UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Turtle Mountain Band of Chippewa Indians, et al.,	)	
Plaintiffs,	)	
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 IV
Pages 1-73

Taken at
United States Courthouse
Fargo, North Dakota
June 15, 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 9:00 a.m., Thursday, June 15, 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're back on the record for trial in this matter, and it's, I think, highly likely that this is the last day of trial. We will just dive into things this morning, I believe, unless there is something pressing, Mr. Phillips, that the defendants would like to see addressed.

MR. PHILLIPS: No, Your Honor.

THE COURT: Mr. Gaber?

MR. GABER: Nothing, Your Honor.

THE COURT: All right. Let's proceed with the next witness.

MR. PHILLIPS: Thank you, Your Honor. The defense will call Brian Nybakken and Mr. Wiederholt will do the examination.

THE COURT: Thank you.

MS. DANAHY: And, Your Honor, we would just renew our objection with respect to expert opinion testimony by Mr. Nybakken, but we have no objection to his fact testimony.

THE COURT: Thank you. And do you -- Mr. Wiederholt,

do you have a response?

MR. WIEDERHOLT: Yes, Your Honor. I would probably just reiterate the same points I raised yesterday. I do not intend to get into any expert areas. If I were to get into expert areas, we did disclose Mr. Nybakken's expert opinions. I think we disclosed those fairly and appropriately, and there was no motion in limine. In any event, I do not intend to get into expert issues with Mr. Nybakken.

THE COURT: Given the representations of Mr. Wiederholt, at this point in time the objection is overruled and -- overruled as moot. And if we start to get into that territory, please do renew the objection, and we will decide at that time how to proceed.

MS. DANAHY: Thank you, Your Honor.

THE COURT: Thank you. Please come forth, sir.

BRIAN NYBAKKEN,

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

THE COURT: Go ahead and get comfortable, sir. And I know that you've been here for trial at least yesterday, so you know the drill.

THE WITNESS: I do.

THE COURT: Please proceed, Mr. Wiederholt.

MR. WIEDERHOLT: Thank you, Your Honor.

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DIRECT EXAMINATION

BY MR. WIEDERHOLT:

Q. Would you please state your full name for the record?

A. Brian Nybakken.

Q. Are you employed by the State of North Dakota?

A. I am.

Q. Mind if I call you Brian?

A. Yes -- or, no, I do not mind. I'm sorry.

Q. What agency are you employed by, Brian?

A. I work for the Secretary of State's Office, in the elections department.

Q. And what's your job title?

A. I'm the elections systems administration manager.

Q. Election administration system manager?

A. It's elections administration systems manager.

Q. So, Brian, you'll have to wait for me to ask the question and then answer it, okay? How long have you been in that position?

A. Since January of '18.

Q. What did you do before that?

A. I was a teacher in Montana. I grew up in my hometown -- I call it my hometown -- back in Nashua, Montana, near the Fort Peck Indian Reservation.

Q. So prior to that, what was your job?

A. I also worked for the Attorney's General's Office. I

worked in the CJIS Department, the Criminal Justice Information Sharing Department. I worked with state's attorneys.

Q. Was that here in North Dakota?

A. It was.

Q. And how long did you work in that job?

A. Roughly six years.

Q. How long have you lived in North Dakota, excepting --

A. Since 19 --

Q. -- that stint?

A. I'm sorry. Since 1992.

Q. Thank you. So, Brian, would you let the Court know some of your job duties at the Secretary of State's Office as the election administration system manager?

A. I oversee the -- our central voter file, our election management's software. I maintain the central voting file on a daily basis, updating records. I also do -- sorry. I help with training for the auditors for upcoming elections. I provide documentation to auditors. I also help procure election equipment, oversee those election equipment, whether it be voting machines, poll books, et cetera, answer questions to the public on anything voting related.

Q. So those duties and the jobs you need to do in relation to those duties, do they only arise at about around election time?

A. It happens daily. So every -- more so during election period for election-related questions, timetables, making sure

that elections are handled correctly. Then in off-election years we're helping with legislation, we're helping with documentation for any law changes that have occurred, and/or just maintaining the central voter file, and/or Street Master work that comes over on a daily basis from the Department of Transportation, Department of Corrections, as well as vital records.

Q. So your work in relation to elections is ongoing every year, correct?

A. Every year, every day.

Q. I think you talked about some training that you helped provide as part of your responsibilities at Secretary of State?

