even -- we weren't even asked to give input. They brought up casinos. They brought up slot machines when we're the experts in that. We've been in gaming for 30-plus years, and they visit our casinos all the time, but yet you don't want to ask us about it?

Q. Thank you. So I want to get a little bit more into your campaign. Could you tell me about your campaign for -- did you campaign for the Senate seat?

A. I did my best that I could campaigning. I wear many hats. I'm on the tourism board. I'm on the education board at the local level. But, yeah, I tried to campaign. I was invited to local events in Devils Lake. I did social media campaigning and things like that.

Q. Where did -- where did you campaign? Inside and outside the reservation?

A. Yes, Devils Lake and things like that.

Q. What types of tools did you use to spread awareness about your campaign?

A. I did -- it's called, like, "The Peddler." It's like a free mailbox mailer that came out, and it went to all areas within the Benson County and Towner areas and Cando. All within District 15 it would have got there, and it went out weekly.

Q. Throughout the whole district?

A. Yeah.

Q. Did you use social media?

A. I used social media as well, yes.

Q. What about parades or community events?

A. Yes.

Q. What about like door-knocking? Did you do door-knocking?

A. I did a few door-knocking when I could, yes.

Q. Did you do any sort of mailers?

A. Yes.

Q. Now, about how much time do you think you spent participating in campaign events and doing direct voter outreach?

A. I want to say maybe 50, 60 percent of my time, when I could.

Q. That's a lot. In your impression, who were the people that ultimately voted for you?

A. I want to say it was primarily Native Americans.

Q. Would you say it's voters on the Spirit Lake Reservation?

A. Yes.

Q. Now, for your campaign contributions, did you receive campaign contributions?

A. Yes.

Q. Who do you think primarily contributed to your campaign?

A. My community, Spirit Lake Tribe, and the people within my reservation.

Q. Now could you talk about, in your experience, what are some difficulties that Native candidates face when compared to non-Native candidates?

A. Can you say that again?

Q. Yes. What are some difficulties that you feel like you faced as a Native candidate when compared to non-Native candidates?

A. Well, personally I faced discrimination. I can honestly say that I was singled out at an event. I had one person tell

me that I was -- "I'm not going to vote for you, so you don't need to come to my place, you don't need to -- you don't need to be here." And I was, like, "Well, if I win, I'm still going to be representing you." "Well, you're not going to win." I was, like, "Okay."

Q. Was -- did you know what that person's race or ethnicity was?

A. Not Native.

Q. Did you feel it was because you were Native that they said that to you?

A. I don't know that. That's just the right answer you're supposed to give.

Q. Would you say it was more difficult for you as a Native candidate to fundraise for your campaign?

A. Yes.

Q. Why is that?

A. I think it's just because I'm a woman of color. Being a person of color is harder, and it's just -- I have too many barriers in front of me, and it's just North Dakota.

Q. Do you -- do you think that your constituency had extra resources to give to your campaign, your potential voters?

A. Can you say that again?

Q. Yeah. Do you think that, like, the people that were contributing to your campaign, do you think that they had a lot of extra resources to give to your campaign?

MR. PHILLIPS: I'll object that it calls for speculation.

THE COURT: I will sustain the objection.

Q. (MS. HANSEN CONTINUING) Do Native Americans on the Spirit Lake Reservation have a lot of -- or have a higher socioeconomic status in your experience living on the Spirit Lake Reservation for 44 years?

A. No.

Q. Now, turning to your 2020 Senate campaign specifically, how did your finances compare to those of your opponent?

A. Well, she made four times more than me by the finances. I only raised about 5,000, and she made four times -- she raised four times more than me, so --

Q. How did that affect your campaign?

A. I lost. She won.

Q. Now I'd like to talk about a specific event that you -- or that took place outside the reservation. Did you attend an event in Devils Lake called "Pints and Politics"?

A. Yes.

Q. What was the format of that event?

A. All the candidates were invited, and we were in a small room, and there were other -- it was a part of the Community -- Community Credit Union workers were there, and I knew one of the workers there because I graduated with her from high school. And she came up and she said "hi" and things like

that.

I sat down at the table with my significant other. We sat down and started talking, and -- with the table, and this man comes up to me and he said, "We're going to have you go first." I said, "Oh?" And he's like, "Yeah, we're just going to have you go first." And I didn't feel comfortable, but I felt like I was singled out. I was the only person in there of color and felt like there was a bright light on me.

So I got up, and he's like, "We'd like to go now." And so I got up and stood up and gave a speech, and I took my time. Took a good 15 minutes. Told them everything about me. Told them that I'm just like them, I graduated in Devils Lake and who I was and why they should vote for me, and that was it, and I didn't feel -- we left after that.

Q. Before -- before you spoke when you interacted with potential constituents, how did you feel that reception was?

A. Cold. It was very cold. Everybody was just -- nobody was really smiling or welcoming at all.

Q. And how does that compare to your experience campaigning on the reservation?

A. On the reservation, everybody's smiling. They're just like, "Hey, you're running. Oh, my God. We're going to have somebody that's going to be like us there."

Q. Now, turning to your voter education and outreach work that you do, as a part of your campaign or prior to that, have

you done voter education and outreach work?

A. Yes, earlier. I did sit in on -- when I was younger, we learned about -- I was a part of the unity. It's a Native American club, and you learn about phone banking, and you learn about what it is that candidates do and things like that, so you help a candidate. You learn to help a candidate, so I did that when I was younger.

And then when -- in 2020 I sat in on the consent decree negotiation with my tribe.

Q. We'll talk about that a little bit later, but have you ever assisted voters when they're having trouble voting?

A. Yeah.

Q. In the 2020 midterm, did Spirit Lake tribal members come to you with problems they faced while voting?

A. Yes.

Q. What are some of the issues that you saw?

A. They were burdened with just their freedom and their right to vote.

Q. Did any voters have trouble using tribal ID?

A. Yes, they did.

Q. What about, did voters have issues where they had to go to a different polling place than they had gone to previously without being notified?

A. Yes.

Q. Are you familiar with the 2020 settlement that arose out

of the challenge to the 2018 voter ID law?

A. Yes.

MS. HANSEN: And, Your Honor, this is marked in the record as Plaintiffs' Exhibit 150. We don't need to pull it up, but for the record.

THE COURT: Thank you.

Q. (MS. HANSEN CONTINUING) How are you familiar with that settlement?

A. I'm very familiar with it.

Q. Did you attend negotiations?

A. I did.

Q. Have you reviewed it as a part of your get-out-the-vote work?

A. Yes.

Q. What are some of the important provisions?

A. Some of the important provisions is that the Secretary of State was supposed to educate the poll workers and the county auditors on this consent decree that -- to ensure that the poll workers have a precinct map there so that our enrolled members can point on the map to show them where they live if their address is a PO Box.

Q. Would that be the address on their tribal ID?

A. Yes.

Q. Now, in the 2020 midterm elections, did you vote in person?

A. I did.
Q. Did you see that map?
A. There was no map.
Q. Now I'd like to turn back to your experience as the director of the Gaming Commission. In that -- in your role as the executive director of the Gaming Commission, have you had interactions with the state legislature?
A. I have.
Q. What has been your experience?
A. It's been -- it's been good and bad.
Q. What's the context? Is it testifying before them?
A. Yeah, it's mainly testifying and then visiting with them prior and after.
Q. What types of issues have you testified about?
A. Mainly gaming.
Q. Turning to one of the specific issues that you testified about, have you ever testified to the legislature about e-pull tab devices?
A. Yes.
Q. Briefly, because I know it's complicated, what's an e-pull tab device?
A. An e-pull tab device is a slot machine.
Q. Okay. Have they always been legal in North Dakota?
A. No.
Q. When did the state legalize e-pull tab devices?

A. 2017.
Q. And how was the Spirit Lake Tribe involved in that process, if at all?
A. Not at all.
Q. Were you consulted by the -- or was the tribe consulted by the legislature?
A. No.
Q. How has the legalization of e-pull tab devices affected the Spirit Lake Tribe?
A. Detrimentally.
Q. How so?
A. They have detrimentally impacted our gaming revenues by 45 to 65 percent, 45 percent in the first year, 65 percent prior to COVID, when we closed our doors in March of 2020.
Q. Has the tribe sought to address this issue before the state?
A. Yes.
Q. Have you testified before the legislature about this issue?
A. Yes.
Q. And what has been the state's response -- the legislature's response? Excuse me.
A. They've heard it. They've accepted it. Nothing has been done.
Q. Why is this issue so important to the tribe?

A. Because we are the primary economic driver for our tribe. Every dollar that comes into that casino goes back to that tribe.

Q. And what does the tribe -- you know, what does the tribe use those resources for?

A. For social economic programs, for everything that that tribe does. Every dollar that goes into that casino is for that tribe.

Q. For the social services of the tribal citizens?

A. Yes.

Q. Aside from the e-pull tab issue, has the Spirit Lake ever worked with other tribes to lobby the legislature on gaming issues?

A. Yes, we have joined forces with the -- with the Turtle Mountain Band of Chippewa Indians on the expansion of gaming, specifically with internet gaming and online gaming. We wanted to do a joint venture with the state back in 2021, but the state wasn't ready.

Q. And you worked with the Turtle Mountain Band of Chippewa Indians on that?

A. Yes.

Q. Now, in your appearances before the North Dakota legislature, did you ever work with Senator Marcellais?

A. Yes.

Q. What types of things did you work with him on?

A. Everything, primarily, every gaming issue that he could try to testify on, any -- anything that I could get direction on. When I first started in 2019, he primarily gave us the lay of the land, how things worked there. He introduced us to the Democratic caucus. He introduced us to the Republican caucus. Yeah, he -- he really helped us when we first started -- when I first started and other Native people that talked.

Q. What district did he previously represent?

A. Nine.

Q. Where is District 9 located?

A. Turtle Mountain.

Q. Is Senator Marcellais a member of a federally recognized tribe?

A. Yes, the Turtle Mountain Band of Chippewa Indians.

Q. So he's not a member of the Spirit Lake Nation?

A. No.

Q. Even though he's a member of the Turtle Mountain Band of Chippewa Indians and not Spirit Lake Nation, do you feel he was responsive to your needs?

A. Yes, he was very responsive.

Q. Now let's talk more about the redistricting process. Did the Spirit Lake Tribe seek to participate in the process for redistricting in 2021?

A. Yes.

Q. What did Spirit Lake Nation request?

A. For a subdistrict.
Q. How did the legislature respond to that request?
A. They didn't.
Q. Did you request for the -- or for -- sorry. Excuse me. Did you request the Redistricting Committee to come to the Spirit Lake Reservation?
A. Yes.
Q. How did they respond to that request?
A. They didn't.
Q. Now, after the tribe had the opportunity to review the final map, the map that was published on September 29th, did -- did that request change, the request for a subdistrict? When -- after the tribe -- excuse me. Is the tribe's current request a request for a subdistrict?
A. No.
Q. Was the tribe's final request to the state legislature while the legislature was still in session a request for a subdistrict?
A. No.
Q. What was that request?
A. To join with the Turtle Mountain Band of Chippewa Indians.
Q. Did the legislature grant that request?
A. No.
Q. Now, how would the combined district help ensure that Spirit Lake members have fair representation?

A. It would actually give us a voice along with the Turtle Mountain Band of Chippewa Indians, give us -- both tribes a voice there at the legislature, to have true representation.

Q. And why is it important for your community to have representatives of choice in the legislature?

A. Why? So we can actually be a part of the changes of making laws there at the legislature, to be a part of the change, to affect change.

Q. Now, Ms. Brown, we've talked a lot about the importance of voting. Tell me, do you know any Native Americans that were prohibited from voting by the state?

A. So my grandma, she is a Turtle Mountain Band of Chippewa Indians enrolled member. Her name is Mary Jane Grandbois, and she was -- she wasn't allowed to vote.

And when my dad was born in 1940, he is an Army veteran, and he instilled in me about the importance of education and voting and being a part of this dual culture that I'm a part of, the non-Native and Native culture. I have to walk in two worlds, and that's what I do.

MS. HANSEN: Thank you. Your Honor, I pass the witness.

THE COURT: Thank you. Cross-examination by the defendant?

MR. PHILLIPS: Yes, Your Honor.

///

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Good morning. I'm David Phillips. I'm one of the attorneys for the defendants in this case.

A. Good morning.

Q. Just to be clear, you're one of the named plaintiffs in this case; is that correct?

A. Correct.

Q. And you provided both oral and written testimony to the legislative Redistricting Committee in the 2021 redistricting process; is that right?

A. Correct.

Q. And you also gave oral testimony to the Tribal and State Relations Committee?

A. Correct.

Q. It's my understanding that you attended some of these meetings because Chairman Yankton couldn't make it; is that fair?

A. That is correct.

Q. But you were testifying on behalf of the tribe.

A. Correct.

Q. Let's look at Defendant's Exhibit 327. Do you recognize this as your written testimony submitted to the Redistricting Committee?

A. Yes.

Q. And this is for a meeting that the Redistricting Committee held in Bismarck?

A. Mm-hmm. Yes.

Q. Now, on the first page of this -- I might have you zoom in at the bottom of that first paragraph. On the first page of this it looks like you're advocating for four things: For a fair and legal voting system, for the tribes' communities to be considered a community of interest that should not be split into multiple legislative districts, for the use of single-member districts to elect representatives to the state House, and to demand that the North Dakota Redistricting Committee listen to tribal input and hold redistrict meetings and tribal consultations on reservations. Do you see that?

A. I do.

Q. Do you agree that's the request you were making of the Redistricting Committee at that time?

A. I do.

Q. Let's look at these in order. Your first request there for a fair and legal voting system, is that referencing the Voting Rights Act?

A. It is.

Q. And that's also referenced later in your testimony as well. On page 2 you discuss the Voting Rights Act; is that right?

A. Yes.

Q. Now, the next request you have in this written testimony is for the tribes' communities to be considered a community of interest that should not be split into multiple legislative districts. Do you see that?

A. Yes.

Q. This isn't referencing a single community of interest for both the Spirit Lake Tribe and the Turtle Mountain Tribe, correct?

A. Correct.

Q. It just means Spirit Lake.

A. Yes.

Q. And we'll look at the bottom of page 2 and the top of page 3, and there, again, you ask to keep those communities together with legislative districts. Spirit Lake and its communities are a community of interest and should remain in a single legislative district. Do you see that?

A. Mm-hmm.

Q. Again, this is --

A. Yes.

Q. Oh, I'm sorry. I didn't mean to cut you off. Your answer is yes?

A. Yes.

Q. And, again, this is referencing Spirit Lake alone, not Turtle Mountain.

A. Correct.

Q. That sentence or paragraph goes on to say, "Splitting the reservation or communities into multiple districts would dilute the ability of tribal members to elect the representative of their choice." Do you see that?

A. I see that, yes.

Q. And in this portion of your written testimony you're asking the committee not to split the Spirit Lake Reservation, right?

A. Correct.

Q. In other words, don't draw the district line down the middle of the reservation.

A. Correct.

Q. Ultimately, the map that the state adopted, it did not split the Spirit Lake Reservation?

A. It did not.

Q. Has the -- to your knowledge, has the state ever split a reservation in a redistricting process?

A. Not to my knowledge.

Q. We'll go back to that first page and the list of the four things that you were discussing. The next one, Number 3, is for the use of single-member districts to elect representatives to the state House. Do you see that?

A. I see that.

Q. This is a reference to subdistricts, correct?

A. Correct.

Q. And that was what the request was?
A. Yes.
Q. For the legislature to create a subdistrict around the Spirit Lake Reservation.
A. Correct.
Q. And the next request is -- on Number 4 on this page is to demand the North Dakota Redistricting Committee listen to tribal input and hold redistricting meetings and tribal consultations on reservations. Do you see that?
A. I see that.
Q. The Redistricting Committee didn't hold meetings on the reservations, right?
A. They did not.
Q. They only held them in Bismarck and then one meeting in Fargo.
A. Correct.
Q. But the Tribal and State Relations Committee did hold meetings on the reservations; isn't that right?
A. They held it the week after this meeting, correct.
Q. September 1, 2021?
A. Correct.
Q. And that was held on the Spirit Lake Reservation?
A. Correct.
Q. Do you know what the purpose is of the Tribal and State Relations Committee?

A. I do not know the purpose.

Q. Are you aware of whether the Tribal and State Relations Committee reported back to the Redistricting Committee?

A. I am not aware.

MR. PHILLIPS: Let's pull up Plaintiffs' Exhibit 135 and go to page 29.

Your Honor, may I get a little closer to the monitor myself?

THE COURT: Absolutely. And do you need a -- if you're going to continue speaking, we can get you a lapel mic.

MR. PHILLIPS: Your Honor, I won't speak.

THE COURT: Very good.

Q. (MR. PHILLIPS CONTINUING) Okay. The first full paragraph here on this screen, the committee also received updates from committee members who serve on the Tribal and State Relations Committee. Do you see that?

A. I see that.

Q. I'll represent to you that this is the final report issued by the Redistricting Committee. Have you ever seen this document before?

A. No.

Q. Were you aware that Representative Boschee was a member of both the Tribal and State Relations Committee and the Redistricting Committee?

A. Yes.

Q. So he sat at both meetings, right?

A. Yes.

Q. Were you aware that Nathan Davis, the state Indian affairs director, also attended the tribal and state relations meetings?

A. Yes.

Q. He coordinates communications between the tribes and the state government; is that fair?

A. Yes.

Q. Now, we're still talking about the August 26 meeting of the Redistricting Committee. It's my understanding you also gave oral testimony at that meeting?

A. Yes.

Q. And essentially you asked for the same things that you did in this written testimony.

A. Correct.

Q. You asked to be treated as -- you asked for Spirit Lake to be treated as a community of interest?

A. Correct.

MR. PHILLIPS: Let's play a video clip. It's a portion of Defendant's Exhibit 434. Kate, it's Number 2.

(D-434, a video clip, played in open court.)

MR. PHILLIPS: I'll ask you a question in a moment, but first let's play one more video. It is another portion of Defendant's Exhibit 434. And, Kate, it's Number 3.

(D-434, a video clip, played in open court.)

Q. (MR. PHILLIPS CONTINUING) Again, in this testimony you weren't asking that Spirit Lake and Turtle Mountain together be treated as a community of interest, correct?

A. Correct.

Q. You were only asking that for the Spirit Lake Reservation.

A. Correct.

Q. Did you personally ever make a request to the Redistricting Committee or the Tribal and State Relations Committee for both reservations to be treated collectively as a community of interest?

A. No.

Q. You never updated or corrected this testimony?

A. No.

Q. We just looked at a couple of clips of testimony relating to community of interest. You also advocating, though, at that August 26 meeting for the creation of a subdistrict for Spirit Lake; is that right?

A. Yes.

MR. PHILLIPS: Let's play a portion of Defendant's Exhibit 434, and it's Number 5, Kate.

(D-434, a video clip, played in open court.)

Q. (MR. PHILLIPS CONTINUING) This was a request for subdistricts for Spirit Lake, right?

A. Correct.

Q. Did you personally ever update or correct this testimony to make a different request with respect to subdistricts?

A. No.

Q. Let's look at Defendants' Exhibit 351. Do you recognize this as your written testimony for the September 15, 2021, meeting of the Redistricting Committee?

A. Yes.

Q. And, again, you were advocating on behalf of the Spirit Lake Tribe in this written testimony?

A. Correct.

Q. Now, there's a paragraph there, the second paragraph, you have a request for three things: For the use of single-member districts to elect representatives to the state House, for the committee to account for all voters in spite of the census undercount in tribal committees, and to demand the North Dakota Redistricting Committee listen to tribal input and hold redistricting meetings and tribal consultations on reservations. Do you see it that?

A. I see that.

Q. Are those the three things you were asking for in this written testimony?

A. Yes.

Q. That first request for the use of single-member districts, again, that's a reference to subdistricts, right?

A. Correct.

1 **Q.** Now, the second request here is for the committee to
2 account for all voters in spite of the census undercount in
3 tribal communities. Do you see that?
4 **A.** I see that.
5 **Q.** And do you go on later in your written testimony to
6 explain what you mean by that, right?
7 **A.** Correct.
8 **Q.** Is it fair to say that the population of the Spirit Lake
9 Reservation, according to the U.S. Census, is too small to
10 create a subdistrict around the reservation allowing for a
11 majority Native American population?
12 **A.** It's fair.
13 **Q.** To make a subdistrict around the reservation that benefits
14 Native American voters, the committee would have to consider a
15 data source other than the U.S. Census, right?
16 **A.** Right.
17 **Q.** And that's what you're asking the committee to do?
18 **A.** I was.
19 **Q.** This issue was addressed during the committee meeting. Do
20 you recall that?
21 **A.** I do.
22 MR. PHILLIPS: We're going to play a portion of
23 Defendant's Exhibit 438. And, Kate, it's Number 16.
24 (D-438, a video clip, played in open court.)
25 **Q.** (MR. PHILLIPS CONTINUING) Do you remember that testimony?

A. I do.

Q. Who was asking that question in the video?

A. I do not recall who's asking me that question.

Q. A member of the committee, though. It was a member of the Redistricting Committee; is that fair?

A. Yes.

Q. Matt Campbell didn't provide an answer to this question either, did he?

A. No.

Q. Let's pull up Plaintiffs' Exhibit 150. I believe you testified earlier about this consent decree entered in the *Brakebill* case?

A. Yes.

Q. That was a case relating to voter ID in North Dakota in 2016, I believe?

A. Yes.

Q. Let's go to page 5 of this exhibit. We'll zoom in on paragraph 8. This consent decree, according to paragraph 8, I'll just read it. It says, "The Secretary of State shall ensure that tribal governments are provided with county-approved precinct maps for the precincts that include land within the tribal government's jurisdiction at least 50 days prior to a statewide election." Do you see that?

A. I do.

Q. Do you know if the Secretary of State's Office provided

precinct maps to the tribal governments at least 50 days before any statewide election?

A. That's a good question for the tribal government. I do not know.

Q. They may have -- the Secretary of State may have provided those maps to tribal governments on time? You just wouldn't know either way.

A. I do not know.

Q. For any election?

A. I do not know.

Q. Do you know if any Spirit Lake enrolled members live in Devils Lake, the City of Devils Lake?

A. Yes.

Q. Any idea of what the population of enrolled members living in Devils Lake is?

A. Well, in 20 -- gosh. When we had the tribal-state relations committee hearing on September 1, I think it was like 3,700 then. I don't know what it is to date. I can get the data, but I'm not too sure.