A. As there is -- any questions that would come in from a voter, county auditor or local election official, we will answer those questions on a daily basis. But leading up to an election in an even-numbered year, by Century Code it requires the Secretary of State's Office to provide training in the March -- March timeframe leading up to an election and have the county auditors all be present for any trainings and updates that are necessary.

Q. When you say "March timeframe," do you mean even- or odd-numbered years?

A. In even-numbered years.

Q. Are there some deadlines that drive the training part of training county auditors?

A. With an election, there's a hundred days prior to an election, so we need to have that training in place before the election process, itself, takes -- takes place. And so we will do a one -- one huge conference, and then we'll do specific trainings on how to use the software, updates to any county auditors that are brand-new to the process.

Q. Where do those types of training take place?

A. They have taken place more currently virtually, but they have taken place -- they -- the conference does have to take place at the capitol in Bismarck, but then we also have regional trainings that we've also provided as well, and whether that's -- that's been in Jamestown, Cass County, Devils Lake, Grand Forks, Ward County, Williston, and then Dickinson as well.

Q. So do you have some of that training scheduled currently?

A. At this point we have not scheduled any training, but the training --

Q. When will it happen?

A. We would schedule the training closer to -- after our conferences that we have with the auditors this summer to determine what their preferences are of where they would like to have their trainings take place. We usually work in conjunction with the county auditors to see when they would want their trainings in relation -- or where they would want their trainings that would work best for them, so --

Q. So sometime this summer you'll be speaking with the county auditors?
A. Correct.
Q. And then you'll be getting their positions on when they would like the training to happen?
A. Correct.
Q. And where at?
A. We haven't determined that yet, whether they would rather them be in Bismarck, or would they rather have regional trainings in certain locations.
Q. That include all of the county auditors for the 53 counties in --
A. It would.
Q. -- North Dakota?
A. I'm sorry. It would.
Q. Brian, do you have some kind of security role at the Secretary of State's Office?
A. I have access to -- or I provide access to the secure -- to our election software. I also have clearance to go to the Homeland Security updates for election-related security briefings from Homeland Security.
Q. Why is security important in relation to your work?
A. It's voter integrity, to make sure that the systems are not tampered with. The information that the voter has is going to be allowed for them to vote the proper ballots that they

would need to vote and to keep our process secure.

Q. Sure. I think you talked about some of the election systems, and that's kind of your specialty, right?

A. It is.

Q. Can you go into what those systems are, what they're called -- a little bit -- to educate the Court and the folks in this room?

A. In our central voter file we have a listing of all voters and nonvoters within the state, whether they -- we keep a list of where they -- what address they are, date of birth, and we keep track of their voting history. And within that we also know what precincts, what ballot styles, and what districts that they are aligned to. That's part of our central voter file database.

Along with that, every street in our central voter file is tied to a -- part of the program is called the Street Master. The Street Master identifies highways, roads, lanes, boulevards within a precinct that will allow -- determine whether this house number resides within this precinct, and we must update that whenever there's a change or update to the process -- to the system. That way we can add a house number if there needs to be a house number added so that particular voter that lives at that address is assigned to that particular precinct.

Q. Sure. And we can get into that in a little more depth

later, but let's go a little more generally into the databases you've talked about. Is that something the Secretary of State has created?

A. Correct.

Q. But is that something that they purchase through a license?

A. We purchased -- we purchased the program from our vendor called vPro. It's our central voter file software. It's called ND Voices.

Q. And how long has that been in use in North Dakota?

A. Since 2015.

Q. Do any other jurisdictions utilize that type of vendor, if you know?

A. I believe South Dakota and New Mexico use the same software platform. It would obviously be different based upon their state codes and regulations.

Q. Is that state-of-the-art software, to your mind?

A. It is nearing its end of life. It is -- we are looking at procuring new software within the next few -- next few years.

Q. Is that type of software expensive?

A. We asked for $5 million in funding in this last legislative cycle.

Q. Okay. Can you break down for us the various -- you know, what's the system called and the various types of subsystems that are located within this database software, et cetera?

A. Well, the Street Master -- in regards to the Street Master?

Q. What's the overall Secretary of State voting administration system called?

A. ND Voices.

Q. Okay. And within ND Voices, are there some subsystems?

A. So the central voter file is one piece of that. That's the database of all the voters there. There's also the election management software. That's what uses -- the system uses to create the ballots, contests, add candidates to that ballot. Also it exports that file to a vendor to print those ballots for us and program our software for the election equipment, as well as maintaining our streets and precincts and jurisdictions within that -- within that software.

Q. Sure. And is there some interaction between North Dakota agencies to create that central voter file with the voter-specific information?

A. There is. We work with the Department of Transportation. We receive a file from them of any new -- new voters, per se, and as well as any address updates for any voters within North Dakota.

Department of Corrections will send a file of all incarcerated felons that are being -- in the prison system or being released from Department of Corrections so we can update our files to allow the voting rights to be restored.

And then Vital Records updates us for any death records that they -- have been received so we can update our records as well.

Q. Sure. So let's talk about now who has access to these -- these election voting systems that are maintained at the Secretary of State. I'm assuming you have access.

A. Correct.

Q. Who else has access to the system?

A. The Secretary of State's Office within the elections department has access to all counties' information, but then each individual county has their own access to their own counties' worth of information. But they do have the capability to search the entire voter database for voters, if necessary; the county auditor within that agency, as well as any deputies or assistants that they have within their own agency.

Q. Sure. And then we've heard quite a bit of testimony in this case about data that was taken from the Secretary of State's website. Is there access for the public information there?

A. On our website -- for example, election night reporting is information so you can see the election results on that night. You can also go into our website to see where you are -- where you are aligned to vote, look up your districts. You can even see a sample ballot, if you have questions about voting,

different types of information, what ID's are appropriate, what ID's you can use, supplemental documentation, just general information questions on our vote.nd.gov website.

Q. Sure. Is it common for outside parties to access the Secretary of State and obtain that information?

A. All the time, yes.

Q. Sure. And do you personally get requests for information from time to time?

A. Mm-hmm. Yes. I'm sorry.

Q. Thanks. Let's talk specifically a little bit more about the auditor training. It sounds like there will be some training upcoming, after you talk to the auditors this summer, but what types of things are the auditors trained on, and who does that?

A. It -- many people. In particular, myself, I will go over the election software in particular, how to create an election, how this -- how to input different parts to create your own election. But we also bring in vendors to use -- that we use their equipment for, so we bring them in for training purposes as well. Anyone within our elections department will help provide guidance and training on a particular area, as necessary.

Q. Did you do any of that prior to the newly-enacted map that came out in November of 2021?

A. I did. I worked with the county auditors on how to

proceed through the process of redistricting, how to update their maps accordingly to get that information into the system, how to use the Street Master, and what to look for through processing that -- those address updates to define those new precincts and boundaries.

Q. So in your current position, you went through a few election cycles before 2022, correct?

A. Correct.

Q. Was the training and the involvement with the auditors more or less in 2021 or thereabouts?

A. It was -- I would say it would be more because there was new -- new boundaries, new precincts. And as always, there's new auditors that are being -- being brought in from turnover, so --

Q. Yeah. And auditors, are they all elected in North Dakota?

A. There -- there are some auditors that are appointed. For example, in Cass County, the auditor here is appointed. Across the state they can be elected. Usually the larger jurisdictions tend to appoint, but that's not -- it's up to the individual county to decide how they wish to elect or appoint their auditor.

Q. So for appointments, do those last for a certain term?

A. It does not. It lasts the entirety of the contract with the county. They would stay as at-will of the county commissioners.

Q. Have you done specific auditor training of auditors that have county -- or are in counties where there are tribal reservations?

A. I have.

Q. What are some examples of those auditors and that type of training?

A. So, for example, in Sioux County there's auditor -- they lost their longstanding auditor. There's a brand-new auditor. Went through their training program with them, helped them identify mapping issues that they have, helped them understand the jurisdictions that they have within their county, helped them identify house numbers within certain streets that they were having issues with looking at their maps.

Q. And you were able to assist that auditor with those issues?

A. We do. I did.

Q. So, Brian, let's talk more specifically about the -- kind of the nitty-gritty of those systems and what some of the terms are that the auditors and yourself use when there are deadlines and there are requirements set by law. I know that Erika talked yesterday, and I think you were here for that testimony, right?

A. I was.

Q. Talked about December 31st, and I think you mentioned it today as well. December 31st is one of the drivers because

why?

A. By Century Code the county auditor -- or, I'm sorry -- the county commissioners must approve the precincts that will be established for the upcoming election year, and then they must remain in place for the remainder of that election year.