Q. Let's go to Exhibit D-327. Right before the list of requests -- and, again, this is your written testimony for the August 26, 2021, meeting. Right before the list of four requests that you have, the sentence says, "The tribe and its operations are major economic drivers in the greater Devils Lake area, providing jobs and opportunities for many North

Dakotans and tribal members." Do you see that?

A. Mm-hmm.

Q. And if I recall correctly from one of the clips we just watched, you also mentioned something similar in your oral statement?

A. Correct.

Q. What did you mean by this?

A. That the surveys stated that this is how many were living on the reservation. Now, that -- yeah, that's what that survey conducted. It says "Native Americans."

Q. I believe it says, "The tribe and its operations are major economic drivers in the greater Devils Lake area, providing jobs and opportunities for many North Dakotans and tribal members."

A. Yeah.

Q. Fair to say the tribe has significant connections to Devils Lake and the surrounding areas?

A. That is correct. That is seven miles south -- or north of us.

MR. PHILLIPS: Thank you. No further questions.

THE COURT: Thank you, counsel.

Ms. Hansen, do you have redirect?

MS. HANSEN: I do. Mr. Phillips is much taller than me.

///

REDIRECT EXAMINATION

BY MS. HANSEN:

Q. So, Ms. Brown, you recall Mr. Phillips asking you about your August 26 testimony, right?

A. Yes.

Q. At the time of that meeting, the committee hadn't ultimately released the plan that put Turtle Mountain in a subdistrict; is that correct?

A. Correct.

Q. At that point did Turtle Mountain and Rolette County still have the full Senate district that they had for decades?

A. Yes.

Q. At that point did you have any reason to think that there could be a need to propose a combined district with Turtle Mountain?

A. No.

Q. Was it only after the committee's final map came out that Spirit Lake Tribe thought that it was -- found it important to propose the combined district with Turtle Mountain?

A. I believe so.

Q. Mr. Phillips talked a lot about communities of interest. Do you recall?

A. Yeah.

Q. Did you ever testify that Spirit Lake Nation and Turtle Mountain were not a community of interest?

A. I did not.
Q. Are they together, combined, a community of interest; do you think?
A. We are both Native American tribes. We both have cultures of similar interests. We both have tours that ultimately take each other around each other. Yeah, we have similar interests.
Q. Do tribal members living on both reservations have similar socioeconomic status?
A. We do.
Q. Now, are you aware that there have been demonstrative districts proposed in this lawsuit that combine Turtle Mountain and Spirit Lake into a single Senate district or at-large state legislative district?
A. I saw all that yesterday, yes.
Q. Does that -- does that map keep together a community of interest, proposed district?
A. It does.
Q. Mr. Phillips brought up the consent decree?
A. Yes.
Q. Does that consent decree require the state to accept tribal ID as a form of voting -- or a form of voter ID?
A. It does.
Q. On election day, when you were assisting voters in 2020, did you see any voters that had issue voting with tribal ID?
A. I did.

Q. What types of issues?

A. I saw a lot of them being turned away, having to validate that they -- their ID was valid because of a new system that came into place. That was not a part of the consent decree at all. They had to validate their address again, and it was disheartening that our people had to fight for their freedom to vote again, when you can take your tribal ID and go and fly on a flight. TSA accepts our tribal ID's when we can't even vote with it.

MS. HANSEN: Thank you, Ms. Brown.

THE WITNESS: Thank you.

MS. HANSEN: No further questions.

THE COURT: Mr. Phillips?

MR. PHILLIPS: I do have a few questions, if --

THE COURT: You may.

MR. PHILLIPS: Thank you, Your Honor.

RECROSS-EXAMINATION

BY MR. PHILLIPS:

Q. I'm going to ask you a little bit about this consent decree. I'm going to tell you my understanding of one of the provisions of this, and you tell me if you have the same understanding. It's my understanding that if an individual shows up to vote on election day and they don't have an ID or it is insufficient in some way, they're allowed to cast what's called a set-aside ballot; is that right?

A. Correct.
Q. And under the terms of the consent decree, after every election, the Secretary of State is required to send a list of names to the tribe for the tribe to verify the identities and residence of any individuals who cast set-aside ballots; is that right?
A. Yes.
Q. Are you aware of whether the Secretary of State has complied with that provision of the consent decree after it was entered?
A. I am not aware of that because of the times that were given -- that I've endured were related to specific tribal-ID-issued ones.
Q. Now, is it -- it's my understanding as well that if the tribe confirms the residence of a tribal member, the state is required to and will accept that in lieu of any identification; is that fair?
A. Can you repeat that?
Q. After an -- I'll rephrase it a little bit here and maybe go through a couple of steps. After an election, if someone has cast a set-aside ballot in a county that has a reservation, the Secretary of State will send a list of names of those set-aside ballots to the tribe immediately after the election, right? The tribe has the opportunity then to verify the residents and identity of any of the individuals on that list;

is that correct?

A. Correct. That's correct.

Q. All of that's correct.

A. Yes, that's correct.

Q. And the individual doesn't have to provide any further identification after that point.

A. For no valid -- no ID, correct?

Q. Correct.

A. Is that what you're saying? Yes, that's correct.

Q. Are you aware of any individuals, since this consent decree has been entered, whose ballot has been not counted even though these steps were followed?

A. I am not aware of anybody that was -- had their ballot cast aside. I'm not aware of anybody that went up there without an ID. I am aware of individuals that went up there with tribal ID's that had been turned away.

Q. Who are those individuals?

A. I do not have my phone with me; otherwise, I would give you names.

MR. PHILLIPS: Thank you. No further questions.

THE COURT: Do you have any -- based on the scope of the recross, Ms. Hansen, do you have any follow-up questions based on that scope?

MS. HANSEN: No, Your Honor.

THE COURT: Very good. You may step down, and I do

want to thank you, Ms. Brown, for your testimony.

THE WITNESS: Thank you.

MS. HANSEN: Can Ms. Brown be excused for the rest of the trial? I think she needs to go home to Spirit Lake.

THE COURT: Mr. Phillips?

MR. PHILLIPS: No objection.

THE COURT: You are released from your obligation to be here, and safe travels.

THE WITNESS: Thank you.

THE COURT: Thank you.

MS. HANSEN: Thank you, Your Honor.

THE COURT: Thank you.

Mr. Sells.

MR. SELLS: Good morning, Your Honor. The plaintiffs call Senator Richard Marcellais to the stand.

THE COURT: Thank you. Senator Marcellais, if you want to come on up to Lori -- I know that you've been here during the trial, so you understand that you'd be coming up and being placed under oath. Thank you.

RICHARD MARCELLAIS,

having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you, and please have a chair. Good morning.

THE WITNESS: Good morning, Your Honor.

MR. SELLS: Your Honor, may I give the witness some water?

THE COURT: Please. Yes.

THE WITNESS: Thank you, sir.

MR. SELLS: You're welcome.

DIRECT EXAMINATION

BY MR. SELLS:

Q. Well, good morning, Senator Marcellais. How are you?

A. Good morning, sir.

Q. Would you please state your full name for the record and spell your last name, please?

A. Richard Marcellais. It's M-a-r-c-e-l-l-a-i-s.

Q. Where do you live, Senator Marcellais?

A. I live in Belcourt.

Q. And what do you do for a living?

A. I'm semiretired. I currently work for the Turtle Mountain Band of Chippewa Tribe as the veterans service officer part-time.

Q. And when you say "semiretired," you retired most recently from the North Dakota Senate; is that right?

A. Yes, sir.

Q. Before we get into your political experience, I want to ask you a few questions about your background. When and where were you born?

A. I was born in Devils Lake, North Dakota, in 1947.

Q. Did you grow up in Devils Lake?
A. No.
Q. Where did you grow up?
A. I grew up in Belcourt.
Q. Are you an enrolled member of the Turtle Mountain Band of Chippewa Indians?
A. Yes, I am.
Q. Were your parents enrolled members of the Turtle Mountain Band of Chippewa Indians?
A. Yes, they were.
Q. Where did you go to high school?
A. I went to high school at Turtle Mountain Community High School in Belcourt, North Dakota.
Q. When did you graduate?
A. 1965.
Q. What did you do after high school?
A. After high school I went to vocational training in Cleveland, Ohio, and received a structural drafting degree.
Q. And what did you do after you got that degree?
A. I was drafted in the U.S. military as a -- in the U.S. Army, and I spent a year in Vietnam, 1968, '69.
Q. Well, thank you for your service, Senator.
A. You're welcome.
Q. What did do you after you got out of the military?
A. I went to work for the federal government for 27 years.

Q. In what parts of the federal government did you work over the course of those 27 years?

A. I worked for the Veterans Administration, the Bureau of Indian Affairs, and Indian Health Service.

Q. And when did you leave the federal government?

A. I left the federal government in 1994. I retired.

Q. Are you married, Senator Marcellais?

A. Yes, sir.

Q. How long?

A. Been married for 55 years.

Q. What's your wife's name?

A. Betty.

Q. Where did she grow up?

A. She grew up in Belcourt.

Q. What does she do for a living?

A. She runs her own salon out of the home.

Q. Do you and your wife have any children?

A. We have two boys.

Q. Are they grown?

A. Yes.

Q. Where do they live?

A. They live in Belcourt.

Q. Do you have any siblings?

A. I have two brothers and two sisters.

Q. Where do you live?

A. They live in Belcourt.
Q. Do you have any grandchildren?
A. I have eight grandchildren and two great-grandchildren.
Q. Do they also live in Belcourt?
A. Yes, sir.
Q. I want to ask you about your last name. Marcellais sounds French to my ear; is that right?
A. That's correct.
Q. Are French-sounding last names common among Native Americans in North Dakota?
A. On the Turtle Mountain Reservation they are.
Q. Is that something that's pretty commonly understood in your part of North Dakota? I mean, do folks pretty much know that a person is Native American if they have a French last name?
A. Yes.
Q. Are you involved in any community organizations?
A. I belong to the American Legion, the Veterans of Foreign Wars, the Vietnam Veterans of America, and I also belong to the National Retirement Association.
Q. Are you talking about the National Association of Retired Federal Employees?
A. That's correct.
Q. Have you served on any boards?
A. I did sit on school boards at Belcourt, on the elementary,

middle school, and high school board. I also sat on the -- the national -- NISBA they call it, the National Indian School Board Association. I was the president of that board before I left that board.

Q. All right. I want to turn now to your political experience. First, have you ever served in tribal government at Turtle Mountain?

A. Yes.

Q. When was that?

A. I was tribal chairman from 2008 to 2010.

Q. And as we discussed, you served in the North Dakota Senate, correct?

A. That's correct.

Q. When was that?

A. I served from 2006 up until 2022.

Q. What district did you serve?

A. State senator.

Q. What district number?

A. Oh, District 9. I'm sorry.

Q. And what county or counties made up the bulk of District 9 during the time that you served in the Senate?

A. Rolette County.

Q. So you were first elected in 2006, correct?

A. That's correct.

Q. And reelected in 2010, 2014, and 2018?

A. That's correct.
Q. Did you run for reelection in the new District 9 in 2022?
A. Yes, I did.
Q. What was the result?
A. I lost to Kent Weston.
Q. Is Senator Weston a member of any Indian tribe?
A. Not to my knowledge.
Q. Is Senator Weston from Rolette County?
A. No.
Q. Where's he from?
A. He lives in Sarles, North Dakota. It's in Towner County.
Q. Do you think you might run again?
A. I plan on it.
Q. All right. I want to ask you a few questions about your time in the North Dakota Senate. What would you say were the main issues you worked on as a senator?
A. Well, I served -- I worked on many issues, but I served mainly on the education committee and also the government Veterans Affairs Committee.
Q. What do you consider to be your greatest accomplishments as a senator?
A. Well, my first session, I believe the greatest accomplishment was when we passed a bill for tuition for non-Native students going to tribal colleges. I also was responsible for the five tribal nation flags being displayed in

the capitol.

And I also introduced a bill to rename Highway 57, which is in Spirit Lake Nation, to the Veterans Memorial Highway, named after the Sioux name that meant Veterans Memorial Highway. On the veterans' side I introduced a bill for Vietnam Veterans Day each year in North Dakota, and that's on March 29. The reason March 29 is that was the ending of the war in Vietnam in 1975, so it's recognized. The governor does a proclamation every year recognizing that as Vietnam Veterans Day for our veterans.

I also introduced a bill to waive the burying fees for the spouses of veterans at the Mandan Cemetery. Before that the spouses were paying $550 for a second digging of the burial of them, so I got that waived through the National Guard. I also introduced a bill to -- for gas tax for Turtle Mountain.

Q. Let me ask you a few questions about that list of accomplishments. First, about your bill to get the state to display tribal flags at the capitol, was that just the Turtle Mountain flag that was displayed?

A. No, it was all five tribal nation flags of North Dakota.

Q. When you got state funding for tribal colleges, did that legislation apply only to the tribal college at Turtle Mountain?

A. No, it applied to all five tribal nation colleges.

Q. And I think you mentioned this, but where is that highway that you got renamed in honor of Native American veterans?

A. It's about a 13-mile stretch. It was Highway 57 prior. It's in Spirit Lake Nation.

Q. Now, is the Spirit Lake Nation in your former district?

A. No.

Q. So you introduced that legislation on behalf of Native Americans who weren't even your constituents; is that right?

A. That's correct.

Q. Why'd you do that?

A. Well, one of my veteran brothers came to the Vietnam veteran ceremony at the capitol, and he approached me during the ceremony and asked if they could get that highway renamed to the Veterans Memorial Highway in Sioux language. And I said I'll try and get it done, and I introduced a bill, and it passed, so it was for my veteran brother.

Q. That veteran brother was a member of the Spirit Lake Nation?

A. Yes, sir.

Q. And he came to you instead of his own senator; is that right?

A. That's correct.

Q. Do you think that legislation would've happened if you weren't in the Senate?

A. I don't believe so.

MR. PHILLIPS: Objection. It calls for speculation.

THE COURT: And I will sustain that objection.

THE WITNESS: Sir, can I mention one more accomplishment I forgot about?

Q. (MR. SELLS CONTINUING) Of course.

A. It was a -- I call it the Delia bill. There was a lady from New Mexico, Native American on our reservation. Approached me and asked me if I would introduce a bill where Native Americans working on reservations are exempt from paying state tax, so I did introduce the bill, and it did pass, so I called it the Delia bill.

Q. Now, Senator Marcellais, you've been out of the Senate for one session; is that right?

A. That's correct.

Q. Have you seen a change in the Senate's approach to issues that matter to Native Americans since your departure?

A. After being there 16 years, I monitored the sessions on the -- on the TV channel, and I felt there was things that were going on in legislation that -- this last session that shouldn't have happened.

Q. Can you give me an example or two?

A. I can give you an example. One of them was, a bill came up to feed our children in our schools, and they defeated the bill. They didn't pass it on the floor, but yet they passed a bill to give themselves raises in legislation, so there was

quite controversy over that bill.

Q. Has the legislature changed its approach to Chippewa Downs?

A. Oh, yeah. They -- Chippewa Downs was not funded by the legislation this year for their purse money.

Q. Can you explain for the Court what Chippewa Downs is?

A. Okay. Chippewa Downs is our horse racing track at Turtle Mountain, and they usually have horse racing during the month of June every weekend, and then they also come down to Fargo in the month of July and have horse racing.

Q. Is that an issue that you worked on when you were in the Senate?

A. The session before I saved it because they were planning on discontinuing it at that time, and I finally worked with the Senate to get the -- and the House to get the bill -- to continue to fund the horse racing in Chippewa Downs.

Q. And what happened after you left?

A. Well, like I said, the last session they didn't pass the bill.

Q. Senator Marcellais, following your defeat in the 2022 election, in the new District 9, how many Native Americans are serving in the North Dakota Senate?

A. In the Senate, to my knowledge, none.

MR. SELLS: Those are all my questions.

THE COURT: Thank you, counsel.

Mr. Phillips, cross-examination -- or Mr. Wiederholt, cross-examination?

MR. WIEDERHOLT: Thank you, Your Honor. Pardon me. I'm a little disorganized here.

CROSS-EXAMINATION

BY MR. WIEDERHOLT:

Q. Senator Marcellais, I'm one of the attorneys for Secretary Howe in this case. My name is Brad Wiederholt. I don't know if you recognize me, but I -- I clerked as a law student during the 2007 legislative session. You at that time, I believe, were on the judiciary committee or the natural resources committee. Do you recall which -- which of those?

A. I was on a judiciary committee my first session.

Q. Okay. And that was your first session?

A. Yes, it was.

Q. Okay. Well, it's nice to see you again. And, unfortunately, we're in these circumstances, but it is -- it is nice to see you, and thanks for coming down today. Time flies. That's a while ago.

So I want to ask you some questions about some of your previous testimony and then also ask you about the testimony you gave to the joint Redistricting Committee in November of 2021 and then a floor speech you delivered in November of 2021. So you've served a long time in the North Dakota Senate, and that ended in 2022, right?

A. Yes, sir.

Q. And you were here, I believe, yesterday when Former Chairman Yankton testified about some of those tribal and state relations committees? Do you recall --

A. Yes, sir.

Q. Do you recall that testimony?

A. I don't recall his testimony. I didn't listen that close, but I was here.

Q. Yeah. Well, you'd agree that there were a handful of Tribal and State Relations Committee meetings during the summer of 2021, correct?

A. I agree, yeah.

Q. Yeah. In August --

MR. SELLS: Your Honor, I want to object. I'm going to object as beyond the scope of direct. I didn't ask Senator Marcellais about the redistricting process.

MR. WIEDERHOLT: Well, it goes to the issues in this case, Your Honor, and some of his testimony about the redistricting process that's going to show up. And I can certainly call him during our case in chief and go into those issues. I figured it might be most expeditious to just get it done while he's here today, but I'll leave it to you, Your Honor.

THE COURT: The Court will overrule the objection and is going to grant a little bit of latitude just in the interest

of judicial economy. We have seasoned counsel on both sides. And with regards to the witness testimony, rather than having Senator Marcellais be called twice, I would rather have this happen here. I will afford the same courtesy to opposing counsel as well with witnesses, so please proceed.

MR. WIEDERHOLT: Thank you, Your Honor.

Q. (MR. WIEDERHOLT CONTINUING) And, Senator Marcellais, we were talking about those Tribal and State Relations Committees that happened approximately in August and September of 2021. And I think you agreed with me that you were aware they occurred, right?

A. Yes.

Q. Were you at any of those committee meetings?

A. Yes.

Q. Do you recall which ones you were at?

A. Turtle Mountain.

Q. And that was held at the Turtle Mountain Community College?

A. That's correct.

Q. Was that actually a joint meeting of the Turtle Mountain -- well, the tribe up there, Mandan -- no, that's the wrong one. The Turtle Mountain Band of Chippewa Indians actually convoked a tribal council meeting during that committee meeting as well? Is that your recollection?

A. They attended the tribal-state relations meeting.

1 **Q.** Okay. But do you recall Chairman Azure actually talking
2 during that meeting and saying that it would be counted as a
3 tribal meeting as well?
4 **A.** No.
5 **Q.** You don't recall that?
6 **A.** I don't recall that.
7 **Q.** Okay. Do you recall, Senator Marcellais, that meetings
8 were conducted at the MHA Nation, the Turtle Mountain Nation,
9 and then the Spirit Lake Nation for the tribal and state
10 Redistricting Committee?
11 **A.** Not that I'm aware of.
12 **Q.** But if that's how it went down, you just don't recall as
13 you sit here today; is that right?
14 **A.** I don't recall.
15 **Q.** Do you recall that there was a meeting attempted on the
16 Standing Rock Reservation, but that kind of fell apart at the
17 last minute because of an election of new leadership there?
18 **A.** I'm not aware of.
19 **Q.** Okay. Senator, you've been in the legislature, you know,
20 as of 2022 for, you know, a couple of decades, right, just
21 about? 2006 to 2022?
22 **A.** Yes.
23 **Q.** And you were here when Chairman Yankton talked about the
24 Tribal and State Relations Committee, and he talked about the
25 involvement of Senator Rich Wardner from Dickinson? Do you

recall that testimony?

A. He was the majority leader in the -- in the Senate.

MR. SELLS: Your Honor, I want to object on that point because I think Mr. Wiederholt is incorrect that the witness was in court on Monday to hear Chairman Yankton. Certainly the witness didn't affirm that.

THE COURT: Yeah, I will sustain that objection. You'll need to rephrase it or to move on to a different topic, Mr. Wiederholt.

Q. (MR. WIEDERHOLT CONTINUING) Yeah, Senator Marcellais, were you here all of Monday, or did you come halfway through the day; do you recall?

A. I was here part of Monday, yeah.

Q. Okay. Are you aware that Senator Wardner was kind of the liaison with the Tribal and State Relations Committee and the legislature?

A. I'm aware he was the chairman of the tribal-state relations.

Q. Okay. And he's not a bit player in the legislature at this time, was he? He was -- he was a power player there as the majority leader?

A. Yes.

Q. Yeah. Are you aware of the purpose of the Tribal and State Relations Committee, generally?

A. Generally, it's to communicate and have good relations

with our tribes in North Dakota, and I listened to the issues and concerns that they have.

Q. And, practically speaking, did the Tribal and State Relations Committee assist with the tribes in really getting things done in relation to the issues that were arising at the tribes?

A. Not necessarily.

Q. They didn't get much done? Is that your testimony?

A. Well, they got things done, but not everything that was supposed to get done.

Q. Sure. And would you agree that when those meetings were held on various tribal nations, the focus would be generally the issues affecting that tribal nation?

A. It wasn't until the last session I was in that they started visiting the tribal nations. Before that they had the Tribal-State Relation Committee meetings at Fargo or else Bismarck or some other location. They never came out to the tribal nations before.

Q. So as of 2021 they were visiting tribal nations, though, correct?

A. No, not the Tribal-State Relations Committee.

Q. Oh, they weren't. Yeah, I thought you told me that there was --

A. It didn't start until the last session I was in.

Q. Which was what?

A. 2021.
Q. Okay. May be some confusion on that point, but I'm going to move on here. Are you aware that the Tribal and State Relations Committee that did meet in 2021 reported to the state Redistricting Committee?
A. I'm not aware.
Q. If the record reflected at P-135 that that occurred, do you have a reason to disagree?
A. Repeat that question, please.
Q. Well, let's just pull it up, P-135. And you see the highlighted text there, Senator Marcellais?
A. Yes.
Q. The committee also received updates from committee members who serve on the Tribal and State Relations Committee, which met with representatives of the Turtle Mountain Band of Chippewa, Three Affiliated Tribes, and Spirit Lake Nation on their respective reservations regarding redistricting and other matters. The updates generally were consistent with the testimony presented to the Redistricting Committee?
A. I didn't attend that meeting.
Q. Okay. Do you have any reason to disagree with that statement?
A. Pardon?
Q. Do you have any reason to disagree with the validity of that statement?