Q. Okay. So assuming, you know, a new map is enacted and the auditors need to look at what they need to do because there are changes in districts, what are some of the things those auditors look at and have to do with the automated systems at the Secretary of State's Office?

A. So the first thing that the auditor would have to do is review the map that was -- that's previously in place and compare it against the map that is enacted or that is the newest map, determine where those changes are. They would need to work with their emergency management coordinator, 911 person or a GIS person, as well as their county commissioners to decide if there's going to be changes to their precinct boundaries within those legislative districts.

Q. And have you been involved with those discussions and those types of changes at the county auditor level?

A. I have, to advise them of what it would take to make those changes happen.

Q. So yesterday Erika talked about jurisdictions, and I think she rattled off a whole host of jurisdictions that the county auditor works with and needs to account for in doing county

auditor work. She also talked about precincts, and then she talked about streets, and I'd like to ask you just a few questions about the streets. And I think you talked about Street Master being kind of one of the subsystems that those auditors and yourself works with when there's an upcoming election. So just explain to the Court what a street is and why a street is important for this process.

A. So in our software, we call it a Street -- Street Master, and it keeps a log of all the roads, highways, streets that there would be houses aligned to. And we would create a segment for a particular street within a precinct so we can define what precinct that they are tied to to know what jurisdictions are available to that one particular voter.

The Street Master has a line-by-line-by-line of the street that will align from this house number range -- the lowest number to the highest house number range within that street will be defined, and then that voter would then be assigned to that street segment that is tied to that precinct.

Q. So Street Master is kind of a -- like a spreadsheet or a database?

A. It's a database that can be exported into a spreadsheet to be used, but it is -- it is software.

Q. Sure. And then, like, at the county level in Street Master, is it going to be a long spreadsheet?

A. I would say on average the counties that we were

discussing in the Rolette area, there's roughly about 700 street segments per county, and --

Q. And so --

A. I'm sorry. And it would also be larger -- like in the Cass County range, it'd be exponentially larger. The more roads, the more divisions, the more processes that there are within that precinct, the more street segments you have.

Q. Why would a street be an appropriate boundary for a precinct?

A. Because the house numbers -- or houses are tied to a street within that precinct. Everything within that street is often used as a boundary in the first place, so as a precinct is aligned to a highway, we would be able to use that street, say, from this house number range to this house number range, this particular boundary, and then we would align every street within that precinct to that precinct.

Q. Is it fair to say that using a street as a boundary is simpler for the auditor and for your office than, say, just going through the country somewhere?

A. It is.

Q. And why is that?

A. Simply because we can identify the lowest house number range or even-odd-numbered house in a particular situation for whether it's in this jurisdiction or that jurisdiction.

Q. So when there are changes to the legislative districting

map, that Street Master for each county is going have to be updated by the auditor, right?

A. Correct.

Q. And that's quite a bit of work?

A. It is extensive, depending on circumstances.

Q. And then GIS folks are involved in that process typically?

A. Yes, because we would want to identify the house numbers that are within a particular street to identify what the starts and stops of a boundary would be.

Q. Kind of switching gears to that central voter file of voters, Brian, I think you said -- well, I don't know what you said now. You talked about each voter is assigned certain information in the central voter file that I think ties back to a street address, correct?

A. Correct.

Q. How does a voter change address in North Dakota, typically?

A. So the simplest way that can be done is, if you have a North Dakota driver's license or non-driving ID, you can contact -- by their website or by phone -- DOT, and they will update their address. We receive a file every day from Department of Transportation, and it will update our system. A non-driving ID or a driver's ID from North Dakota, as long as the plastic is there, the address that we have on file is what matters; so you would not need to receive a new piece of

plastic in that situation.

Q. So a North Dakota voter can change address without going into a DOT office?

A. Correct.

Q. How long has that been in place, if you know?

A. As long as I've known, 2018, since I -- since I've been aware of it, so --

Q. Since you've been employed with the Secretary of State --

A. Correct.

Q. -- since 2018?

A. Yes.

Q. Specifically in relation to auditor training, Brian, can you recall any times where you've assisted auditors where they have part of the county located next to reservations or reservations are within that county, either in whole or in part?

A. We have. I have, I should say.

Q. And what do you recall about some of those situations, Brian?

A. Making -- well, for all auditors, making them aware that tribal ID's are acceptable across the state, not just at -- on tribal lands and tribal areas, to ensure that that misconception isn't used, but teaching them about the tribal ID's, what ID's are available.