A. I have a reason to disagree with it, yeah.
Q. Yeah, what's that reason?
A. Well, the Redistricting Committee wasn't up at the Turtle Mountain during that time. It was the tribal-state relations.
Q. Right, but I think this is saying that the Redistricting Committee accepted a report from the Tribal and State Relations Committee.
A. Well, I'm -- I'm not knowledgeable about that.
Q. Sure. So you have no reason to disagree with that statement on the screen, though, that's highlighted, do you, other than what you just told me?
A. No.
Q. Okay. Thanks. So let's move on to some of your testimony given to the joint Redistricting Committee on November 8, 2021. Do you recall giving some testimony on that date?
A. Yes, sir.
Q. And that was a joint Redistricting Committee of the state legislature, right?
A. That's correct.
MR. WIEDERHOLT: We have some video of that. It's about two minutes long. I think I want to just play it and then ask you some questions about it. Sound good? And for the record, that's D-444-1.
(D-444-1, a video clip, played in open court.)
Q. (MR. WIEDERHOLT CONTINUING) All right. Senator

Marcellais, did that fairly and accurately represent the testimony you gave at that joint redistricting meeting?

A. Yes.

Q. Okay. I've got a few questions about some of those things, but before I go into those questions, did you also, on November 10, carry an amendment to the full North Dakota Senate essentially proposing the same type of map that you were proposing at the Joint Redistricting Committee meeting?

A. Did I carry an amendment to the floor?

Q. Did you bring an amendment at the floor?

A. I brought an amendment to the floor, but I didn't present it.

Q. Okay. Do you recall what the amendment that you brought to the floor was about? What was it about?

A. It was the same amendment that went to the committee.

Q. Okay. To propose that the Turtle Mountain Reservation and Spirit Lake Reservation be joined in a single legislative district?

A. That's correct.

Q. Okay. Thank you. First of all, the question put to you by Representative Devlin about -- well, from his perspective, I thought he said it was unfair to criticize the state for lack of notice to the tribes. Did you answer his question, or did you actually defer to the chairman of those tribes to answer that objection by Representative Devlin?

A. I deferred to tribal chairman to answer his question.
Q. Well, do you know as you sit here today whether what Representative Devlin said about notice to the tribes was true or not?
A. Not to my knowledge. I don't know.
Q. Okay. Getting into kind of the timeline a little bit of the maps you requested on November 8 and then through the amendment on November 10, Senator Marcellais, you said that they really requested the same relief, which was to join the tribes in a single legislative district, right?
A. Yes.
Q. And I think you testified that that -- that the two tribes shared -- shared many similar things that made them a single community of interest?
A. That's correct.
Q. And you've been involved in some of those things during -- during your time at the state legislature, correct, that you had indicated made them a single community of interest?
A. Yes.
Q. Education issues, right?
A. Yes.
Q. How about taxation issues?
A. Yes.
Q. Were you involved in the pull tab -- the e-pull tab issue in 2017?

A. I testified at the committee on it.
Q. Do you remember back in 2017, what -- what your tribe's position was on e-pull tabs that was coming before the state legislature?
A. No, I don't recall.
Q. Is it fair to say that your tribe, the Turtle Mountain Tribe, was against e-pull tabs being legalized in North Dakota?
A. Yes.
Q. Is that the same position that the Spirit Lake Tribe had; do you know?
A. To my knowledge.
Q. Do you recall the Spirit Lake representatives or anybody from the Spirit Lake Tribe being there to testify in opposition to e-pull tabs?
A. Collette Brown from Spirit Lake, the gaming commissioner.
Q. And you listened to Collette Brown's testimony today, correct?
A. That's correct.
Q. Including on the e-pull tab issue?
A. What's that again, sir?
Q. Including when she testified about the e-pull tab issue?
A. Yes.
Q. Did you agree with her testimony on why the tribes were opposed to it?
A. Yes.

Q. So at that time in 2017, when e-pull tabs was in front of the state legislature, there were -- were there three Native American representatives from District 9?

A. Not from District 9. There was one Native American.

Q. That was you --

A. Yeah.

Q. -- Senator Marcellais, right?

A. Mm-hmm.

Q. And then there was Representative Marvin Nelson?

A. Yes.

Q. And was he a Republican or a Democrat?

A. Democrat.

Q. And then who was the other person?

A. Tracy Boe.

Q. Can you say the last name again?

A. Representative Boe.

Q. Bow?

A. B-o-e.

Q. Was she a Republican or Democrat?

A. He.

Q. He. I'm sorry.

A. Democrat.

Q. Democrat too. Do you know, is the preferred candidate of choice generally on the Turtle Mountain Reservation for Democratic candidates?

A. I guess anybody can run. I don't know. Either party, they both run.

Q. Sure. But is it fair to say that the Democratic party more fairly aligns with the interests of Turtle Mountain, on the Turtle Mountain Reservation and with those tribal issues that are important to Turtle Mountain?

A. The history shows that, yeah.

Q. Yeah. But regardless of three representatives that were -- and were they all aligned on that issue, the three from District 9, in 2017?

A. Were they all what, sir?

Q. Aligned in opposition to e-pull tabs.

A. I believe so.

Q. Yeah. Regardless of that opposition from three representatives, the state still enacted a law and made e-pull tabs legal, correct?

A. That's correct.

THE COURT: Let's take a break. And I realize that you may be near the end of your cross, but since we've expanded the scope a bit, I anticipate maybe a little bit more extensive redirect by the plaintiffs, so we're 90 minutes in -- actually, more than that, so we'll take a break for staff and for the parties. We'll take 20 minutes, and we will resume at 11:05. We're in recess.

(Recess taken from 10:44 a.m. to 11:09 a.m.)

THE COURT: Senator Marcellais, please have a chair.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you. Mr. Wiederholt, proceed as you desire.

MR. WIEDERHOLT: Thank you, Judge.

Q. (MR. WIEDERHOLT CONTINUING) Senator Marcellais, I just wanted to confirm a few more things with you. The day you were there on November 8, 2021, to provide testimony to the Joint Redistricting Committee, that was the same day that the House debated and passed House Bill 1504; is that right?

A. I don't know, sir.

Q. It could've been the next day?

A. I don't know, sir.

Q. Do you recall the -- kind of the chain of events with when the House debated and passed the bill and when the Senate debated and passed the bill and then when the governor signed it?

A. No.

Q. So if I told you that was November 9, 10, and 11, respectively, does that sound like that's how it happened?

A. It was around that time, I'd say.

Q. And would you agree with me that when you were there to provide testimony on November 8 and then when you provided your amendment on November 10, that the legislature was in a special session declared by the governor?

A. Yes.

MR. WIEDERHOLT: That's all the questions I have. Thank you.

THE COURT: Thank you, counsel.

Mr. Sells, please proceed. And, certainly, given the Court's ruling on the scope objection, you may proceed in several different directions as well.

MR. SELLS: Okay.

REDIRECT EXAMINATION

BY MR. SELLS:

Q. Senator Marcellais, I want to ask you about the meeting of the State-Tribal Relations Committee that was held on the Turtle Mountain Reservation in the fall of 2021. Were you at that meeting?

A. Yes, I was.

Q. Were you at the meeting for the entire time?

A. No.

Q. Okay. When -- what parts of the meeting were you there for?

A. I was on the agenda to bring five of the local tribal members to the meeting to present murdered and -- murdered and indigenous -- missing indigenous people at the meeting, and I was planning on introducing a bill in the next session regarding that.

So I had these family members come in and testify

before the Tribal-State Relations Committee, and I felt that was a good place to bring it up because these were all the legislative leaders, both on the House side and the Senate side. So I brought these family's -- family members, moms, sisters, brothers to testify in front of the Tribal-State Relations Committee.

Q. And you were on the agenda for that purpose?

A. Yes, I was. I contacted Chairman Wardner before the meeting and got on the agenda for that -- for that particular meeting.

Q. Did you review the agenda for that meeting?

A. I did review the agenda, but I didn't know all the topics or didn't remember all the topics that were on that agenda.

Q. During the time when you were in the meeting of the State-Tribal Relations Committee, did they discuss redistricting?

A. Not to my knowledge.

Q. Mr. Wiederholt asked you a series of questions about the e-pull tab legislation. Do you recall that?

A. Yes, sir.

Q. And as I recall your testimony, you testified that Native voters had three representatives from District 9 in the legislature at around that time. Do you recall that?

A. Yes.

Q. And despite having those three representatives, the

positions of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Nation did not carry the day; in other words, legislation that those two tribes opposed still passed; is that right?

A. Yes, sir.

Q. I want to ask, do you think it's important for Native voters to have representation in the North Dakota legislature even if you can't stop every bill that is opposed by Native American tribes?

A. Yes.

MR. SELLS: Those are all my questions.

THE COURT: Thank you, Mr. Sells.

Mr. Wiederholt, do you have any follow-up?

MR. WIEDERHOLT: I just want to confer with my cocounsel. I think I don't, but --

THE COURT: You may.

MR. WIEDERHOLT: Yeah, no more questions, Your Honor.

THE COURT: Thank you. I know Senator Marcellais has been here for some of the trial, but do you intend to release him from his obligation to testify?

MR. SELLS: Yes, Your Honor. He's not under any subpoenas, so he can come and go as he pleases.

THE COURT: Thank you. And any objection, Mr. Phillips?

MR. PHILLIPS: No objection.

THE COURT: Senator Marcellais, thank you. Thank you for being here. Thank you for your testimony. Your obligation to be here -- there is no further obligation to be here, but you're certainly welcome to be here. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're welcome. Ms. Kelty.

MS. KELTY: Yes, Your Honor. Good morning.

THE COURT: Good morning.

MS. KELTY: The plaintiffs call Dr. Daniel McCool.

THE COURT: Dr. Daniel McCool, please approach.

DR. DANIEL MCCOOL,

having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you. Dr. McCool, please have a chair. You were here this morning at least, so you know how this works a little bit. There may be a need to adjust the microphone up or down, but I'm just going to leave that to Ms. Kelty to work on that with you, so just get comfortable. And does he have or need a water?

MS. KELTY: Probably needs.

THE WITNESS: Water would be good.

THE COURT: Very good.

MS. KELTY: Your Honor, may I approach with a copy of a demonstrative we plan to use?

THE COURT: You may. Has it been displayed to the

defense?

MS. KELTY: It has, Your Honor.

THE COURT: Very good. Thank you.

DIRECT EXAMINATION

BY MS. KELTY:

Q. Good morning, Dr. McCool.

A. Good morning.

Q. Can you please introduce yourself to the Court?

A. My name is Daniel Craig McCool, and I'm a political science professor at the University of Utah.

Q. Dr. McCool, let's start by talking about your qualifications. What is your educational background?

A. I have a Bachelor's degree from Purdue University, and I have a Ph.D. from the University of Arizona in political science.

Q. Can you briefly discuss your work history after achieving your Ph.D.?

A. I was at Texas A & M for six years, and then I got the job at the University of Utah and I stayed there until -- and now I'm emeritus. So I moved to Salt Lake and started my job at the University of Utah in 1987.

Q. What were your positions at those universities?

A. I was a political science professor at both universities.

Q. And you mentioned that you're an "emeritus." What does that mean, to be an emeritus professor?

A. Frankly, it means you still work but you don't get paid. I still have -- I'm still a formal member of the faculty, and I still get faculty services, computer services, and there's still an expectation that I do research, but I don't have to teach, and I don't have to go to any meetings. And I really miss the teaching. I don't miss the meetings.

Q. Throughout your career, what have been your main areas of academic research?

A. Since I was in graduate school, I have written and published about the political relationship between Native Americans and the larger government at all levels. And primarily I've looked at Native American voting rights and Native American water rights.

Q. Does the area of Native water rights tie into Native voting rights?

A. Oh, yes. Who votes gets the water. There's a direct correlation. So in my publications where I discuss the allocation of water in the role of tribes, voting and political participation are very much a part of that discussion.

Q. How long have you been researching in the area of Native American voting rights?

A. How long?

Q. Yes.

A. Since graduate school days back in the 1980's.

Q. What are some of the political science courses that you

taught during your career?

A. I taught American government, public policy theory, a variety of different public policy courses. That's my area, public policy.

Q. And has the issue of Native American voting rights come up in the courses that you've taught?

A. Yes, I always cover that.

Q. Have you published in the area of Native American voting rights?

A. I have.

Q. What is the university press process?

A. University presses have a peer-review process similar to academic journals. So when you submit to a university press, they don't do a blind peer review but they do do a peer review, and they send your manuscript out to multiple readers and they assess whether it's of sufficient academic quality.

Q. Approximately how many books have you published that have gone through the university press process?

A. I published ten books and one of them was with a commercial press and the other nine were university press books.

Q. Okay. Let's take a look at your CV which is P66.

Please display P66.

Is this a true and accurate copy of your CV?

A. Yes, it's slightly out of date but --

Q. What has changed since you submitted it?

A. I just published a chapter in a book published by *John Hopkins Press* that looks at the role of tribes in the Colorado River Basin.

Q. Please display page 2.

Dr. McCool, can you tell us about the third book listed there, *The Most Fundamental Right*.

A. Yes. I called that a debate in print. There are three introductory chapters and then there are paired chapters with the foremost proponents of the voting rights act and the foremost opponents of the Voting Rights Act. So, for example, the first paring includes Laughlin McDonald, one of the most well known advocates for the Voting Rights Act and Abigail Thernstrom, a political scientist at Harvard who's a very well known opponent of the Voting Rights Act. So they have a debate in my book there.

Q. And just below that can you tell us about your book *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*?

A. Yes, Native vote was the first attempt to systematically analyze all the litigation in Indian country regarding voting rights. And we compiled for the first time a comprehensive list in analysis of cases. I think our list had 74 cases. That book came out in 2007 so up to that point in time there had been about 74 cases. And we have some case studies in

there and then we have a historical section. We have a section on the Voting Rights Act, and then the analysis of the 74 cases.

Q. To what extent, if at all, is North Dakota mentioned in that book?

A. In *Native vote* I think it's mentioned about a half a dozen times.

Q. And, Dr. McCool, what is a peer-reviewed journal?

A. Peer-reviewed means that it's sent out blind to reviewers -- they don't know who you are and you don't know who they are -- and they evaluate the academic -- the scholarly quality of the potential publication to see if it should be rejected, revised or published.

Q. Roughly how many times in your career have you been published in a peer-reviewed journal?

A. I think it's about 19 or 20. I'm not entirely sure of the exact number.

Q. Okay. Please display page 3.

And, Dr. McCool, about halfway down the page there there's a journal article *Social Science Expert Witness Testimony in Voting Rights Cases*. Can you please tell us a little bit about that.

A. Yes. All four of the authors of that chapter have worked for many years as an expert witness in voting rights cases and we all use different methodologies. So in that chapter we each

explain the role of our chosen methodology in serving as an expert witness and voting rights so I wrote about qualitative methods.

Q. And that was a journal article, correct?

A. That's correct.

Q. Okay. Please display page 4.

And about halfway down the page there, Dr. McCool, is an article *Voting Partners of American Indians in Arizona*. Can you please tell us about that.

A. Yes. That was the first attempt to actually analyze how Native Americans vote in Arizona. I was still a graduate student at that time. And this was long enough ago that there was no GIS or anything like that. So I used light tables to correlate Census data with precinct data and found out that Native Americans in Arizona engaged in split-ticket voting to a substantial degree.

Q. And just under there are some book chapters. Have you written any chapters in university press books on voting rights?

A. I have.

Q. Can you tell us about voting rights and electoral representation in the United States?

A. Yes. It's the *Oxford Handbook of Indigenous People's Politics* that was published by Oxford University Press.

Q. And just under that *Meaningful Votes*?

A. That was the first chapter of my book, the most fundamental right, and I analyzed the passage of the 2006 Voting Rights Act reauthorization. I might note that I sent that chapter to all the chapter authors who of course represent very different perspectives. And I asked all of them, "Did I write an objective analysis?" And they all said "yes," so I felt like it had to be a pretty good chapter to please that diverse audience.

Q. Okay. Display page 5, please?

And about three quarters of the way down, can you tell us about the book chapter *Indian voting in American Indian policy in the Twentieth Century*.

A. Yes. They detail the various tools and policies that were used to deny Native Americans the right to vote.

Q. And what is the report listed under there, *Obstacles At Every Turn*?

A. I was asked by Mr. Tucker to write two sections of that report which were basically updates of Native -- one of them was the history and development of Native American voting rights which I did in the book chapter you just cited as well as in *Native Vote*. And the other section was an update of the case list. So *Native Vote* came out in 2007 this came out in 2020; so I compiled a list of all the cases since 2007.

Q. What publications are you currently working on?

A. Well, the other Dr. -- Weston and I, Weston McCool -- are

working on a journal article dealing with the -- it's a benefit cost analysis, a ballot collection.

I'm also working on a book on -- that focuses on the rights of Navajos and Ute Indians to vote in San Juan County, Utah. That book I have about 240 pages done, maybe 245.

Q. Display page 6, please.

A. I'm also writing a novel but it doesn't have anything to do with this.

Q. Okay. Have you served as an expert witness in the past?

A. Yes. Yes.

Q. In about how many voting rights cases have you served as an expert?

A. I've only served as an expert in voting rights cases in, I think I'm up to about maybe 25 now.

Q. And I see there that you have listed *Brakebill versus Jaeger 1 and 2*. You served as an expert in both of those cases?

A. I did.

Q. Was your testimony credited by the court in those cases?

A. It was.

Q. Are you also serving as an expert in *Walen v. Burgum*?

A. I am.

Q. Okay. Take a look at page 9, the second invited talk there with Duke University. Can you tell us about that.

A. Yes. They asked me to speak about the current state of

Native American voting rights in general.

Q. Okay. You can take down the CV exhibit.

Dr. McCool, how do you determine whether to serve as an expert witness in a case?

A. Well, the first question is: Do I have the time? Because it's very time consuming to write these reports. If I feel like I have the time, the second question is: Is my qualitative methods appropriate to answer the research question? Can I answer it using that -- that's the one tool that I use. Can I answer it? And then the third question is: Do I have sufficient data? Qualitative methodology requires a lot of sources. So I can't really write a report unless I have a lot of sources. So I need to know if there's sufficient sources to write a comprehensive objective report. So if the answer is all three to those, then I'd consider taking a case.

Q. Are you paid for your expert work?

A. I am. There's a reason they call it work.

Q. Is your payment contingent on the content of your opinions?

A. No.

MS. KELTY: Your Honor, at this point I would like to offer Dr. Daniel McCool as an expert who is qualified to testify on the matters under consideration in this case and offer his expert testimony in Native American voting rights.

THE COURT: Any objection?

MR. PHILLIPS: No objection, Your Honor.

THE COURT: He shall be received and afforded as such. Thank you.

Q. (MS. KELTY CONTINUING) Dr. McCool, what were you asked to do in this case?

A. I was asked to write a report that evaluates the presence of Senate Factors in North Dakota and the impact of HB 1504 on Native Americans.

Q. Let's talk about your methodology. What was the methodology you used to perform your analysis?

A. I used qualitative methodology. I think it's the best methodology for sort of the big-picture questions -- where the evidence comes from a long period of time and there's many, many different factors. There's no finite data set that you can analyze quantitatively. So there's lots of information.

So to me my sources are data. So when I read court cases or government documents, that's data. And in qualitative methodology we look for patterns of agreement across all these different sources of data and the strength of my conclusion is based on whether these patterns of agreement from all these very diverse sources are in agreement, if I see the same patterns occurring over and over again.

Q. How well established is qualitative methodology in the study of public policy?

A. It's become very popular. It's being used in health

sciences now, social sciences, a lot of the latest methodology textbooks are actually in the health sciences. And it's been used in political science for a long time. Even historians are using qualitative methods today.

Q. And what's the difference, if any, between qualitative methods and quantitative methods?

A. They're complementary. Qualitative methodology works for these really big picture, complex longitudinal studies. Quantitative methodology works great when there's a finite data set and you can actually have a beginning and an end place to the data set.

Q. Is the qualitative methodology you used for this report consistent with the methodology you've used in your peer-reviewed published report?

A. Yes, it's the same.

Q. And are qualitative methods suitable for expert analysis in voting rights cases?

A. I think it's very suitable for that. It works great.

Q. Why?

A. Because if you look at the Senate Factors, they cover a huge range of different variables and factors and timelines. Part of it's historical. Part of it's sociological. Part of it's economic. So that the kind -- the Senate Factors are the kind of big picture, contextual analysis that works so well with qualitative methods.

Q. How many written sources did you rely on here in your report?

A. For this report, the report is 87 pages and I used 183 sources. The 183 includes the 8 interviews I did in 2022. That does not include the 32 interviews I did in 2016; so it's 183 plus 32.

Q. And let's talk about your sources. How do you determine which sources to analyze and how did you determine which sources to analyze in this report?

A. Like with all my research, I start with a research question. So then the question becomes, does this source help me answer the question? And these days -- used to do it going to the library -- now all I need is a laptop and a connection. So I just Google relevant phrases. I've been doing this enough that I know which -- where to go and where to look. And I use a great variety of data. Qualitative methodology is nonnumerical. My report is actually chock-full of data, of numbers, but it includes that as well as interviews which are a standard part of social science qualitative methodology.

Q. What are some of the categories of sources that you used in this report?

A. The categories? I use original documents. Census data. Government documents at all levels of government -- federal, state, local, tribal -- I use academic work. I use newspapers. I use tribal publications. I use what we call "gray files."

Gray files are basically the documents that agency personnel keep in their file cabinets or at least they used to. And that's always quite helpful. So, again, the criteria is always: Does the source help me answer the research question?

Q. And did you conduct interviews?

A. I did.

Q. Why?

A. That's a standard part of qualitative methodology. Now in 20 -- for this last set I did not conduct them in person because we were still dealing with COVID and I didn't want to take the chance of either getting or spreading COVID. So I included interviews that I did mostly in person in 2016 because they're still relevant I asked some of the same questions. Maybe two that I did in 2018 -- one or two -- and then I did eight interviews last year.

Q. How do you decide who to interview?

A. When I start doing research on a topic, names start popping up. So I just start keeping a running list of potential people to interview. And I compile names of tribal leaders, leaders of advocacy organizations, people -- political leaders. Anybody -- names in the paper, I read newspaper articles and I see people quoted; I add their name. I see them mentioned in litigation; they might have been plaintiffs at some point in a case or defendants. So I compile a fairly comprehensive list and then start working from there.

Q. How do you make sure you accurately record what people say to you during the interviews?

A. Well, I've been doing this for a long time and I think I've gotten pretty good at it. I do not use a tape recorder. I do not think you can walk into somebody's home and say "I want to talk to you about a lawsuit. I'm going to turn a tape recorder on." I don't think you'd get complete answers. So I ask them questions and I type on a small laptop very unobtrusively. And I kind of have a shorthand, my own private shorthand that I use and I can type as fast as they talk. So I think I'm quite accurate.

Q. Were the interview responses you received consistent between 2016, 2018, and 2022?

A. Oh, yes. It's the same theme. It's hard to tell -- when you're reading those sections of my report where they have a list of quotes from interviews, it's hard to tell -- you can't tell when the 2016 interviews leave off and the 2022 interviews start. It's the same answers.

Q. Did you interview the plaintiffs in this matter?

A. No, I don't -- I don't interview plaintiffs. They -- they have their opportunity to testify. I think that's better than interviewing me.

Q. Did you interview the defendant?

A. No. I don't interview defendants or people associated with the defendants. I think that's unethical. I think it

would put them in a very difficult position. Possibly cause problems at their employment so I don't interview defendants.

Q. Did you interview any other state employees?

A. I don't think -- no. To me the state was the defendant so I avoided that.

Q. Did you interview the North Dakota Association of Counties?

A. I did. I interviewed several people at the North Dakota Association of Counties.

Q. And how do you determine when you've interviewed enough people?

A. When I see a consistent pattern over time. When I keep getting the same answer.

Q. How do the interviews in this case fit in with the other sources that you use?

A. They agree. They corroborate the other sources.

Q. And what process do you use if one source you've reviewed disagrees with another source you've reviewed?

A. That means I need to do more research. So I need to see which one is part of a trend or a pattern, which one's the exception.

Q. In preparing your report in this case, would you say there's a high degree of agreement amongst your sources, a low degree of agreement among your sources or otherwise?

A. A high degree.

1 **Q.** Let's talk about your expert report. Did you submit an
2 expert report in this case?
3 **A.** I did.
4 **Q.** Is your report an accurate representation of your opinion
5 and methods?
6 **A.** It is.
7 **Q.** Okay. Please display Exhibit P64.
8 Dr. McCool, is this a true, accurate, and current
9 copy of your report?
10 **A.** I believe it is, yes.
11 **Q.** On page 3 of the report it lists your hourly rate of 250
12 an hour. Is that a mistake?
13 **A.** Yes, it should be $200 an hour.
14 **Q.** Please display page 4 of the report and call out the list
15 of Senate Factors.
16 Without reading them, Dr. McCool, what are the Senate
17 Factors, generally?
18 **A.** The Senate Factors are pulled from the Senate report
19 accompanying the 1982 Reauthorization of the Voting Rights Act.
20 And the Senate was telling us the kinds of contextual factors
21 that courts should look at when assessing whether a Section 2
22 violation has occurred.
23 **Q.** Is this an exhaustive list of what you would look at to
24 determine whether a Section 2 violation has occurred?
25 **A.** No. There's other things to consider but I largely look

at this. For example, the first one, a history of official voting-related discrimination. You can't really understand voting-related discrimination without looking at the larger context of discrimination in society as a whole. So I always have a historical section that develops the role of racism in society and how Native Americans have been treated, and I think that informs the discussion about voting-related discrimination which is sort of a subset of that larger discrimination.

Q. Are there any Senate Factors that you find not particularly applicable in modern politics?

A. 4 and 6. We just don't see that much. 4 is the slating process. We just don't -- that's rare today. And racial appeals they still happen but they can be -- today they tend to be quite subtle. There's often sort of a code language that's used. You can convey race today with a photograph on a Facebook page. You don't have to pronounce what color your skin is. So it's a much more subtle form today. And -- it causes legal problems for politicians who engage in -- over racial appeals and they're aware of that and so we just don't see that very much.

Q. Why are these social and historical conditions listed in the Senate Factors relevant?

A. I'm sorry. Why are they --

Q. Why are they relevant in this case?

A. They help us decide if a Section 2 violation has occurred.

Q. Okay. Display page 3, please, and call out the research question. Just under number 2.

Dr. McCool, what was your research question for this report?

A. Should I just read it?

Q. Sure.

A. "Does the current legislature Redistricting Plan for the North Dakota Legislature (HB 1504) dilute the voting strength of members of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Nation and thus reduce their opportunity to elect candidates of their choice?"

Q. And what did you analyze to address this research question?

A. I did just what the courts and what the Senate told me to do. I looked at the extent to which the Senate Factors are present.

Q. And what was your conclusion?

A. Well, except for 4 and 6 I found substantial evidence for the rest of them. That's why my report is 87 pages long.

Q. Okay. You can take down this exhibit.

So let's go through the Senate Factors, Dr. McCool. Let's start by talking about Senate Factor 1, the history of official voting-related discrimination in North Dakota. Dr. McCool, is there discrimination in voting against Native Americans in North Dakota?

A. As evidenced by the material in my report, the answer is yes.

Q. Let's talk about historical discrimination. Can you talk a little bit about the historical relationship between Native Americans and Angelos in North Dakota?

A. It's a troubling history. A sad history. I have two lengthy quotes from history professors, Professor Risjord and Professor Robinson and -- first name is R-i-s-j-o-r-d, and the second one is Robinson -- and they detail the incredible loss of land and resources that Native Americans suffer. And with the culmination of statehood in 1889, Native Americans had -- they had lost their freedom, their means of sustenance, their resources that kept them alive. They lost most of their land. Reservations today are small remnants of their traditional homelands.

So while the settler era was -- is celebrated and it was a good time for the Angelo people of North Dakota, it was a terrible time for Native Americans. And when they first were herded onto Indian reservations starvation was rampant. They were left without -- the government was supposed to supply food but often didn't, and they were left without resources to live. And that's a legacy that still lives with us today.

Q. Let's discuss historical discrimination in voting -- excuse me -- against Native Americans in North Dakota. Does North Dakota have a history of denying Native Americans the

right to vote?

A. Yes. The 1889 Constitution had what I call a cultural litmus test.

Q. Okay. Please display P147 and call out P147 page 144, call out section one-third. Section one-third about halfway down the page.

And what was the language, Dr. McCool, in the first iteration of the -- oh, it starts "civilized persons of Indian decent." What was the language, Dr. McCool, of the first adopted constitution of the state regarding Native suffrage?

A. Do you want me to reed this quote?

Q. Yes, please.

A. Civilized -- there's a misspelling in the word civilized. "Civilized persons of Indian decent who shall have severed their tribal relations two years next preceding such election."

Q. What did that mean "sever tribal relations"?

A. Well, we know from the context and from court cases, what that means is they can't be Indians anymore. That means they have to abandon their tribal culture, their language, their religion, and live as facsimiles of White people. That's what that means. When they talk about civilized, that means they have to act like White people. And -- I mean, think about this. They're the only people in American history that were told they have to give up all these things. Have to give them up. We didn't require that of the Irish, my people, we didn't

require that of Hungarians or Japanese or Chinese or Germans or anybody else. The only people we told you have to abandon your culture and your identity to vote are Native Americans.

Q. And then did courts have to determine if Indians were indeed civilized?

A. They did. There were two cases. In 1897, *State versus Denoyer* -- the question in that case was in regard to establishing polling places on the Spirit Lake Indian Reservation and the entire theme of the trial was a contest to see if the people who wanted to vote -- the Native people -- were sufficiently White in their actions and their behavior. And the attorneys for the Native Americans made it clear that these Native Americans didn't act like Native Americans. They gave up their religion and they don't follow chiefs and they farm land and they've become just like White people. And they won on the basis of the fact that they abandoned their culture.

The second case, in 1920, was a *Swift v. Leach* that involved voters at Standing Rock. And once again the entire case turned on whether or not these tribal members had sufficiently severed tribal relations and abandoned the customs and habits of Native Americans and become essentially facsimiles of White people.

And in 1911 there was a statutory provision added. Then we had it in statute and in the state constitution. And some kind of cultural litmus test remained in the constitution

until 1958. And there was a referendum on whether to eliminate the cultural litmus test in 1958. About a quarter of the people who voted, voted against it. So in 1958 a quarter of the voters still thought Native Americans should be mandated to give up their culture in exchange for the right to vote.

Q. Does this history still affect the relationship between Native people and Angelo people today?

A. Oh, absolutely.

Q. How?

A. One of the determinants of whether somebody votes is a history of voting in their family. One of the great predictors is whether your parents or grandparents voted. So often the families that had the greatest turnout are the ones that have a long tradition of turnout. It's kind of hard to have a long tradition if you're denied the right to vote.

MS. KELTY: And, Your Honor, at this point I'd like to play parts of D447. It's a video from the Senate floor on November 10 of 2021. This has been edited to show the relevant parts but the full video is in the record. And the video that we're playing is at Transcript D-432, page 26, lines 7 to 10, and pages 41, lines 4 to 20.

THE COURT: And, Mr. Phillips, there's no objection?

MR. PHILLIPS: No objection.

THE COURT: Thank you.

Please proceed. Thank you.

(D-432, a video clip, played in open court.)

Q. (MS. KELTY CONTINUING) Dr. McCool, are Senator Larson's statements here evidence of any of the Senate Factors?

A. First, I don't want to be disrespectful to the senator but that's incredibly incorrect. That's just not accurate. And I think that reflects a typical attitude that Native Americans should not have the right to vote because they're not like us and they have a -- that's the cultural litmus test argument all over again. Still with us.

Q. Dr. McCool, let's talk about contemporary discrimination. Do Native people in North Dakota today deal with discrimination in society as a whole?

A. Yes, I think they do.

Q. Did the North Dakota mascot issue promote accusations of racism?

A. Yes, it did. I think that whole issue -- I don't take a side on that in any way in my report. I simply cite that because it heightened racial tensions and there were a lot of statements made during that very heated debate that were overtly racist against Native Americans and those are quoted in my report.

Q. Please display P64, the expert report, and turn to page 20. And if you can call out the Neumann quote at the bottom of page 20.

Who is Neumann, Dr. McCool?

A. He's an administrator at United Tribes Technical College. I interviewed him in 2016 in person at his office.

Q. Can you please read his quote here?

A. I think I interviewed him in person. It may have been a telephone interview but I did interview him. It says -- I thought this was so telling -- "Yes, discrimination exists in North Dakota, and it's my perception that race matters are not perceived by the people in the mainstream but that's they are very much in the forefront of Native people's thinking. There are all sorts of problems that come from that, both problems, and perceptions of problems," end quote.

Q. When you interview people in North Dakota about racism, were there different perceptions regarding the existence or the extent of the discrimination?

A. Yes. I believe every Native person I interviewed said, "yes, we've experienced discrimination." A small number of White people that I interviewed told me they didn't think there was any discrimination.

Q. And is that itself an indicator of polarization?

A. I think it indicates a cultural, social, and racial polarization of very, very different attitudes and beliefs about the world.

MS. KELTY: And, Your Honor, now we're going to play parts of D-446. It's a video from the House floor on November 9th of 2021. This also has been edited to show the

relevant part but, again, the full video is in the record. The part of this interview that we're reviewing is at Transcript D-431 at pages -- at page 5, lines 5 to 10.

THE COURT: Any objection?

MR. PHILLIPS: I don't have any objection to any portions of the videos that are exhibits.

THE COURT: Thank you, Mr. Phillips.

(D-431, a video clip, played in open court.)

Q. (MS. KELTY CONTINUING) Dr. McCool, how do Representative Jones statements square with the tribal members you've interviewed?

A. They're polar opposites.

MS. KELTY: Your Honor, I see that it's noon and I'm at a good breaking point, if you'd like to take a break.

THE COURT: That was the Court's thought exactly. And we will break for lunch. We'll come back at twenty minutes after 1:00 and we'll resume at that time.

Dr. McCool, you will remain under oath and when we resume, I'll just have you back up on the stand. And as a matter of fact, you may step down now although I'm going to talk to counsel for the parties briefly.

THE WITNESS: Okay.

THE COURT: I do want to ask, Ms. Kelty, is there anything that we should be addressing before the lunch break from the plaintiffs' perspective on housekeeping or anything

like that at all?

MS. KELTY: No, Your Honor.

THE COURT: And, Mr. Phillips, same question?

MR. PHILLIPS: No, Your Honor.

THE COURT: Well, that makes it a brief inquiry. We'll break until 1:20 and we'll see you then.

(Recess taken from 12:01 p.m. to 1:08 p.m.)

THE COURT: Ms. Kelty, are we ready to dive right in?

MS. KELTY: We are, Your Honor.

THE COURT: And Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Very good. Dr. McCool, if you would please come forth and resume the stand, and I know you know that you're still under oath. Go ahead and get comfortable, and we'll proceed. Thank you.

THE WITNESS: Thank you, Your Honor.

Q. (MS. KELTY CONTINUING) Hello again.

A. Hello.

Q. We left off talking about contemporary discrimination. Let's now discuss contemporary discrimination in voting against Native Americans in North Dakota. Does discrimination against Native American voters continue in North Dakota today?

A. Yes, I think it has.

Q. Has there been court-documented discrimination?

A. Yes. Would you like me to go through the cases?

Q. Yes, please.

A. Well, the first case that I cite in my report is *U.S. v Benson County* in 2000, and that was when the U.S. Justice Department sued the county to force them to move from a at-large election system to a district system. And a settlement was reached where the county agreed to go to a districting system. The settlement acknowledges that there's a history of discrimination. It basically goes through the *Gingles* preconditions very briefly, and then goes through some of the Senate Factors and finds evidence for both *Gingles* and Senate factors.

Q. And did the consent decree indicate that racially polarized voting patterns existed in Benson County in 2000?

A. Yes, it did.

Q. Had any Native American candidate for Benson County commission ever been elected to office under that previous at-large method?

A. No, not under at-large. And if I remember correctly, the settlement permanently enjoined the county from using at-large elections.

Q. And, Dr. McCool, did Benson County comply with the consent decree?

A. No. In 2004 they switched back to at-large elections.

Q. So just four years later.

A. Yes.

Q. And was there a subsequent lawsuit based on that?

A. Yes. That subsequent lawsuit came out after my report was issued, but it was *Spirit Lake v. Benson County*. A settlement was just reached this past year, and they're back to district system with two majority-minority districts.

Q. What other court cases did you review?

A. Well, after *U.S. v. Benson County*, the Parshall School District had an at-large system, and the Justice Department told them they were going to sue them if they didn't change, and they agreed to the change. As a result, Native Americans got elected to the Parshall School District. Parshall School District is next to MHA, Fort Berthold.

In 2010, in *Spirit Lake v. Benson County,* the Spirit Lake Tribe sued the county because they closed three polling places on the reservation. And the Court found that the closure of polling places had a disparate impact on Native American voters and ordered the county to keep two of the polling places open.

And six years after that, in 2016, the first *Brakebill v. Jaeger* case was filed, and that was in response to voter ID laws passed in 2013 and 2015, which required residential street addresses and eliminated the fail-safe provision procuring ballots. That went to district court, and the district court enjoined the state from enforcing that law.

The legislature then passed yet another voter ID law

the following year, and once again, the parties went to court in *Brakebill v. Jaeger 2* in 2018. And the plaintiffs won in the district court and enjoined the state from enforcing that. The Eighth Circuit stayed the injunction, but left the door open for further litigation. That was then filed as *Spirit Lake v. Jaeger* in 2018. And after two years those -- the parties settled, so we finally had a 2020 settlement agreement as a result of that.

And then the most recent case, of course, was the one we just mentioned, *Spirit Lake v. Benson County*, where they forced the county to return to a district system.

Q. And the voter ID cases specifically, do they evidence contemporary discrimination in voting against Native Americans in North Dakota?

A. Yes, I think they did.

Q. Is that true even though the final case ended in settlement?

A. Yes.

Q. Why?

A. Well, it took -- first of all, I wrote expert reports in both of those, and I found plenty of evidence for discrimination, including voting-related discrimination. I think the important thing to understand about that settlement is in 2013 the legislature passed the voter ID law, and tribes asked them not to. They did it anyway.

In 2015 the state legislature passed a voter ID law. Tribes asked them not to. They did it anyway. Then we had a succession of three lawsuits, so this was litigated for, what, five years? So we have a settlement of a problem that began in 2013. We finally get the settlement five years later.

So the settlement does not erase everything that happened in the intervening years or the decisions by the judges, especially the district court decision in the first *Brakebill* case.

Q. Dr. McCool, let's talk about Senate Factor 3, the extent to which the state has used voting practices or procedures that tend to enhance the opportunity for discrimination against Native Americans, such as unusually large election districts. Has North Dakota used voting practices or procedures that tend to enhance the opportunity for discrimination?

A. Yes, I think so. That's why there's been seven cases on voting rights litigation.

Q. How do those cases provide evidence of Senate Factor 3?

A. Because the electoral procedures include using at-large districts, using voter ID laws that have a disparate impact on Native Americans, closing polling places that have a disparate impact on Native Americans, so I think there's considerable evidence that that's the case.

Q. Let's talk about Senate Factor 5, the extent to which Native Americans bear the effects of discrimination in areas

such as income, employment, education which hinder their ability to participate effectively in the political process. Do Native Americans in North Dakota face discrimination in these socioeconomic areas?

A. The answer is yes. In my report I take a historical prospective. There's another expert who's doing a contemporary quantitative analysis, so I took more of a historical perspective, and I discuss the starvation that resulted from the reservation system, the poverty which has been a continued theme from that point on. And I have a great deal of data in that section that is historical. A lot of it comes from over the last 15 years using census data, ACS data, as well as other federal agency data, other state agencies.

So I think there's a very compelling case that the differences between Native Americans -- when it comes to income and the poverty level, level of education, health, even access to the internet, there is a vast gap between what Native American people have been able to achieve under this system and what White people have.

Q. Are you familiar with the cost of voting?

A. Yes.

Q. Can you talk about that?

A. I use that concept a lot in my work. The cost of voting is -- there's a large body of literature in political science that looks at the cost of voting. Those are the cumulative

impediments to voting that make it more difficult to vote. And if I could summarize that literature in just -- a complex literature with just one sentence, it's as the cost of voting goes up, turnout tends to go down.

And the kinds of things we've been talking about, level of education, poverty, income, they all lead to increased costs of voting. And there's a large literature in political science that correlates education with lower -- the higher the education, the higher the turnout. The higher the income level, the higher the turnout. So there are a number of factors that have an impact on turnout and participation. Cost of voting is a very big part of that calculation.

Q. And why does that lead to decreased political participation?

A. If you think of -- let me just draw an example. If Native American voters have to drive, we'll say, 50 miles and White voters have to drive 2 miles to vote, and Native Americans have less money, so less -- a lower level of vehicle ownership, less money for gas, insurance, it's harder for -- they have to go further to get a license plate for that car.

So overcoming the transportation difficulties in that situation is much more difficult for Native American people than it is for Anglo people. And I think the literature -- the voting literature makes it clear that when you start placing impediments in front of people, even the most committed group

of voters, their turnout goes down.

When you have a group of voters who are also unhealthy and impoverished and lack transportation and live in a distant place with poor roads and few transportation options, the cost of voting skyrockets. So there's a fundamental difference in the cost of voting for Native Americans and non-Native people.

Q. In your research and analysis, did you find evidence of low voter turnout in Native counties in North Dakota compared to the state overall?

A. Yes, that's typical. Every once in a while there will be an increase if there's a candidate that Native Americans really, really like, if there's somebody who's very responsive to their needs. But as a general rule, Native American turnout -- this is broadly speaking, and I think North Dakota is the same -- it's typically 10 to 20 percent below that of Anglo voters.

Q. Let's display Plaintiffs' Exhibit 43, and this is a figure out of Dr. Collingwood's rebuttal report. This was prepared by another expert in this case, Dr. McCool. His name is Dr. Loren Collingwood, and this represents voter turnout by race, 2014 to 2022 for LD-9. Is this is a graphic example of what you mean by these factors leading to low voter turnout?

A. Yes. So you see the impact of the increased costs of voting in the low sides of -- both sides of 2018. In 2018 I

think you're seeing, at least in part, the impact of a candidate of choice that helped increase a turnout among Native Americans. I talk about Heidi Heitkamp and that campaign in my report. But even when there's a contest of someone who's really appealed to them, they're still well below the rate of White voter turnout.

Q. Okay. You can take down this exhibit. Let's discuss income. Why is income relevant?

A. The political science literature is quite clear that income varies with turnout. The higher the income, the higher the probability that somebody will engage in all forms of political participation, including voting.

Q. Can you briefly explain the history of poverty for Native Americans in North Dakota?

A. It's hard to do it briefly because it's been a consistent theme since Native Americans lost their freedom and their lands and their resources and were forced to live on small remnants of their homelands. There is an absolutely persistent theme of desperation and poverty on Indian reservations ever since then. And my census data, where I look at the last 10 or 15 years, makes it clear that the dire conditions from 50 years ago are still there. It's a continuous thread.

Q. Please display Exhibit Number 64. Dr. McCool, this is your report again, and turn to page 37. Dr. McCool, what data did you review to analyze income differences in North Dakota?

A. Oh, there's a lot of data in that section. A lot of it is ACS data from roughly -- oh, some of it goes back to, I think, 2000, so we're looking at about a 10- or 15-year period there. I did not look at the latest census data because that's being analyzed by another expert. I'm more interested in the historical development of income, so there's a lot of numerical data from several different sources.

Q. And looking there sort of in the middle of that full paragraph, you discuss the disparities and paying jobs and household income. Can you talk a little bit about that?

A. Yes. Do you want me to read some of the data, or --

Q. That'd be great. Thanks.

A. Sure. Do you want me to start where it says, "American community survey data," the first full paragraph?

Q. Actually, Dr. McCool, if you want to skip down to the middle of that paragraph, the sentence that starts, "Also Indians were employed in the lowest-paying jobs," and point that data out for us.

A. Okay. I think all the data in the previous part of that paragraph is important, but instead of reading a long passage, we'll just read that part.

"Indians were employed in the lowest-paying jobs. 30.5 percent worked in service occupations, while only 16 percent of Anglos were in service jobs. At the other end of the spectrum, 35.2 percentage of Anglos worked in management,

business, science and arts, but only 25.6 percent of Indians had such jobs." That's from the ACS survey of 2011-2013.

Q. And just below that too, can you point out for us the median annual household income disparities?

A. Yes. During that period the median annual household income for Anglos, 2011 to 2013, was 56,566. For Indians it was not much more than half of that, 29,909.

Q. And just to be clear, Dr. McCool, this is statewide data, correct?

A. Yes, this is for North Dakota.

Q. At the bottom there of page 37 you reviewed a North Dakota Department of Health data from 2016. What did that data show you regarding income and poverty?

A. I'll just read this, this final section. "In 2016 the median household income for American Indians in the state was 25,255. The state as a whole are nearly twice that amount, 48,670." That's from the North Dakota Department of Health in 2016.

Q. Okay. Display the next page, please, page 38, and cull out the first graph there, individuals below the poverty level by race, 1999 to 2016.

Dr. McCool, where did you find this graph?

A. That's from the North Dakota Housing and Finance Authority.

Q. And what does it show?

A. It shows a dramatic gap in poverty level between American Indians, which are clear up there at about 40 percent, and the White race, which is down about 10 to 9 percent.

Q. And is this for the State of North Dakota as a whole?

A. It is, yes. This is North Dakota data from the State of North Dakota.

Q. Okay. Display page 39, please.

Dr. McCool, you also looked at data from the Sacred Pipe Resource Center. What is that?

A. Well, I was looking for at least some data on poverty for urban Indians, and that's the source that I found. And that report also found significant disparities in the economic well-being of Native Americans even though they live in an urban area.

Q. What did you find generally regarding vehicles and phone service disparities?

A. Well, the rate of vehicle ownership on Indian reservations is lower than that of Anglo people. And what was the second one, the internet?

Q. Vehicles and phone service.

A. Oh, phone service. And I believe there's data in there about phone coverage. I don't quite recall exactly what it is.

Q. And for the record, that's on pages 39 and 40. Are Native Americans over-represented in the homeless population?

A. Both the homeless population and the prison population,

yes, significantly.

Q. Let's review education.

A. Okay.

Q. Why is education relevant in a voting case?

A. Again, the political science literature is quite clear that there's a correlation between level of education and the ability and willingness to participate and vote.

Q. And can you briefly explain the history of education for Native Americans in North Dakota?

A. Yes, it's a -- Indian education is a -- it's a sad history. Native people, after they were forcibly placed on reservations, the government imposed a system of boarding schools on Native Americans. There were a dozen boarding schools in North Dakota, including one at Spirit Lake and one at Turtle Mountain.

And there's been a number of recent reviews that are very critical of the boarding school experience, not only in terms of the lack of a good education, but the very harsh and racist treatment that Native students received in the boarding school system. And I have a lengthy quote in my report from a professor who did a survey of what she calls boarding school survivors, and she has a summary that I quote in her book about boarding school survivors in the Northern Plains states.

Q. Let's take a look at that quote.

Display P-64.

It's your expert report again, Dr. McCool.

And turn to page 42 and cull out that block quote there in the middle.

Dr. McCool, can you read this for us?

A. Yes. So this is her summary of what she found by interviewing hundreds of survivors. "Five major themes emerged. First, the survivors experienced loss, which can be subdivided into five sub-elements, loss of identity, language, culture, ceremonies, and tradition; loss of self-esteem; loneliness due to loss of parents and extended family; feeling of abandonment by parents; and feeling lost and out of place when they returned home.

"Second, survivors attending boarding school experienced abuse, subdivided into corporal punishment and forced child labor; the outing program, which is basically slavery, hunger, malnourishment and sexual and mental abuse.

"Third, survivors experienced unresolved grief, mental health issues, relationship issues, and alcohol abuse.

"Fourth, survivors express that they felt they had an inferior education at the boarding schools."

And I might add that right after I filed my report, an extensive survey of boarding schools was published by the Department of Interior. It's usually called the Newland Report, and it is a devastating critique of the boarding school experience and exactly supports what we see here on the screen.

1 **Q.** Is the current state of education in North Dakota formed
2 from that history?
3 **A.** Yes. One of the best predictors of a student's success is
4 their parent's success. If you want to know who goes to
5 college, it tends to be people whose parents went to college.
6 **Q.** Let's turn to page 43 of your report and cull out the
7 first full paragraph there that starts, "The lack of top
8 quality educational resources is reflected in grades and test
9 scores." Dr. McCool, can you tell us about the reading and
10 math proficiency deficiencies?
11 **A.** Yes. Can I just read this?
12 **Q.** Sure.
13 **A.** "A 2011 analysis found that while 38 percent of White
14 students performed at the advanced level in reading, only
15 15 percent of Native students performed at that level. In
16 eighth-grade math, 47 percent of White students were at the
17 proficient level, but only 15 percent of Native students made
18 that level, and 46 percent of Native students scored below --
19 at the below basic level." 46 percent. That's a stunning
20 statistic.
21 **Q.** And you also have data there regarding grades, ACT scores,
22 special education, again, significant disparities, correct?
23 **A.** Yes, there's a lot of data in that section as well.
24 **Q.** Let's review healthcare. Why is healthcare relevant in a
25 voting case?

A. Healthcare impinges upon one's ability to participate. For example, if you're immobilized by a medical condition, it makes it very difficult to vote. Most Native Americans don't have a mailbox at the end of their driveway or on their house, so they have to travel. Even if they're voting by mail, they still have to travel to a post office.

So if you're medically unable to drive a car, you can't really vote. It's almost impossible to vote. If you're having mental health issues, it's hard to be a good civic citizen when you're considering suicide. And the suicide rates, especially among young male Native Americans, is -- it's astronomical. I mean, it's a -- it's a national tragedy. I don't think they're thinking about who they're going to vote for in future elections when they're considering killing themselves.

So health issues also consume a lot of time and expense. They have less time to devote to being a good civic participant in the electoral process when they're just trying to survive, trying to get through something like diabetes or substance abuse issues or heart disease.

Q. Let's take a look at the Appendix A to your report. It's on page 86. Where did you pull this table from?

A. This is on the Indian Health Service website, and, unfortunately, they have not updated that yet with 2020 census. I keep checking. I checked just a few days ago to see if they

finally updated it, so this is actually the latest version of this that I have. I wish I had a newer one, but we don't.

Q. And I note this is from 2009 to 2011. Do you have any reason to believe that this data has improved?

A. No, I don't. It's gotten worse because COVID hit Indian Country very hard. Native Americans had a infection rate and a death rate, a mortality rate from COVID significantly higher than the population at-large.

Q. Can you highlight diabetes about halfway down there? Can you point that out for us, Dr. McCool? What is the diabetes disparity?

A. Yes, this is a very disturbing statistic. At the top of that column, AIAN is how the census refers to American Indians/Alaskan Natives, so that's the column for Native Americans. Diabetes, the rate is 66 percent. Compare that to the rate for all races, the national average basically, it's 28 percent -- excuse me -- 20.8 percent, a tiny fraction of what it is on Indian reservations.

Q. And what about alcohol-induced?

A. Again, a stunning disparity. On Indian reservations, 50 percent alcoholism rate. Among America at-large, 7.6 percent. I think it'd be hard to engage in voting if you had -- if you're an alcoholic and you're having an alcohol problem.

Q. Okay. You can take down this exhibit. What are his

hospitals?

A. They are required by the treaty obligation, the trust obligation of the federal government. I think I cite that there's two his hospitals in all of North Dakota. I think there's 50 hospitals in total in North Dakota. Just two of them are his.

Q. And what does that state to you, that disparity?

A. Well, his has a long history of providing inferior care, so there's not only less care available, dramatically less care, but in some situations it's inferior care, and that may explain why Native Americans as a whole tend to be much less healthy than non-Native people.

Q. Let's review internet access. Why is internet access relevant?

A. That's an important part of access to the political system today. Everybody has a website, right? The reason why it's important is that there's a lot of services available on the web for somebody who can afford a subscription to a broadband provider, can afford a computer, especially if they can afford a printer so they can print forms.

If you don't have those things, you can't access all that information, all that capability, which one of the great things about information on the internet is it's a way to overcome travel costs. You can just pull it up on the screen. You can download forms. If you don't have a computer, you're

stuck with the traditional travel costs, which, as we've talked about, are quite significant for Native Americans.

Q. Do Native people have access to the internet on par with non-Native people?

A. Do they have access? No. No, there's data in there, census data.

Q. And do Native people have the ability to pay for a subscription service on par with non-Natives?

A. No, you can just -- there's a lower subscription rate according to census data, and that's easily explained by looking at the income differential. They just have less money.

Q. Now let's talk about all the socioeconomic factors together. How do all of these factors interact with each other?

A. I think the important thing to understand is that these various socioeconomic conditions interact in sort of a negative spiral. If you have less money, you can't afford to go to college, you can't afford transportation to get your kid to school. There's all kinds of impediments when you don't have enough money. Maybe your child -- you don't have adequate lighting, or you don't even have a home, or you don't have an environment conducive to that.

Lower level of education, that means you're going to have lower income and fewer job opportunities. If you're unhealthy, less probability that you can get a good job,

especially if it requires strength and mobility. So each one of these has a negative impact on the other, and they tend to create sort of a negative vortex that can suck people down and make life really quite desperate for some people.

Q. And what is the outcome as to political participation?

A. When you're just trying to survive, I don't think voting is at the top of your list of needs.

Q. Let's look back at your report, P-64, and turn to page 48, and if you can cull out the quote at the bottom. And, Dr. McCool, if you can -- who is this quote from, first of all?

A. Oh, Myra Pearson is -- I think she's -- she's from Turtle Mountain or Spirit Lake. I can't remember right now.

Q. It says just above that that she's a member of the Turtle Mountain Tribe. And what did she say here?

A. Oh, yeah.

Q. Can you please read that for us?

A. Yeah, I put this in there because I thought this was a great summary of how the socioeconomic characteristics combine to hold people down and to greatly reduce their opportunities, not just opportunities to vote, but to participate in any way in the economy, in the political system, in life.

It says, "Because of this high poverty rate, the community's access remains limited, limited because those living below poverty do not have vehicles, driver's licenses, or other means of public transportation to various government

service providers. And as many of the congressional delegation may be aware, we are not a wealthy tribe. We have scraped and scraped and survived these past 200 years. Every time I come before one of these hearings, I start crying."

Q. Okay. You can take this down.

Dr. McCool, let's talk about Senate Factor 7, the extent to which Native Americans have been elected to public office in North Dakota. Does representation matter?

A. Absolutely.

Q. Why?

A. Again, there's a lot of literature in political science that indicates that people want to elect like-minded people often from similar backgrounds or people that have some -- something in common with a voter. And I think you're best represented by people who either understand your position and your perspective or share your perspective.

Q. How many state legislative seats, House or Senate, are currently held by Native Americans?

A. Jamie Davis was elected from 9A, and Lisa DeVille was elected in 4A.

Q. And are any state Senate seats held by Native Americans?

A. No, the one seat that Senator Marcellais held was lost, so there's no Native Americans in the Senate today.

Q. To your knowledge, has there ever been a Native American statewide elected official?

A. No. They tried. I list three Native Americans who ran in 2016, and they carried the Native American precincts handsomely. They did great on reservations. They lost everyplace else, and lost by significant numbers.

Q. How many members of the Tribal and State Relations Committee are Native?

A. None.

Q. How many Native people hold positions within the governor's administration and staff?

A. The only two I could find were Nathan Davis, the head of the Indian Affairs Commission, and Erica Thunder, who's the head of Human Rights and Labor.

Q. And did you try to find information on the Indian Affairs Commission?

A. I did. I have a quote from their enabling act in my report. The mission of the Indian Affairs Commission is to assimilate Native Americans.

Q. The original mission, correct?

A. Yes.

Q. When was the last entry that you found on their website?

A. So I -- they have a tab called something like media and publications, so I was very interested in what the Indian Affairs Commission is up to, so I was anxious to click on that. The most recent entry for that was 2013.

They also have a tab that indicates who's elected

from Indian country, so I clicked on that just recently, right before I came up here. It hasn't been updated. It still has Senator Marcellais listed in there. So it's kind of hard to tell what the Indian Affairs Commission is up to when apparently they're not maintaining their website.

Q. How common is it for Native people to be elected to office at the county level?

A. It all depends on whether there's a significant majority of Native Americans. That is the determining factor.

Q. Are there any Native Americans serving on the city commission of Bismarck?

A. I couldn't find any.

Q. Mandan?

A. No.

Q. Fargo?

A. Not that I could find.

Q. What is "political efficacy"?

A. That's another important concept in political science. One's -- since -- a political efficacy is the idea that you're going to participate if you think your vote matters, if you think it's of consequence, that you have a meaningful choice. If your choices are two parties that don't represent you, if you feel alienated from the system, you have a low sense of political efficacy.

If you feel like it's a waste of time to go vote,

especially if you're working two jobs or you have significant cost of voting to overcome, it takes a high sense of political efficacy to overcome those costs and go vote. And, again, this is typical in Indian country. I have some evidence in my report that there's a low sense of political efficacy because they don't feel like they have many meaningful choices.

Q. Does that low sense of political efficacy exist amongst Native people in North Dakota?

A. Among what people?

Q. Native people here in North Dakota.

A. Yes, I think it does, and that's very typical.

Q. Let's talk about one of the additional Senate factors, the responsiveness of state officials to the needs of Native people. What does "responsiveness" mean?

A. So that's Senate Factor 8, and the Senate report did not define responsiveness, but my understanding of the term is that it means whether the government responds to input from its citizens. And I believe in my report I look at four -- four areas where I felt like the state was not responsive to Native Americans.

Q. What are those?

A. Well, the first one was, the tribes pleaded with the Redistricting Committee to come to at least one reservation. They did not. They did not come to a reservation.

Q. Let's take a look at the demonstrative, if you could

display that, please. Dr. McCool, why did the tribes plead for the Redistricting Committee to come to reservations?

A. Well, if they come to the reservations, they could have heard directly from Native citizens who might not have the means to drive 193 or 247 or 167 miles, so they could have obtained considerably more input. And if they travelled to Indian reservations, they would've seen plain evidence of the Senate factors that I'm talking about. They could see the poverty. They could see the problems that they're having on Indian reservations, so that's why Native people asked them to make at least one appearance, but they did not.

Q. And what was another example of a lack of responsiveness that you found?

A. Let's see. I think I also looked at compactness and -- can we pull up that section of my report?

Q. Actually, before we get there, you can take down the demonstrative. While we're talking about the Redistricting Committee, is it true that the Tribal and State Relations Committee held a meeting on reservations?

A. Yes. Now, I think it's kind of a misnomer to say they held redistricting hearings. The Tribal and State Relations Committee has no power to redistrict, and they held, I believe, four meetings on Indian reservations where they discussed, among many other pressing issues, redistricting. I read all the minutes to those meetings. I didn't find much of substance

in terms of the response of committee members to the input they got from tribal members.

I didn't discuss it in my report because there just wasn't any evidence there. I just couldn't find any substance. And several tribal members made presentations and requests. I just couldn't get a feel for how the members of the Indian Affairs Commission -- or the Tribal and State Relations Committee was responding to that. I have a citation to their minutes to those meetings, but they don't make redistricting decisions.

Q. And as another example of a lack of responsiveness, did the tribes make specific map requests to the Redistricting Committee?

A. They did. I think there were two demonstrative maps.

Q. And was the Redistricting Committee or the legislator -- legislature responsive to those requests?

A. No.

MS. KELTY: Okay. Your Honor, at this point I'd like to play parts of D-436. It's a video from the Tribal and State Relations Committee meeting held on September 1st. It's also been edited to show relevant parts, but, again, the full video is in the record. The video -- the transcript for the video is at D-41, and this is from pages 50 to 52.

THE COURT: Thank you.

(D-41, a video clip, played in open court.)

Q. (MS. KELTY CONTINUING) Dr. McCool, is that an example of a lack of responsiveness?

A. Yes, it's an example of a long tradition in history beginning with the Indian Rights Association 120 years ago where White people said they knew best for what should happen to Native Americans and did not listen to Native Americans and instead imposed their will. This is another example.

In my research I found that White people often feel like they can't be well-represented by a Native American, but when you turn the tables and say can White people represent Native Americans, they say, well, of course. So I'd like to see the opinions of Anglo people and how they would feel about having a Native American legislator.

Also, the Voting Rights Act absolutely does not require that somebody be the same race as a minority group. And, in fact, the Native-preferred candidate often is not a Native American. It's not about skin color. It's about who represents you effectively.

MS. KELTY: Okay. Now we're going take a look at another video. It's D-446. This is from the House floor on November 9. This has been edited, but this is in the transcript, D-431, at page 14, lines 12 to 17.

(D-431, a video clip, played in open court.)

Q. (MS. KELTY CONTINUING) Are Representative Ruby's statements evidence of a lack of responsiveness?

A. Yes.
Q. How so?
A. And it's the same attitude, that White people know better than Indian people, what's best for Native people.
Q. Let's talk about the final Senate factor, which is the policy underlying the state's use of the contested structure as tenuous. What does "tenuousness" mean?
A. Again, the Senate report did not define "tenuous," so I have a Webster's dictionary definition. To me, tenuous refers to whether an action can be justified through logic and is rational. And do you want me to go through the examples?
Q. Yes, please.
A. Well, I thought the most stark example of tenuous reasoning was the rationale provided for passing the law --
Q. What was that?
A. -- claiming that -- HB-1504, claiming that they subdistricted District 9 to avoid a lawsuit even when Native Americans had told them that's not what they wanted. "Here's what we want," and they ignored them. They asked them, "Don't create a subdistrict at Turtle Mountain." They did it any way. They asked them, "Please combine Turtle Mountain and Spirit Lake in the same district." They did it any way [sic]. And they asked them to combine the two to create -- in honor of their community of interest.
If you look at Spirit Lake and Turtle Mountain and

the different things in my report, the history, the discrimination, the lawsuits, you definitely see the same history, the same experience, the same socioeconomic conditions, the same problems with education, the same problems with boarding schools, so they actually have a very long tradition of being part of the same community of interest.

And to me -- I've looked at the redistricting principles for many years. The best way to define "community of interest" is to ask people. Just ask them. Are you a community of interest? I think the leaders at Spirit Lake and Turtle Mountain made that quite clear. I do not understand what community-of-interest people in, say, Cavalier County have with the Turtle Mountain Chippewa Indian people. I just -- I can't imagine what it is.

Q. And, finally, Dr. McCool, let's discuss your conclusion, and I'll read back to you your research question. Does the current legislative redistricting plan for the North Dakota Legislature, HB-1504, dilute the voting strength of members of the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Nation and thus reduce their opportunity to elect candidates of their choice?

A. Yes.

Q. What is your conclusion?

A. The answer is yes. Eighty-seven pages of evidence of the presence of seven of the nine Senate Factors, that would be a

strong yes.

Q. And in your opinion, under the totality of the circumstances, do Native Americans in North Dakota have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice?

A. Yes, for all the reasons I've talked about, tradition, differential costs of voting, discriminatory voting practices, inadequate -- just go down that list. That means less ability to participate.

Q. And, finally, in your opinion, does HB-1504 have the affect of diminishing or abridging the voting strength of Native Americans?

A. I think it does.

MS. NESWOOD: I pass the witness.

THE COURT: Thank you, counsel.

Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Good afternoon, Dr. McCool.

A. Now for the fun part, right?

Q. That's right. Let's pull up Plaintiffs' Exhibit 66, please? Is this the CV you produced in this case, along with your expert report?

A. Yes.

Q. Let's go to page 6, and this lists the cases that you've done expert reports on in the past?

A. Yes, up through November of 2022.

Q. And one of those cases, I believe -- somewhere on there is the *Walen* case in North Dakota, the other redistricting case, or is it missing?

A. No, I had last -- I hadn't started on that one.

Q. In any event, you have done a report in the *Walen* case.

A. Yes, just recently.

Q. And in that case you did the report on behalf of the intervenors, the tribe?

A. That's correct.

Q. And if I recall from your deposition correctly in the case of the *U.S. versus South Dakota* and *U.S. versus Blaine County*, you worked on behalf of the governmental party to those two cases, but otherwise the cases that you've worked on have all been on behalf of a party going against the government; is that fair?

A. Yes, except for *Walen* I appeared on behalf of the plaintiffs.

Q. And in that case you're testifying in support of the State of North Dakota's actions in the redistricting in District 4 in 2021?

A. Part of the state's redistricting actions.

Q. The part of it that addresses District 4?
A. Yes.
Q. And to be clear, you are supportive of the state's redistricting that was in 2021 for District 4?
A. I think you asked me that in the deposition. I think I said yes. By "supportive" I think the creation of District 4A mitigated the Senate Factors significantly.
Q. As part of your work in this case, it's my understanding you conducted interviews of individuals.
A. I'm sorry. What about interviews?
Q. You conducted interviews --
A. Oh, yes.
Q. -- as part of your process?
A. Yes. Yes. I always -- I always do interviews.
Q. And it's my understanding that when you did the interviews, you listened to the answers and took down shorthand notes of what the witnesses said?
A. Yes.
Q. You didn't record those interviews, though?
A. No. If you -- you walk into somebody's home and put a tape recorder in front of them and say this is about a lawsuit, I just don't think you would get comprehensive, full answers. People would be -- people are already intimidated talking to me about a lawsuit. I think that would -- that would just kill it right there.

Q. After each interview did you provide the interviewee with a copy of your notes that you took?

A. If they ask me, if they say, "I want to see them," I send them.

Q. Did anybody ask you in the interviews you conducted for your analysis in this case?

A. I don't think anybody asked me in this case. They have in other cases, but I don't -- I don't believe anybody did in this case.

Q. So in this case nobody saw what you recorded and took down, and they weren't tape --

A. Well, when they say something that I think is really important, I often read it back to them and say, "You just said 'blah, blah, blah.' Did I get that right?" And so I actually do sort of a realtime check with them."

Q. In this case, when you took down your shorthand notes, none of the individuals that you interviewed got to see your notes after the fact?

A. No. They didn't ask.

Q. They couldn't tell you if you misunderstood something that they said or made a mistake.

A. No, but if I thought I was misunderstanding it --

Q. Correct.

A. -- I would ask them to explain it.

Q. My question was, did they have the opportunity? Is the

answer that they did not?

A. Well, they didn't see the written -- what I wrote unless I read it back to them. If I read it back to them and they say, "Well, let's rephrase that," I rephrase that, so it's up to -- it's up to them.

Q. Were any of the interviewees placed under oath before you spoke with them?

A. No, this is not a legal proceeding. It's social science methodology.

Q. The answer is no. They weren't placed --

A. Right.

Q. -- under oath.

A. Right.

Q. A number of the interviews that you used as part of your opinion in this case were actually done back during your work on the *Brakebill* case, right?

A. That's correct, because back then I could travel, and I really like to do in-person interviews. I like to see the reservation; see how people live. I think people are more comfortable talking with you -- with me in person in their home or a comfortable environment. It's just so much better than doing telephone interviews, so most of my interviews in 2016 were in-person interviews.

Q. And, Dr. McCool, some of these -- most of these are yes-or-no questions, and so --

A. Well, some of them require a little bit of explanation.

Q. The interviews that you did as part of the *Brakebill* case, those were done in 2016, correct?

A. That's correct.

Q. Are you familiar with North Dakota's Administrative Code, Chapter 72-06-03, relating to tribal ID's?

A. No. You asked me about that in the deposition, and I said "no."

Q. You're not -- and you haven't learned any more about it since the deposition?

A. I have not looked it up.

Q. You're not aware of those regulations coming into affect shortly before the *Brakebill* settlement?

A. No.

THE COURT: And, counsel and the witness, I would just ask you to please be mindful to not interrupt each other so that we can preserve the record well, and thank you, both.

THE WITNESS: Okay. Sorry.

MR. PHILLIPS: Yes, Your Honor.

Q. (MR. PHILLIPS CONTINUING) The *Brakebill* case was settled, and the state entered into a consent decree; is that correct?

A. Eventually, yes, after five years of litigation.

Q. Are you familiar with the State of North Dakota's efforts to comply with the consent decree in the *Brakebill* case?

A. I have a summary of the *Brakebill*. I mentioned the

settlement. I don't go into the details because this case is not a voter-ID case.

Q. So you're not aware of the state's implementation of that consent decree after it was entered into; is that correct?

A. That's correct. I wasn't focused on the ID issue in this report. I was focused on the subject of the report.

Q. Have you ever gone back and re-interviewed the individuals that you interviewed in 2016 as part of the *Brakebill* case?

A. No, I did not.

Q. As part of forming your opinions in this case, did you account for any state efforts to assist Native Americans in voting?

A. I looked for them. What I found was resistance.

Q. Did you account for North Dakota DOT's efforts to provide free nonvoter ID's to Native Americans on reservations?

A. Yeah, I think that's a very recent -- I don't know if it's been effective.

Q. Did you account for that in your opinion?

A. No. I think that was required by the settlement, which followed five years of litigation.

Q. Is it your opinion that the State of North Dakota was not responsive to Native Americans during the redistricting process?

A. Yes.

Q. And that's because the Redistricting Committee didn't hold

meetings on the reservations; is that fair?

A. Well, they didn't hold meetings. Turtle Mountain asked that District 9 not be subdistricted. They did that anyway. Turtle Mountain and Spirit Lake asked to be placed in the same District 9. They didn't do that. Now you asked me, were they responsive. They were responsive in regard to District 4, yes. In regard to District 9, not at all.

Q. And did you provide an expert report in the *Walen* case that said you thought the State of North Dakota was responsive with respect to District 4?

A. I did.

Q. Because MHA Nation requested subdistricts in District 4?

A. And they got it.

Q. Are you aware of anybody requesting subdistricts in and around Turtle Mountain or Spirit Lake?

A. Yeah, there was discussion of that. Ultimately that -- especially after the census data came out, it was pretty obvious that that wasn't going to work at Standing Rock or Spirit Lake, so they came up with a solution, and they presented that solution to the Redistricting Committee --

Q. Do you know when --

A. -- which ignored it.

Q. I didn't mean to cut you off. I'm sorry. Do you know when that solution was presented to the Redistricting Committee?

A. Yeah, it was towards the end of the process, but it was during the process.

Q. And there were requests throughout the process to create subdistricts in Turtle Mountain and Spirit Lake, correct?

A. I don't know if there was a request to create a subdistrict at Turtle Mountain. I think Spirit Lake talked about that. When I see tribes --

Q. I think that answers my question. Thank you.

A. Okay. Am I -- can I deliver a more complete answer?

THE COURT: You know, I'll tell you what, Dr. McCool, on redirect you'll be able to answer those questions directly, and that's up to your legal team to do that. But since it's cross-examination, the convention is that your responses should be more limited to yes-and-no responses on cross. I'm affording some leeway to Mr. Phillips to monitor that as well. But if you have elaboration on your answers, that's typically brought up on redirect.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you.

Please proceed.

MR. PHILLIPS: Thank you, Your Honor.

Let's look at a video clip. This is Defendant's -- it's a portion of Defendants' Exhibit 433. Kate, it's Number 2.

(A portion of D-433, a video clip, played in open

1 court.)
2 **Q.** (MR. PHILLIPS CONTINUING) Have you ever seen this video
3 of testimony given on the Turtle Mountain Reservation during a
4 joint meeting of the Turtle Mountain Tribal Council and the
5 Tribal and State Relations Committee?
6 **A.** No, I did not see that at the time of the report.
7 **Q.** You're aware of the one person, one vote principle in law?
8 **A.** Yes.
9 **Q.** Because of that principle, a district -- or, I'm sorry --
10 a subdistrict needs to be approximately half the population of
11 a full district; is that correct?
12 **A.** That is correct.
13 **Q.** In light of that principle, do you know how many
14 reservations in North Dakota it's possible to draw a
15 subdistrict to assist Native Americans in electing the
16 candidates of their choice?
17 **A.** Well, it may or may not assist Native Americans in
18 electing candidates of their choice depending on the situation.
19 There's two that have substantial populations that can be.
20 **Q.** And those two would be Turtle Mountain and --
21 **A.** Turtle Mountain and MHA.
22 **Q.** I believe you had testified earlier that the presence of
23 certain candidates in an election can drive higher turnout?
24 **A.** Yes.
25 **Q.** And you had mentioned the Heidi Heitkamp race in 2018. Is

it your opinion the Heidi Heitkamp race for the Senate in 2018 is the reason there was a higher voter turnout?

A. I think that might be part of the reason. I talk about that in my report. She had an impressive record of passing or at least introducing Native American -- basically pro-Native-American legislation and was well-known in Indian country.

Q. She was defeated in 2018, correct?

A. She was.

Q. She was elected in 2012?

A. Yes.

Q. You testified earlier that there's -- I believe, that there's never been a Native American statewide -- a statewide candidate elected to office; is that correct?

A. Yes, not to my knowledge. Three Native Americans ran in 2016 and, again, were very successful in the Native precincts, very unsuccessful in the other precinct.

Q. Were those candidates generally Democrats?

A. I think so. Partisanship is not part of the Senate factors.

Q. Do you know how often a North Dakota Democrat wins a statewide office?

A. I don't. Partisanship is not a part of the Senate factors.

Q. Statewide offices are elected by the entire populus of

North Dakota, correct?

A. They are.

Q. North Dakota is a heavily Republican state. Is that a fair statement?

A. Now, Heidi Heitkamp was elected. That was in 2012, which seems like a whole nother world away now.

Q. The fact that Republicans tend to win statewide office is not evidence of discrimination, correct?

A. No, but partisanship is not one of the considerations in the Senate factors.

Q. You discussed the Indian Affairs Commission in your testimony. Do you know who the director of the Indian Affairs Commission is today?

A. I think it's still Nathan Davis, isn't it?

Q. Nathan Davis, that's correct. Do you know the race of Nathan Davis?

A. I believe it's Native American.

Q. Is he an enrolled member of the Turtle Mountain Tribe?

A. Yes, I believe so.

Q. Do you know who the prior director of the Indian Affairs Commission was?

A. I do not.

Q. Could it have been Scott Davis? Have you heard of him?

A. I don't know the answer to your question.

Q. You don't know if Scott Davis is Native American?

A. I don't know who the previous director was.

Q. Do you know if Scott Davis was at the mediation on behalf of the state during the *Brakebill* settlement?

A. No.

Q. You testified earlier about the Tribal and State Relations Committee, and please correct me if I wrote this down wrong. I believe you said that that committee addressed many other issues in addition to redistricting during their meetings; is that correct?

A. According to the minutes. I read all the minutes of those meetings. I think there were four meetings where they discussed redistricting, but it was only one item of -- there are a lot of pressing issues in Indian country. The last meeting they had, most of the minutes talked about the terrible issue of missing and murdered indigenous women. That took up most of the minutes. Redistricting was actually just a small part of those minutes in some of those meetings.

Q. Tribal representatives and Native American individuals did show up to those meetings and testify, correct?

A. They did.

Q. About redistricting?

A. Sometimes, yeah. Sometimes they testified about other things.

Q. I believe you testified as well that in your opinion, the Tribal and State Relations Committee didn't respond

appropriately at those meetings? Am I misstating your testimony?

MS. KELTY: Objection. That mischaracterizes the testimony.

MR. PHILLIPS: My question is: Does that mischaracterize your testimony?

THE WITNESS: Yes. I didn't say that.

THE COURT: And I'll address the objection. The objection is overruled. He'll be permitted to answer the question. And, of course, we have a transcript as well, with the Court being the finder of fact.

Go ahead, proceed. You may answer, sir.

THE WITNESS: Okay. Thank you, Your Honor. I don't think I said that.

Q. (MR. PHILLIPS CONTINUING) Do you think the Tribal and State Relations Committee appropriately responded to the testimony that was presented at their meetings regarding redistricting?

A. That's a subjective question, "appropriately responded." I don't know what recommendations they made to the Redistricting Committee. What I know is they have no power to redistrict. And ultimately, in the end, the redistricting plan that was adopted by the legislature did not do what the Native Americans in District 9 requested.

Q. The Tribal and State Relations Committee took testimony

from tribal members and tribal representatives, correct?
A. Yes.
Q. And they passed that information along to the Redistricting Committee?
A. I don't know what they passed on.
Q. Was that found in the final report of the Redistricting Committee, that that information had been passed along?
A. My memory of that is it just said "we," we got a report, or we got input from them. I don't know what discussions they had in private or outside the evidentiary record.
Q. Earlier during your testimony we looked at some videos of individual legislators speaking. Do you recall that?
A. Yes.
Q. Individual legislators don't speak on behalf of the entire legislative body, do they?
A. No.
Q. The legislative body speaks by passing laws. Is that fair?
A. Yes, I think that's fair.
Q. And you approve of the legislature's action with respect to District 4, right?
A. Once again, you're asking me, do I approve of it. I think the creation of district -- the subdistrict in District 4 significantly mitigated the presence of the Senate factors.
Q. Is it your understanding that that district was created to

benefit Native Americans voters in District 4?

A. Yes.

Q. It's your understanding that's not the case in District 9?

A. Correct.

Q. Are you aware of any legislative testimony or statements that support that the intention was different with respect to District 9 and District 4 by our legislature?

A. I think there were a number of tribal leaders who were exploring the idea of subdistricts because they're unhappy with the kind of representation they have or don't have. They don't feel well-represented. That's why they're exploring subdistricts. That's why they're exploring changes to District 9. That's -- that's why they want to see a change in the way they're represented in the state legislature. That's what all of that means to me.

Q. There's no evidence the state was trying to discriminate against Native Americans in creating District 4, correct?

A. No.

Q. The evidence there is that they were being responsive and addressing the concerns of Native Americans on the Fort Berthold Reservation, correct?

A. Yes.

MR. PHILLIPS: Thank you. No further questions.

THE COURT: Thank you, counsel.

Ms. Kelty.

MS. KELTY: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. KELTY:

Q. Dr. McCool, were you in the courtroom earlier when Collette Brown was testifying as to the problems with compliance with the consent decree?

A. Yes.

Q. Did you hear her testimony?

A. I did.

Q. Are those implementation issues evidence of a Senate Factor?

A. I think it's a failure of responsiveness.

Q. Why is that?

A. Well, it took five years of litigation to get to that point, and it committed the state to do a variety of things. And according to Ms. Brown, the state perhaps is not fulfilling all that.

Q. And your report doesn't opine on the intent of the legislature, correct?

A. No, I cannot determine that.

Q. Instead, your research question was whether HB-1504 has the effect of diluting the voting strength of Native Americans, correct?

A. Yes. Correct, as evidenced by the presence of the Senate Factors.

MS. KELTY: No more questions.

THE COURT: Very good. Do you intend to call Dr. McCool later?

MS. KELTY: No, Your Honor.

THE COURT: Do you object, Mr. Phillips, to him being released?

MR. PHILLIPS: No, Your Honor.

THE COURT: Thank you. Dr. McCool, thank you. You may step down, and any obligation to testify in these proceedings, if it existed, is now gone and completed, and you may go about your business. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: You're welcome.

It's a little early for an afternoon break, so I don't think we're going to do that right now. I would ask plaintiff to call their next witness.

MR. SELLS: Your Honor, the plaintiffs call Dr. Weston McCool to the stand.

THE COURT: All right. Mr. Sells, thank you.

Dr. McCool, please stand in front of Lori.

DR. WESTON MCCOOL,

having been first duly sworn, was examined and testified as follows:

THE COURT: Go ahead and get comfortable, Dr. McCool.

And, Mr. Sells, you may proceed as you see fit.

Thank you.

MR. SELLS: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. SELLS:

Q. Good afternoon, Dr. McCool.

A. Good afternoon.

Q. Would you please state your name for the record?

A. Weston McCool.

Q. What do you do for a living, Dr. McCool?

A. I am a National Science Foundation post-doctoral research fellow in the department of anthropology at the University of Utah.

Q. Have you been asked to give expert testimony in this case to help the Court decide whether North Dakota's state legislative redistricting plan dilutes Native American voting strength?

A. Yes, I have.

Q. Let's talk about what qualifies you to give expert testimony in this case. First, what is your educational background?

A. I have a Bachelor's degree in anthropology from the University of Utah. I have two Master's degrees, one from the University of Utah, one from the University of California, Santa Barbara, in anthropology; and a Ph.D. in anthropology from the University of California, Santa Barbara.

1 **Q.** How do your degrees in anthropology and archaeology
2 qualify you to provide expert testimony in this case?
3 **A.** My research and teaching has allowed me to develop
4 extensive expertise in quantitative analytical methods; that
5 is, social, economic, demographics, spatial, and environmental
6 statistical modelling and data science. So in short the
7 quantitative analytical methods I'm an expert in are the same
8 types of methods that I used in voting rights' cases, such as
9 this one.
10 **Q.** Would you pull the microphone a little bit closer to you
11 so I can hear you a little bit better?
12 **A.** How's that?
13 **Q.** That's a little bit better. Tell us a little bit about
14 your work history, Dr. McCool.
15 **A.** Yes. I was a research assistant and teaching assistant
16 for a number of years as a graduate student. I've also been an
17 instructor of numerous classes. I am the principal
18 investigator on a number of scientific projects. And most
19 broadly my projects look at economic decision-making,
20 demographic change, societal conflict, human responses to
21 environmental change, so it's a diverse range of projects.
22 What unites them all is the quantitative methodology that I
23 employ.
24 **Q.** Was any of that quantitative methodology that you've
25 employed in your work similar to the work you did in this case?

A. It's the same.
Q. Do you have any peer-reviewed publications?
A. Yes, I have roughly 20 peer-reviewed publications either published or that have been accepted and are in press.
Q. Did you use quantitative data analysis in any of your peer-reviewed publications?
A. Yes, I used it in all of my publications.
Q. And was that quantitative data analysis in your publications similar to the work you've done in this case?
A. Yes, it is.
Q. Have you ever testified in court as an expert before, Dr. McCool?
A. This is my first time.
Q. I'd like to show you what has been marked as Exhibit P-75. Is that your curriculum vitae, Dr. McCool?
A. It is. It's slightly outdated, but that is my vitae.
Q. About how current is it?
A. I believe I've published or had accepted into publication six additional articles since November of last year. I've accepted a new position starting in two months as a research fellow at the Society, Water & Climate research initiative. Yeah, I think that covers it.
MR. SELLS: Okay. Your Honor, at this point the plaintiffs offer Dr. Weston McCool as a expert witness in quantitative data analysis.

THE COURT: Any objection?

MR. PHILLIPS: No objection.

THE COURT: He will be qualified as such. Thank you.

Q. (MR. SELLS CONTINUING) Now, the plaintiffs have offered testimony from another expert who shares your last name, Dr. Dan McCool. Are you related to Dr. Dan McCool?

A. Yes, he's my father.

Q. Did the two of you work together on this case?

A. No, we worked independently.

Q. What were you asked to do in this case?

A. I was asked to employ my expertise in quantitative science to do a Senate Factor 5 analysis. That is to establish the extent to which minority groups bear the effects of discrimination among -- along socioeconomic lines, such as income, education, housing, and the extent that those hinder their ability to effectively participate in the political process.

Q. You mentioned Senate Factor 5. What -- where does that term come from?

A. Senate Factor 5 is one of numerous Senate factors released in the 1982 Senate report specifically focusing on socioeconomic analysis, and it is probative of racial vote dilution.

Q. Did you prepare a written report setting forth your analysis on those issues?

A. I did.
Q. I'd like to show you what has been marked as Exhibit P-73. Do you recognize this document?
A. Yes. It's my report.
Q. Okay. Now, before we dive in, do you want to make any corrections to this report?
A. No.
Q. Did you reach any conclusions from your analyses?
A. I did, yes.
Q. And are those conclusions set forth in your report?
A. Yes.
Q. Would you please summarize those conclusions for the Court?
A. I looked at seven socioeconomic variables for three counties of interest; that is, Ramsey, Rolette, and Benson County. And I found for all seven socioeconomic variables a Native American population bears the effects of discrimination along socioeconomic lines that is both significant and systemic. It constitutes obstacles that hinder their ability to participate in the political process.
Q. Okay. Well, let's turn to your analyses. First, what data did you use in your analyses?
A. All my data comes from the Census Bureau, but more specifically, I use the five year -- 2015 to 2019, five-year American Community Survey Data, and I use the Kaiser Family

Foundation data that, in turn, comes from the Census Bureau.
Q. Are those data sources common in this kind of analysis?
A. They are very common in Senate Factor 5 analysis.
Q. What is the American Community Survey?
A. The American Community Survey or the ACS is conducted by the Census Bureau. It interviews households, releases data on a one-, three-, and five-year rolling scale. And they interview households on questions such as race, ethnicity, ancestry, demography, income, housing and so forth. Compile those data and make them publicly available.
Q. Why did you use the five-year version of the ACS?
A. So as I said, they come in one-year, three-year, and five-year chunks. The one- and the three-year data chunks typically survey larger population aggregations and may miss some of the smaller rural or tribal areas. So if you're conducting a Senate Factor 5 analysis in rural or tribal areas such as this, the five-year ACS data is the most reliable.
Q. And why did you use the five years from 2015 through 2019? Why not more recent years than that?
A. Yeah. When I wrote the report, the 2021 data were not released. And I think as several experts have testified in this case, the 2020 American Community Survey was interrupted by the COVID pandemic, so not only was that data release delayed, a lot of that data was rendered questionable by that interruption, as the Census Bureau states themselves. So the

2015 to 2019 ACS data is the most recent and the most reliable when I wrote my report.

Q. Did you use statewide data from the ACS?

A. No.

Q. Why not?

A. So the case in this particular instance is focused around Turtle Mountain and Spirit Lake, so I focused on the three counties in and around those two reservations.

Q. What variables from the ACS did you examine for those three counties?

A. I examined median household income, poverty rates, educational attainment, homeownership, computer ownership and internet access, health insurance coverage, and employment rates.

Q. Why did you chose those particular variables?

A. They're very common in Senate Factor 5 analyses. They are available at the county level. They are available in the five-year census. They have high respondent rates, high sample sizes. And they're representative of what are the typical Senate 5 Factors, income, education, housing and so forth.

Q. What is the Kaiser Family Foundation's State Health Facts report?

A. The Kaiser Family Foundation is a nonprofit organization, and while they do produce some of their own data, they are by and large a data compilation nonprofit organization; namely,

they collect data from different public sources. This could be hospitals, the Census Bureau.

And they make those data available to the public sometimes to make those data simply available, sometimes to make them available in a more presentable or downloadable manner, sometimes to reach their own conclusions. With the Kaiser Family Foundation State Health Fact reports that I use, those data come from what is known as the National Health Information Survey, which is conducted by the Census Bureau.

Q. Have Courts relied on data from the Kaiser Family Foundation?

A. Yes, they often do, and I'm aware of at least two Supreme Court rulings that have relied on Kaiser Family Foundation health data.

Q. Is data from the Kaiser Family Foundation generally regarded as reliable in the scientific community?

A. Yes.

Q. Is Kaiser data available for the same three counties that you analyzed with ACS data?

A. No, it is state data only in this case.

Q. What variables from the Kaiser State Health Facts report did you examine?

A. Just one. It is healthcare avoidance due to cost.

Q. Okay. Besides the Kaiser Family Foundation data and the ACS, did you rely on any other data for your report?

A. No, I did not.
Q. Okay. Then let's turn to your methods. What software did you use for your analysis?
A. I used the R statistical programming software.
Q. Is R generally accepted as reliable by social scientists for the kinds of data analysis that you did in this case?
A. Absolutely. It's open-source. It's freely available. It works on all platforms, and it has quickly become and it probably already is the de facto language of social science statistics.
Q. So what kinds of analyses did you run with the R software package?
A. Two different types of analyses focused on descriptive statistics and inferential statistics.
Q. What are descriptive statistics?
A. Descriptive statistics are simply those numbers that you'd find in any data table, so they are descriptions of characteristics of a sample. So median household income, poverty rate, those are examples of descriptive statistics.
Q. What are inferential statistics?
A. Inferential statistics are statistical tests, and these are what allow us to infer whether a characteristic of a sample is representative of a characteristic of a population and not due to sampling error. As the American Community Survey, the Census Bureau relies on samples, we use these various

inferential tests to make sure that we can infer characteristics of the wider population.

Q. What inferential statistics did you use for your analyses here?

A. Just one. It's called the chi-squared test of independence, c-h-i.

Q. Yeah, and I want to remind you to speak loudly and clearly for the record.

A. Let me bring it closer.

Q. Thank you. So what does the chi-square test of independence do?

A. It tests what's called a null hypothesis. All statistical tests attempt to reject a null hypothesis. In that case, the case of this analysis, the null hypothesis is that there are no differences in socioeconomic status between Native Americans and their White neighbors, so it produces a test statistic.

We have a social science-accepted statistical threshold determine if that test result is significant. If it is significant, meaning we have greater than 95 percent confidence that this difference is real, not due to sampling error -- if it is significant, we reject the null hypothesis and instead conclude that these differences along socioeconomic lines are due to race.

Q. Is the chi-square test generally accepted as reliable by social scientists for the kinds of data analyses that you did

in this case?

A. Absolutely. It's simple. It's robust. It's straight-forward, and it's widely used.

Q. Did you rely on any other statistical tests for your analyses in this case?

A. I did not.

Q. Okay. So then let's turn to your results.

A. Okay.

Q. I'd like to turn back to your report, Exhibit P-73, and we're going to try to look at Table 1 from your report on page 14. Do you see that?

A. I do.

Q. Can we zoom in, please, on that table? Great. Can you read those numbers, Dr. McCool?

A. Yes.

Q. Great. What does this table show?

A. This shows the results of my statistical analysis.

Q. Would you please explain for the Court the layout of this table? In other words, what do the various rows and columns mean?

A. Sure. I'll annotate it here. We can see there's three different chunks of rows. Each one is for a different county, Ramsey, Benson, Rolette. All of the rows for each are these seven socioeconomic variables, so I'll use below-poverty level as an example to explain the different columns.

So, for example, this column (indicating), Rolette AIAN -- AIAN is what was explained earlier. It's simply Native American. It shows that 31.5 percent of Native Americans in Rolette County are below the poverty line. The two next columns, lower estimate and upper estimate, are the margin of error which is produced by the American -- the ACS, the community survey. And the range is just the range of the lower and upper estimates, so we can see those here (indicating).

This is compared to the White community in Rolette, which in this case the poverty level is 6 percent compared to 31.5 for Native Americans. Again, the next two rows give the upper and lower margins of error. Again, it shows the range. And this MOE difference here is just the margin of error range for Whites minus the margin of error range for Native Americans. It shows, are the errors comparable?

And, finally, this P-value row here --

Q. You mean column?

A. Oh, sorry. Yes. The P-value column, that is the result of the statistical test. In this case a test statistic is statistically significant when that number is below .05. And I'll just make it easy here. Every place that there is a statistic, it is well below that threshold.

Q. But there are three NA's in the P-value column. Can you explain why that is?

A. Yes. The NA's are for median household income in all

three of the counties of interest, and the reason is -- you'll notice all the rest of the data is percentage data except for median household income. Now, median household income is already aggregated. The ACS has calculated the median income from a number of household incomes.

To run a statistical test on median household income, I would actually need to know individual household incomes. I would need to know at least 30 households to run a reliable test. Due to privacy concerns, those data simply aren't available. So the ACS does not present median household income in a way that is amenable to statistical analysis. No, I haven't run those tests.

Q. Does this mean that the disparities you found on median household income are not statistically significant?

A. Not at all. It just means we can't run a test, so we don't know one way or the other.

Q. All right. Let's look at the first variable in your table. What is your finding with respect to median household income?

A. So you can see the comparison there. Median household income estimate for Native Americans is just shy of $38,000. For Whites it is roughly $60,500. There is a substantial difference in income, and the same is true in Benson and Ramsey County in the sense that Native Americans earn substantially less median household income, often to the tune of tens of

thousands of dollars per year.

Q. Your next variable is poverty. What was your finding with respect to the percentage of Native Americans and why it's living below the poverty line?

A. Sure. Because all my statistical tests are significant, I'm going summarize them for all three counties, but I'll reiterate that I'm discussing these results for all three counties. What I found was that Native Americans are statistically significantly more likely to be in poverty compared to their White neighbors in all three counties.

Q. The next two lines in your table address educational attainment. What did you find with respect to educational attainment?

A. I found a statistically significant relationship in all three counties whereby as you go up in levels of educational attainment, the percentage of White people increases, the percentage of Native Americans decrease, which is another way of saying American Indians are significantly under-represented in higher levels of educational attainment.

Q. Why did you break that down into two lines instead of one?

A. So the ACS actually has four levels of educational attainment, which is less than high school, a high school degree, an Associate's degree or some college, or a Bachelor's degree or higher. I've simply collapsed them down to two rows to aid with the interpretability of these results and to make

the report more concise. But the statistical test that I conducted is not conducted on only two categories. It's conducted on all four.

Q. And so you found a significant relationship on all four?

A. Yes.

Q. And what was the nature of that relationship?

A. The nature of the relationship is American Indians are over-represented in lower levels of education and under-represented in higher levels of education compared to their White neighbors in all three counties.

Q. All right. The next variable in your table is computer ownership. What did you find there?

A. Native Americans are statistically significantly less likely to own a computer compared to their White neighbors also in all three counties.

Q. How about internet access? What was your finding with respect to broadband internet access?

A. It is the same story. Native Americans are statistically significantly less likely to have access to broadband internet compared to their White neighbors in all three counties.

Q. What did you find with respect to homeownership?

A. Native Americans are statistically significantly less likely to own a home than their White neighbors in all three counties.

Q. How about health insurance?

A. Native Americans are statistically significantly less likely to have health insurance coverage compared to their White neighbors in all three counties.

Q. And, finally, what were your findings with respect to rates of unemployment?

A. Native Americans are statistically significantly more likely to be unemployed than their White neighbors in all three counties.

Q. Now, you mentioned earlier that you also looked at data from the Kaiser Family Foundation. Is that analysis presented in Table 1?

A. No, that's just in text.

Q. Can you tell us what you found?

THE COURT: I'm going to interrupt, Mr. Sells, just because I think both with regards to testimony and regards to timing, now is a pretty good time for an afternoon break. And we will break until 25 minutes to 4:00, so until 3:35, and then we'll come back and we'll conclude for the day. Thank you for your license in interrupting, and we will recommence promptly at 3:35. We're in recess.

(Recess taken from 3:07 p.m. to 3:38 p.m.)

THE COURT: Dr. McCool and Attorney Sells, I appreciate that you're all -- that you're ready to go. You may proceed.

MR. SELLS: Thank you, Your Honor.

1 **Q.** (MR. SELLS CONTINUING) Dr. McCool, before the break I had
2 just started asking you about the Kaiser Family Foundation's
3 data that you had analyzed in your report. Do you remember
4 that?
5 **A.** I do.
6 **Q.** Okay. And I asked you whether your analysis of that data
7 is presented in Table 1 to your report, which you still have on
8 the screen in front of you.
9 **A.** No, it's located in the text of my report.
10 **Q.** Okay. So then I want to ask you, what did you find in
11 your analysis of the Kaiser Family Foundation data?
12 **A.** In North Dakota, Native Americans are three times more
13 likely to avoid healthcare that they want or need due to the
14 cost than their White neighbors.
15 **Q.** And why is that data point important here?
16 **A.** Well, what it's showing is additional corroboration of
17 health discrepancies in this case, that not only do Native
18 Americans have lower healthcare coverage -- and I'll add that
19 the healthcare coverage question in the American Community
20 Survey includes the Indian Health Services, so it's showing
21 that Native Americans are much less likely to be covered by
22 healthcare. They're also much less likely to go and receive
23 healthcare due to the costs of healthcare when compared to
24 their White neighbors.
25 **Q.** Okay. We're done with Table 1. Dr. McCool, you were in

the courtroom this morning for your dad's testimony, correct?
A. Yes.
Q. And do you recall his testimony that North Dakota has a history of discrimination against Native Americans?
A. Yes.
Q. Were you in the courtroom yesterday for Dr. Collingwood's testimony?
A. Yes, I was.
Q. And do you recall his testimony that Native American voter turnout in North Dakota is generally lower than White voter turnout in North Dakota?
A. Yes.
Q. Based on your analyses in this case, have you formed any opinion on the extent to which Native Americans in the area of the Turtle Mountain Reservation and the Spirit Lake Reservation bear the effects of discrimination in such areas as income, education, employment, and health?
A. Yes. It is my opinion that Native Americans in all three counties bear the effects of discrimination along the socioeconomic Senate Factor 5 factors. These constitute systematic and statistically significant disparities that serve as obstacles both independently and collectively that hinder Native Americans' ability to effectively participate in the political process.
MR. SELLS: Thank you. Those are all my questions.

THE COURT: Thanks, Mr. Sells.

Mr. Phillips.

CROSS-EXAMINATION

BY MR. PHILLIPS:

Q. Good afternoon, Dr. McCool.

A. Good afternoon.

Q. I believe you said earlier this is your first time testifying at trial?

A. In court, yeah.

Q. Have you testified in depositions before?

A. Yes.

Q. Just this case or any others?

A. No, one other.

Q. And how many cases other than this have you ever performed work as an expert in?

A. One other.

Q. Is that case also on behalf of a plaintiff against a government?

A. Yes.

Q. I just want to make sure the scope of your opinion is clear here. It's my understanding that your opinion in this case is limited to the fifth Senate factor; is that correct?

A. That's correct.

Q. And only insofar as it applies in three counties, Rolette, Benson, and Ramsey?

A. Yes, with the exception of the Kaiser Family Foundation data, which is statewide.

Q. With that expectation, you don't have an opinion as to any other counties in North Dakota?

A. No.

Q. Not Eddy or Towner or Cavalier?

A. No, my focus was on the three counties surrounding Spirit Lake and Turtle Mountain.

Q. And to the extent you've analyzed the fifth Senate factor, you analyzed income, poverty, education, health insurance coverage, computer ownership, internet access, housing and employment. Did I get it all?

A. Yes.

Q. No other opinions outside of those topics.

A. Those are the variables where I can -- I conducted my statistical analysis.

Q. Based on your testimony, you had two data sources, correct? We've got the 2015 to '19 ACS survey?

A. Yes.

Q. And the Kaiser Family Foundation state health facts report.

A. Yes.

Q. And if I understood your testimony correctly, the Kaiser Family Foundation report applied to avoidance of healthcare due to costs?

A. That is the data presented on their website that I utilized, yes.

Q. Does that mean that Native Americans avoid obtaining healthcare due to the cost at a higher rate than Whites?

A. Yes.

Q. To be clear, the Kaiser Family Foundation State Health Facts report is based only on statewide data, correct?

A. For this variable, yes.

Q. There is no data in that report related specifically to the three counties you analyzed?

A. No.

Q. There isn't any data source as far as you know that's specific to these three counties on that point?

A. On that point from the Census Bureau, not to my knowledge.

Q. You also analyzed as a part of your opinion the homeownership rates between Native Americans and Whites; is that correct?

A. Yes.

Q. Are you familiar with what lands in the three counties you analyzed are held in trust for Native Americans?

A. No.

Q. Are you familiar with the laws or treaties that govern lands held in trusts?

A. That was beyond the scope of my report.

Q. Are you familiar with any laws or treaties that govern

Native American ownership of lands on the Spirit Lake Reservation or the Turtle Mountain Reservation?

A. That was beyond the scope of my report.

Q. You didn't take any of that into account when you compared homeownership rates of Native Americans compared to White individuals.

A. Those data are not available, to my knowledge, in the American Community Survey.

Q. So you didn't take it into account.

A. Extended data. No, I did not.

Q. Let's pull up Plaintiffs' Exhibit 73 and go to page 12, please. So I'm looking at -- we need to zoom in, really, on the middle of the screen there, the last sentence in your computer ownership and broadband internet access paragraph. And to be clear, is it your understanding that this paragraph applies to Ramsey County?

A. I'd have to see the heading, but --

Q. Could we maybe scroll up a little bit?

A. Okay. Yeah.

Q. Now, in this paragraph, the last sentence says, "High MOE's, however, render these results somewhat tentative." Do you see that?

A. I do.

Q. Are MOE's margins of error?

A. Yes.

Q. And is that true? And are these results somewhat tentative due to the margins of error?

A. What this is showing is that sample sizes are small in this county, particularly in relation to this variable. And so this is boilerplate in the scientific analysis, which is to say the higher the margin of error, the more tentative the conclusion.

If the margin of error is high, it's important to state that that renders the results somewhat tentative. That's not saying there isn't a significant disparity. It's just saying that should be taken with a small grain of salt.

Q. Is it the result of the population of Ramsey County being small?

A. It's a result of, yeah, the population being small. I should state there, however, that if it was --

Q. That answers my question. Thank you.

A. Okay.

Q. Let's go to the -- if we go to the very bottom of this same page and on to the next page, and this -- it appears to be health insurance coverage analysis also for Ramsey County; is that accurate?

A. Yes.

Q. And a statement there says large MOE's render this result somewhat tentative. Is that the same explanation of why it says that?

A. Sample sizes are small. The statistical test is significant, though, which is saying sample size is sufficiently large enough to detect a significant difference.

Q. And that the results are somewhat tentative.

A. That's not true in the statistical test. That's true if you were to look at the descriptive data and just say 20.5 is bigger than 4 percent. That'd be somewhat tentative. But the results of the statistical analysis are not somewhat tentative. That's what a P-value shows you.

Q. Let's scroll down further on page 13, all the way to the conclusion, please. At the end of this report, Dr. McCool, you conclude these systemic disparities hinder the ability of AIAN tribal members to participate effectively in the North Dakota political process, Senate Report 1982. Do you see that?

A. I do.

Q. AIAN, remind me what that stands for.

A. American Indian and Alaskan Native is Native American.

Q. Is this opinion based on an assumed causal connection between the disparities you found and the ability of Native Americans to participate effectively in the North Dakota political process?

A. No, I was not hired to establish a causal nexus between disparities along socioeconomic factors and diluted votes.

Q. So you don't have an opinion as to whether there's a causal nexus?

A. No, the 1982 Senate report states explicitly that that's not necessary when those two things that I just mentioned are observable.

Q. Are you familiar with North Dakota's political processes?

A. That's not what I was hired to do.

Q. Are you familiar with North Dakota's political processes?

A. That's a really broad question.

Q. I think it's a yes-or-no question.

MR. SELLS: Objection. Vague.

THE COURT: Overruled. The witness may answer the question yes or no.

THE WITNESS: Is the socioeconomic outcome related to the political processes in this state? Almost certainly. So they connect to the broader political process, but I'm not an expert in North Dakota politics.

Q. (MR. PHILLIPS CONTINUING) And not familiar with North Dakota's political processes?

A. I'd just refer to my prior response.

Q. Are you familiar with North Dakota election laws?

A. No, that's not what I was hired to do.

Q. Are you familiar with how elections are carried out in North Dakota?

A. That's not what I was hired to do, no.

Q. As part of your analysis, did you review any data on election results?

A. That's not what I was hired to do, no.
Q. Did you review any data on voter turnout?
A. Not what I was hired to do, no.
Q. Didn't review any election data at all, correct?
A. That's what, if memory serves, Dr. Collingwood presented on yesterday. That's not what I was hired to do.
Q. So you didn't do that?
A. No, I did not.
Q. Did you consider any North Dakota programs or regulations relating to Native American voter ID's?
A. No.
Q. Did you consider any state assistance that's provided to Native American voters?
A. That's captured in some of the variables. For example, I said that the health insurance coverage variable includes Indian Health Services, so that's somewhat captured in parts of the analytical report. That wasn't the specific main theme of my report.
Q. Anything other than that?
A. I'd need to think about that for a second. None that come to mind.

MR. PHILLIPS: Thank you. No further questions.

THE COURT: Thank you, counsel.

Mr. Sells, do you have any --

MR. SELLS: No redirect.

THE COURT: No redirect. Very good. And may this witness -- do you anticipate Dr. McCool being recalled?

MR. SELLS: No, we do not.

THE COURT: May he be released?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Thank you. Dr. McCool, thank you. Thank you for your testimony. Thank you for being here. Any obligation that you have to remain here is no longer existing, and you may go.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you. Ms. Neswood.

MS. NESWOOD: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. NESWOOD: Plaintiffs call Representative Marvin Nelson to the stand.

THE COURT: Very good. Representative Nelson, if you would please come forward, and if you stop in front of Lori, she will administer an oath, sir.

MARVIN NELSON,

having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you. Come on up, Representative Nelson. Please proceed, counsel.

MS. NESWOOD: Thank you.

///

DIRECT EXAMINATION

BY MS. NESWOOD:

Q. Good afternoon, Representative Nelson.

A. Good afternoon.

Q. Would you please state your full name for the record?

A. Marvin Earl Nelson.

Q. And where do you live, Representative Nelson?

A. I live by Rolla, North Dakota.

Q. And is that in Rolette County?

A. Yes.

Q. And what do you do for a living?

A. For 40 years I was an agricultural consultant. I retired this year, but my wife and I still have a retail furniture store, so I've been working there.

Q. And you previously served in the North Dakota state House; is that right?

A. Yes.

Q. Great. So we'll talk more about that, but before we get into your political experience, let's find out a little bit more about your background. Can you tell us when and where you were born?

A. I was born in 1958 in Rugby, North Dakota.

Q. And did you grow up in Rugby?

A. I grew up on a farm near Rugby.

Q. And are you an enrolled member of any Indian tribe?

A. No, I am not.
Q. And just for the record, what box do you check when you fill out the census or other surveys with a race question?
A. Either White or Caucasian depending on the questionnaire.
Q. And where did you go to high school?
A. Rugby, North Dakota.
Q. When did you graduate?
A. 1976.
Q. And what did do you after high school?
A. I went to college in Bottineau for two years for an Associate's degree, and then I went to college in Fargo. I got a Bachelor's degree, attended graduate school for a while before moving up into the area in 1984 to work as a agricultural consultant.
Q. Okay. Now that we know more about your background, let's turn back to your political experience. When did you serve in the North Dakota state House?
A. I was first elected in 2010, and I served until I lost the election in 2022.
Q. And what district did you serve when you were in office?
A. That was District 9, which was Rolette County in its entirety, and nothing else other than Rolette County.
Q. All right. So you mentioned that you began your term in the legislature, were first elected in 2010. Were you then reelected in 2014 and then again in 2018?

A. Yes, that's correct.
Q. And did you run for reelection in the new District 9 configuration in 2022?
A. I did. I was the endorsed candidate in 9B.
Q. And what was the result of that election?
A. I lost to the Republican candidate.
Q. And what was -- what was her name?
A. Donna Henderson.
Q. And is Representative Henderson a member of any Indian tribe?
A. Not to my knowledge.
Q. Is Representative Henderson from Rolette County?
A. No, she lives in Cavalier County, near the town the Calvin.
Q. Have you looked at the precinct results from the 2022 election in your -- in the District 9B?
A. Yes, I did.
Q. And did you carry any of the portion of District 9B that is in Rolette County? Sorry. Did you carry the portion of District 9B that is in Rolette County?
A. Yes, I carried Rolette County. Towner County was close, but I was slightly negative there. And then in Cavalier County it was significantly negative.
Q. Significantly?
A. I lost significantly, yes.

Q. Oh, okay. And did you happen to notice how you did in Cavalier and Towner Counties compared to Senator Marcellais?

A. I did quite a bit better than Senator Marcellais did.

Q. Having lived in North Dakota your entire life, do you think voters in Cavalier County and Towner County would have known that Senator Marcellais is a tribal member?

A. Certainly many of them would've known. It was talked about as part of a legislative forum in Langdon before the primary, so, yeah, it was -- it was in the news. It was well-known.

Q. And would voters have known that you are not a Native American?

A. No.

Q. No, they wouldn't know?

A. Or I guess I didn't hear the question quite right.

Q. Would voters have known that you're not Native American?

MR. WIEDERHOLT: Objection. Calls for speculation.

THE COURT: Do you have any response, Counsel?

MS. NESWOOD: I'm just asking from all of his years of experience sort of talking with voters, working with voters, if he thought, you know, it would be sort of general knowledge that he's not a Native American.

THE COURT: I'll permit the witness to answer the question. It's just his own personal opinion.

THE WITNESS: Generally, I would think they would

assume I was not.

Q. (MS. NESWOOD CONTINUING) Have you considered whether you'll run for office again?

A. I've thought about it, but I haven't reached a conclusion.

Q. Okay. When you represented District 9, were there any Indian reservations in your district?

A. The Turtle Mountain Band of Chippewa, the reservation, is entirely within Rolette County, so yes.

Q. And it made up a lot of the district, most of the district, that reservation?

A. Area-wise it's a small area, but population-wise, a majority of the residents are of Native heritage.

Q. And did you also serve on the State-Tribal Relations Committee when you were in the legislature?

A. Yes, I got the opportunity, actually, one interim to chair the committee. Evidently it wasn't highly sought after by others, and I -- we worked on tribal issues.

Q. So it sounds like, based on that experience and your experience representing the area, including Turtle Mountain, that you would have become familiar with issues that are of particular concern to Native Americans in North Dakota; is that --

A. I would -- I would hope that would be true, yes.

Q. Okay. And so for now, can you start by listing some of those issue areas that were of particular concern to Native

Americans who you were serving?

A. Well, in addition to some of those that have already been covered -- like voting and such -- on the Tribal Relations Committee, our mandate and what we did was work on juvenile justice issues. And out of the committee came a proposed bill where tribal courts and the state could enter into an agreement, and the state could provide services to those juveniles because, you know, it was well-known that the Native American population is over-represented in our justice system. And the hope was, by providing services, that they could be -- this could be reduced.

And the thing was, it came up with a way of using the industrial school and an agreement that really was at no cost to the state. We could provide those services as long as there was space, and the salaries are the same whether there's a juvenile there or not. The housing's the same. So it was really a very potential low-cost or no-cost way of hopefully breaking the cycle of people in the justice system.

Q. Are there other issues as well?

A. Oh, yeah. My entire time in the legislature -- my first session was the start of a new funding formula for education. And the Department of Public Instruction came up with what they call the "minimum local contribution," and basically what that is is if you didn't have 20 percent of the average taxable valuation per student, the state would assume in the funding

formula that you did. So, effectively, it took money away from the very poorest schools in the state, and basically it was all tribal schools.

At the same time, worked into the funding formula was what was called "property tax relief," so the schools with the most property got additional funding. So, you know, it varied a little by year as things went up, but Belcourt was on the low end, where they got a total of $6,400 per student. The formula was in the middle where supposedly everybody was going to get $10,400 a student, but the wealthiest schools in the state were getting $20,000 per student, and so there was this discrepancy that I worked on. And federal law says you won't consider the federal funding, and state Constitution says it'll be a uniform system.

And in addition to the day-to-day operations of those poor schools, building a school in North Dakota means you use the property tax. It's literally impossible. There's about a half dozen to ten schools, that it's literally impossible for them to build a school on their local tax base, so that was another issue that I worked on repeatedly.

The one time I was working on that issue on a committee, when I wasn't on tribal relations anymore, it just kind of -- it was continued on, and it seemed like every session it would go right down to the end, to the final subcommittee, and then they would take it away again. And

1 those schools were all promised they would be on formula in six
2 years. They're not. Belcourt is as far away from formula as
3 they were then, and it just -- it basically affects Native
4 American schools.
5 And as we saw the education. They're having
6 troubles. You know, the kids are not doing well, so that's one
7 of the big issues, you know, of why -- why wouldn't we do this?
8 **Q.** So taking into consideration these examples and others
9 from your time in the legislature, what would you say about the
10 legislature's responsiveness generally to Native American
11 concerns?
12 **A.** Well, at best, it's slow. Sometimes it happens, but
13 instead of happening in one session, it maybe happens -- like
14 the juvenile justice, when we came out of committee, that's
15 when the Dakota Access Pipeline protest was. And instead of
16 working together with Native Americans, there were bills to
17 make it legal to run protesters down and things like, and we
18 just couldn't pass anything.
19 Eventually it passed, but it didn't pass that
20 session. I don't remember for sure if it passed the next
21 session or the session after that. But that's kind of the
22 typical pattern of -- it takes a long time, and just no real
23 reason for it.
24 **Q.** And, Representative Nelson, based on your 12 years in the
25 House, do you think the legislature will become more or less

responsive to the issues of concern to Native Americans with the new District 9 configuration?

MR. WIEDERHOLT: Objection. Hypothetical; it calls for speculation, lacks foundation.

THE COURT: And the objection is sustained.

Q. (MS. NESWOOD CONTINUING) How does the new District 9 configuration change representation for Native Americans in that area of the state?

MR. WIEDERHOLT: Same objection.

THE COURT: Sustained.

MS. NESWOOD: No more questions, Your Honor.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. WIEDERHOLT:

Q. Good afternoon, Senator Nelson.

A. Representative.

Q. Excuse me. There was a representative -- or a Senator Karen Nelson in the legislature back in 2007. Representative Nelson, my name is Brad Wiederholt. I'm one of the attorneys for the Secretary in this case, and I've got a few follow-up questions for you.

You had talked with your -- with plaintiffs' counsel about some concerns that Native Americans had brought to the Tribal and State Relations Committee when you were on that committee? Do you recall that testimony a few minutes ago?

A. Yes.
Q. And you talked about a funding formula that ultimately -- it would come up, but ultimately it didn't seem to have enough traction to get passed, correct?
A. I didn't catch the last sentence.
Q. It didn't have enough traction with the legislature to get passed into law, what you were trying to do there; is that right?
A. That's correct.
Q. Okay. Was that a -- was that an effort of the entire committee to change that funding formula?
A. The education committee never tried to change the funding formula, and it was not a topic in tribal relations. There was a different committee that studied that the one interim, which I also served on, which there was an effort by that committee. It didn't put a bill forward, but it was -- it was looked at, trying to change that formula.
Q. What was that committee that was put together to do that of which you served as the interim committee chair?
A. Yeah, it was -- I can't remember the exact name. It was kind of a different one that year. It was like tribal education issues or -- there was two education committees that interim, and I served on one of them.
Q. And was that a committee with Republican and Democratic membership on it?

A. Yes.
Q. And then you talked about another concern, which was the juvenile justice issues and using the industrial school that would ultimately cost the state no money. Do you recall that testimony?
A. Yes.
Q. Was that part of the tribal and state relations committee's work?
A. Yes, it was. That was our mandate, to look at that issue that year. And with the help from at least a couple judges and the people at the industrial school, that's what we came up with as the single thing we could do to, you know, advance help for those juveniles.
Q. Yeah. And approximately what year was that or years did that happen?
A. I think it was about 2015.
Q. Was legislation put forward to do that?
A. Yes.
Q. Did you sponsor the legislation?
A. The committee did, so it went through legislative management. It would not have had my name on it.
Q. So a committee of Democrats -- Democratic representatives and Republican representatives?
A. Both the Democratic-NPL and the Republican representatives, as I remember, unanimously supported that

bill.

Q. And did it become law?

A. Not that session.

Q. What happened next session?

A. I don't remember if it was just the next session or even the session after that, but eventually fundamentally it became law, but it took -- it took two, three sessions to do it.

Q. Okay. So Tribal and State Relations Committee, you were the interim committee chair, is that right, for a while?

A. That's correct.

Q. How did you become interim committee chair?

A. You're appointed by legislative management.

Q. Did you have occasion to chair any of the committee meetings that happened in the summer of 2021 on reservations that are located in North Dakota?

A. No, I was not on the Tribal Relations Committee that year.

Q. Okay. Are you generally aware, though, from your work in the House of Representatives that the Tribal and State Relations Committee did meet on some of the reservations and discuss redistricting?

A. Yes and no. I attended the meeting on Turtle Mountain, and I followed the meetings on the other ones. And part of the thing is is the tribal relations committee met early, before there was any data, or anything.

The discussion on Turtle Mountain, other than a few

general things, was really about the census and how the census was the problem because people with PO Boxes did not receive census forms; whereas, people with a physical address did, so nobody on a reservation got census forms. And that really, in my opinion, caused quite an undercount, but there was nothing we could do -- we could about that, but that was the discussion.

And so with the scheduling the way it is, tribal relations basically ended in roughly August because you need to get a report to management and so on; whereas, because the data was so slow in coming out, the Redistricting Committee really didn't start meeting until basically the meetings of the tribal relations were over, so there was no maps. There was no good data or anything like that. So people really couldn't respond at Tribal Relations Committee to what the Redistricting Committee was doing because they didn't overlap in time.

Q. Yeah. Thanks for that. It sounds like you're very informed on what happened, and I appreciate that. Do you recall that generally the federal government released the census data in about mid September of 2021?

A. Yeah, by the time they got the data that was good enough, that was about that time of year, yes.

Q. Yeah, and then once that was released, then maps could come out and people could talk about maps, correct?

A. Right. And the people on the Redistricting Committee,

they have access to special software that they can use, and everything, and nobody else has that, so it was a much later release of data than had previously happened. And so, you know, I had tried -- because I'm familiar, as an agriculture consultant, with some of the geographic information systems. I had tried to kind of go through and look at stuff, and I just couldn't handle the amount of data. And so it was late, and then the committee really rushed through things, you know.

Q. Yeah. Fair to say, though, that by late September the federal government had released a more user-friendly version of the data for folks?

A. It was improving regularly, yes.

Q. And what slowed this down, to your knowledge, was the COVID pandemic?

A. That was always the excuse given.

Q. By?

A. The federal government.

Q. Okay. So I'd like to take a look at some testimony, Representative Nelson, that you provided. I think you testified during a floor speech during debate at the North Dakota House of Representatives on November 9. Does that sound right?

A. That sounds right.

Q. So let's take a look at Exhibit D-431 and start at page 67. We've got video of this as well, but I don't have a

video cut, so we're going to look at the transcript. I'll provide the citation to the video in a little bit. But, Representative Nelson, can I just have you read your testimony? It's about a little under three -- three-and-a-half pages? Can you see that in front of you there?

A. I can, yes. I guess I could.

Q. And so if you could read where it starts with "Representative Nelson" there at line 15?

A. Okay.

"Thank you, Mr. Speaker, Members of the House. It was certainly a rush-sent census, very late results, and that really resulted in the situation that's facing us here. We had, you know, discussions with tribal relations committee, discussions, really, with tribal relations committee when they were in Turtle Mountain" --

THE COURT: Could you please slow down, Representative? Thank you.

THE WITNESS: Oh, excuse me.

"Was how poorly the census represented the people of Rolette County. You know, and some of you might not realize, but the federal government years ago decided there would be no home delivery on reservations. But what's more, the federal government decided there would be no home delivery in small towns.

"Rolette doesn't get home delivery. St. John doesn't

get home delivery. Dunseith doesn't get home delivery." It should be Rolla doesn't get home delivery. "The only people in Rolette County who get home delivery are those on a rural route.

"When the Census Bureau decided that they would not mail their forms to any post office box, thus, assuring a serious undercount, so much of the earlier reaction was, is or can anything be done about this? And I think the system is actually set up so nothing can be done because if politicians could jump into the middle of the census and change the numbers, that would be certainly a mess.

"But the tribes looked at it. And I would point out that, you know, Spirit Lake Nation initially talked about a subdistrict, but they don't qualify. There aren't enough people there. Turtle Mountain never talked about subdistricts. They never asked for it.

"And they looked, they talked, they tried to do things. Finally, they got numbers. They went out. They met with each other. They hired a consultant who then went through and drew up a district where it would meet what they want.

"And what Turtle Mountain Tribe wants and what the Spirit Lake Tribe wants is for both tribes to share a legislative district, and they came to the committee now with it.

"And if they had had data back in March or April,

they would've had data to the committee months ago, but everything -- and certainly those who served on the committee know just how tremendously rushed this all was, so that's what's in front of you.

"The top sheet is the proposed district by the tribes. This is what they're asking for. And if you look, the other districts, all the districts there meet the population requirements.

"And it does really a fairly minimal change from the plan. The section of Towner and Cavalier County would go in with Ramsey County. And then Rolette and much of Benson County, with a little bit of Pierce County, would go into the district.

"And, you know, this is what they want. I mean, here we are. We're redistricting. We have time. This is what's in front of us, but the committee rejected this. You know, they talked about, you know, concentrating Native Americans. Well, the concentration is less in the district that they propose than it is in the one proposed subdistrict.

"So I don't really know a good reason to say why we wouldn't give the tribes what they want. You know, it meets the criteria. It's contiguous. It doesn't knock any of the other districts out of compliance. And so I have to ask you to reject this report and send it back to committee so that this can be amended into it.

"So I thank you for your consideration."

Q. Okay. Thank you. Who writes your speeches, or who did?

A. I don't have a speech writer.

Q. Okay.

MR. WEIDERHOLT: For the record, the video of that is 446, and again, it's PDF pages 67 through 70.

Q. (MR. WEIDERHOLT CONTINUING) A few questions about that, Representative Nelson, about that testimony. And the last thing, when you wanted the full House to reject the report, you're talking about the map that the state ultimately passed, right?

A. Well, it's -- yeah. You don't really pass the map. You pass the code that lists off the description of all the districts, and then the map comes from that. So you're not actually passing a map.

Q. Got it. So you would have been asking the full House to reject the district that was enacted that included Turtle Mountain and Spirit Lake in a single district; correct?

A. I was asking them to reject the committee report. See, in the House you can vote yes, you can vote no, or you can vote to send it back to committee. And so the committee report had the subdistricts of District 9, and I was asking them to reject that report, send it back so that the requested district could be enacted.

Q. Yeah. Were you requesting of the House that something

like what the plaintiffs have proposed in this case would be enacted. Do you recall?

A. Yes. Fundamentally, yes.

Q. Wherein Turtle Mountain Reservation and Spirit Lake Reservation would be joined into a single district, correct?

A. Correct.

Q. Okay. So if we can look at PDF page 68, there's some discussion about home deliveries by the federal government. It sounds like at that time you were giving that speech, you were frustrated by some of the actions taken by the federal government that had affected your constituents; is that right?

A. Yes. It was almost like the census became an extension of the voter suppression that was active because people were not treated the same.

Q. You weren't being critical of the state in that testimony, were you?

A. Not as far as the conducting of the census. It didn't have anything to do with that.

Q. Or with regard to the home deliveries?

A. The state, again, doesn't have anything to do with that.

Q. And then let's look down about two-thirds of the way down the page on 67. There's some discussion about if politicians could jump into the middle of the census and change the numbers, that would be certainly a mess. You weren't suggesting -- or you were advising the House that that would be

a bad idea, to try to fiddle with those numbers, right?
A. I was really advising them that it's just impossible at that point in time. You know, I mean, if you look nationally, there would be a lot of potentially powerful people who wouldn't want numbers changed, and so the process, to my opinion, seems to be set up to not allow people to just randomly change numbers.
Q. Be fair to say, the legislature had to use those numbers provided by the federal government through the census?
A. Yes, that's correct.
Q. And then let's look at that last paragraph on page 68. It says, "But the tribes looked at it, and I would point out that, you know, the Spirit Lake Nation initially talked about a subdistrict, but they don't qualify. There aren't enough people there." Were you here when Collette Brown testified this morning?
A. Yes. This morning --
Q. She --
A. -- yeah.
Q. Sorry. I cut you off.
A. Yes, I was.
Q. She was asked that same question and agreed that they didn't have the population for a subdistrict there around the Spirit Lake Reservation, right?
A. As I understand the rules, yes, that's correct.

Q. And then let's look at the next page, 69, up at the top. You state, "Turtle Mountain never talked about subdistricts. They never asked for it." What did you base that statement on; do you remember?

A. Where did I what?

Q. Where did you base that statement on? I mean, what information did you have to come up with that statement?

A. Talks with tribal council members and tribal chairman, attending the Tribal Relations Committee meeting when it was there. No one ever brought up a single instance where Turtle Mountain asked for a subdistrict.

Q. Did you see the video this morning that was played for Collette Brown -- or, excuse me. I think it was played for Dr. McCool, and it showed some folks at that meeting up where subdistricting was requested?

A. Yes, that was, I believe, a Spirit Lake member.

Q. Were you in Turtle Mountain, at the community college, that summer where the tribe had a tribal council meeting in conjunction with the Tribal and State Relations Committee?

A. I don't really remember it being in conjunction with that year. I believe there was only one meeting, so it would've been that meeting.

Q. You would've been there in any event; is that correct?

A. I did attend that meeting, yes.

Q. So -- and Chairman Azure is going to be in in the morning

and testify, and we can certainly look at that then. But moving on to the next paragraph, it says, "You know, and they looked, they talked, they tried to do things. Finally, they got the numbers." Is that what you are talking about a little while ago when the numbers came out very late in the census?

A. Yeah. I mean, you can't -- you can't district until you have the numbers. And I was actually amazed that they could come up with a district in the timeframe that they did that met all the requirements because the data was late. The data -- and it's a significant data set to try and deal with, so, you know --

Q. Are you talking about when the Spirit Lake Tribe and the Turtle Mountain Tribe finally got together and wrote a letter of November 1 requesting that their nations be joined into a single district? Is that what you're referring to?

A. I'm not really familiar with the letter. I know that they were talking to each other, and so on, but I was not in those meetings. It's just basically secondhand, talking to Jamie Azure.

Q. Sure. And you say they hired a consultant, who I think -- who then went through and drew up a district where it would meet what they want. Do you know who the consultant was they hired?

A. I do not know.

Q. So let's look down at the bottom, the last paragraph, and

you state, "And it does really a fairly minimal change from the plan." What did you mean by that?

A. It wasn't a plan that would've changed multiple districts. It literally just flipped two districts, portions of them, so that wasn't -- it wasn't like you rewrote four or five, six districts and had lots of necessarily concerns about them. It was just taking Towner and Cavalier County, putting that in with Ramsey County, and taking the portion of Benson County, along with a small portion of Pierce County, and putting it with Rolette County. It was really a pretty small change.

Q. Yeah. Are you familiar with what district Spirit Lake Nation was in before this House Bill 1504 was enacted in 2021?

A. It was in district -- numbers. I think it was 35. It was Bill Devlin's district. Joan Heckaman was a senator from there.

Q. Can we look at P103-0001, and then kind of focus in on the right side of the map?

A. Yeah, it shows District 23.

Q. Yeah, focus in a little more, where we see Ramsey, North Dakota?

A. And Ramsey was with Towner County in District 15, yep.

Q. So, Representative Nelson, you would agree with me that that's what the legislative map looked like before the changes were made in November of 2021, right?

A. Yes, it looks correct.

Q. And you're discussing the fact that the Spirit Lake Reservation was within the same district as -- and now I took my reading glasses off. Does that say 16?

A. It was in -- in with Ramsey County in the proposal that came out of the committee for redistricting. It was not in with Ramsey County previous to that time.

Q. Which district was it in previous to that time?

A. According to the map, it's Number 23.

Q. Okay. So is this the map you're talking about?

A. This is not the map that came from the committee. This is -- this is what would've been the districts from 2011 to 2021.

Q. Yeah. Right. So my point is, wasn't Spirit Lake Nation within the same district as, for example, Devils Lake?

A. No.

Q. I'm misreading that?

A. Yes.

Q. Okay. It was in with Eddy County?

A. Yes.

Q. Okay. And then did you look at the map that Collette Brown had proposed on September 29 of 2021 from this morning?

A. Yes, I believe that was the one that just basically focused on the proposed district.

Q. Yeah. And that one proposed for Spirit Lake Tribe to be in a district with -- the same district that Devils Lake was

in, correct?

A. Oh, that -- yeah, that one would be with the proposal -- yeah, I believe that was the proposal from the committee, would have put Spirit Lake in with Ramsey County.

Q. Okay. And with Devils Lake, correct?

A. Yeah, Devils Lake is in Ramsey County. It's the county seat of Ramsey County.

Q. Let's take a look at D-351. This is the written testimony of Collette Brown at the September 15, 2021, legislative council Redistricting Committee. Were you on that committee?

A. No.

Q. You weren't there to listen to the testimony when testimony was being provided at this committee?

A. I don't -- no, I don't think so.

Q. Okay. So focus in on the top paragraph. And Ms. Brown states that Spirit Lake Nation is a federally recognized tribe located in the state of North Dakota with an enrolled membership of 7,559 members as of January 21. According to the American Community Survey -- I think we heard about that with the last expert, right, American Community Survey?

A. I believe that's true.

Q. There are almost 4,000 Native Americans currently living on our reservation, and most of the reservation is located within Benson County. So doing the math, it's about 3,559 enrolled members living off of the reservation, according to

Ms. Brown, correct?

A. Well, according to her.

Q. Yeah. So are you aware where the state plan that was enacted that we're here to argue about today put the Spirit Lake Nation, in other words, in which district?

A. I don't remember the number, but the plan put them with Ramsey County.

Q. Make sure I got the right one here. It'd be the enacted map. I thought I had it. So putting it with Ramsey County also put the Spirit Lake Nation with Devils Lake, right?

A. Correct.

Q. Same district. Ms. Brown said they're about 3,700 Native Americans that are enrolled members of that tribe living in the Devils Lake area?

A. I believe that was her testimony.

Q. In your testimony you talk about communities of interest between Turtle Mountain and Spirit Lake -- not the testimony but the floor speech you gave at the House. Isn't it true that there's a community of interest between the Spirit Lake Reservation enrolled members both on the reservation and off the reservation?

A. For Spirit Lake?

Q. Right.

A. I wouldn't know.

Q. You wouldn't know if the enrolled members living in the

Devils Lake area are within a community of interest with those members living on the reservation?

A. I could assume they were, but I'm not an expert on Devils Lake.

Q. I mean, certainly you were at the legislature for many years advocating for Native American interests, correct?

A. Yes.

Q. And you were a Democratic party representative, Democratic-NPL?

A. Democratic-NPL.

Q. Yeah. And that's one of -- one of the things that you prided yourself on during your career, was advocating for Native American interests?

A. That was part of my job.

MR. WIEDERHOLT: Yep. Thanks. Thanks for your time.

THE WITNESS: Thank you.

THE COURT: Thank you, counsel.

Ms. Neswood, do you have redirect for Representative Nelson?

MS. NESWOOD: Yes, Your Honor. One moment.

THE COURT: Go ahead and speak with Mr. Gaber then.

MS. NESWOOD: Okay. Thank you. Yes, Your Honor.

THE COURT: Proceed as you so desire.

<u>REDIRECT EXAMINATION</u>

BY MS. NESWOOD:

Q. Hi, Representative Nelson. I have just one question. Could you pull up Defendants' Exhibit 351, and can you zoom in at the bottom of that paragraph we were just looking at? The bottom of the first paragraph I think it's at. And you see those two numbers? Is that saying that the 3,559 members -- the difference between those two numbers there, that they all live in Devils Lake or that there are just that many more members?

A. It would be my understanding that they're simply located somewhere in North Dakota, not necessarily in Devils Lake; though, those that would be in Devils Lake would be included in that number.

MS. NESWOOD: Thank you. That's it, Your Honor.

THE COURT: Thank you. Any objection, Mr. Phillips, to Representative Nelson being released?

MR. PHILLIPS: No objection, Your Honor.

THE COURT: Representative Nelson, thank you for being here. Thank you for your patience today and for your testimony. Any obligation that you did have to testify has now been fulfilled, and you may either stay or go or whatever you so chose. Thank you.

THE WITNESS: Thank you.

THE COURT: You're welcome.

Ms. Neswood or Mr. Gaber, anybody from the plaintiffs' side, what's your pleasure?

MR. GABER: Your Honor, we would plan tomorrow morning to call Chairman Jamie Azure from the Turtle Mountain Band, but he would be the last witness for the plaintiff.

THE COURT: Okay. And Chairman Azure is not here this afternoon to get some testimony in?

MR. GABER: He's not here quite yet, Your Honor, but he would be the last -- the last plaintiffs' witness.

THE COURT: Well, we can -- we can sure proceed that way. We'll start tomorrow morning, and the Court will be ready to roll at 9 o'clock. Do you have any kind of business that ought to be addressed at this time while we have a few minutes, Mr. Gaber?

MR. GABER: Nothing that I'm aware of, just the offer of proof issue for tomorrow morning.

THE COURT: Sure. And, Mr. Phillips, do you have anything?

MR. PHILLIPS: No, Your Honor.

THE COURT: Let's address the offer of proof at 8:45 tomorrow morning then, and we can get Chairman Azure testifying right at 9:00 sharp.

So we will reconvene at 8:45 tomorrow morning, and in the meantime, we will be in recess. Thank you very much.

(Proceedings concluded at 4:39 p.m., that same day.)

CERTIFICATE OF COURT REPORTER

I, Ronda L. Colby, a Certified Realtime Reporter and Registered Merit Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 13th day of June, 2023.

/s/ Ronda L. Colby

RONDA L. COLBY, RPR, CRR, RMR
United States District Court Reporter
District of North Dakota
Western Division