Q. Sure. That was a bad question. Specifically with regard

to kind of Street Master and reservation lands, have you encountered any difficulties that you've assisted with in that regard?

A. Correct. In Sioux County, for example, there was situations where house numbers were being aligned differently than what is expected in non-tribal areas. So, for example, they might have a house range from 100 to 500 on a particular street, and then all of a sudden there would be a house number 5000 in the middle of the street.

And what that -- what we have learned is that indicates that that house has been remodelled and the Bureau of Indian Affairs Housing has reassigned that number, so they're aware of that difference of housing number where they've remodelled.

And so we had to work with the county auditor when this situation happens, that they basically have to create a second line segment in the Street Master to account for that difference of house numbers; so instead of just 100 to 500, they have a 5100 to 5500, for example.

Q. Did you have to work with any GIS folks for that particular issue?

A. In Sioux County they hired a GIS contractor, and at that time the auditor was fairly new, and she had questions about how to proceed through this process, and they were able to work through a mapping situation. And then they -- the county

auditor often would use that map to help update their own Street Master.

Q. Okay. Thanks, Brian. Kind of moving on to the last topic here is -- is the -- some programs that are available -- and I don't know if "programs" is the right word -- to assist tribal and Native Americans with voting and identification and addressing issues. Are you aware of any such programs that are available through the State of North Dakota?

A. I am.

Q. What are those? Just describe those briefly.

A. One of the topics -- or one of the items is the -- for Department of Transportation to go out to tribal lands to provide mobile driver's license access to the tribes free of charge. There's also -- we provided supplemental documentation forms, as well as alternative ID forms on our website. There's also on tribal -- or in counties where there are tribal lands, they can use a map to identify -- if a voter is unaware of where they live, that they could use to vote.

And there's also grants -- or not grants, but there's funds available from the Secretary of State's Office to the tribes to help off -- to assist with any tribal ID costs or addressing issues that they would have within their county.

And then the other item we have is the desire to work with the tribes to have an interactive file where the tribal -- the tribes would send a file of their tribal members to us with

their tribal information and addresses. The advantage is that that would streamline the process. When a voter would come in -- a tribal member would come in, they would be able to already have their information in the system. If the tribal ID information address is current, then the voter would not need -- it would reduce the need for supplemental documentation.

Q. Sure. Brian, that's a lot of information you've just given us. Let's just break those down and take them one at a time. And I thought you said something about a tribal driver's license. Let's talk about that first. Is it a tribal driver's license --

A. I'm sorry.

Q. -- or did I state that wrong?

A. I'm sorry. That was a tribal ID.

Q. Okay. And what -- and, generally, what -- specifically, what is that, and how can enrolled members take advantage of that?

A. A tribal ID is another form of ID similar to a North Dakota driver's license and non-driving ID. It's provided to tribal members from their tribal reservation agency. It can be used across the state at any polling location to vote.

Q. Okay. So an enrolled member in Fargo, for example, could use a tribal ID to vote in North Dakota?

A. And they do, yes.

Q. And then on the reservation, the same thing?
A. As well, yes.
Q. Is that new -- a new program to your mind, or has that been around a while?
A. That's been ongoing, as far as I know, that a tribal ID has been used as long as it had the -- an address on it that could be used to identify where that voter would be located.
Q. Okay. And then I think you talked about something with the DOT providing maybe driver's licenses? Did I get that right?
A. Correct. Fifty days prior to the election, Department of Transportation will reach out to the tribal leaders of each tribe to determine when they could come onto a location within those -- the tribal reservation to have a mobile site available to provide free non-driving ID's to tribal members.
Q. Has that been utilized, to your knowledge, since you've been at the Secretary of State's Office?
A. It has.
Q. And then you talked about some other -- some other issues, I thought, something about a supplemental document or alternative method to verify address. Can you talk about that?
A. We -- we created a document that worked in conjunction with the tribal -- with the tribes. It's an alternative ID form. So if a tribal member does not have a non-driving ID, driving ID, or a tribal ID, they can fill out the document,

take it to their tribal official, have it signed, and that would become a tribal ID that could be used at a polling location.

There's also a supplemental form. If the tribal member, for example, has an ID, but the address is -- is no longer correct, they can have that form filled out, taken to their tribal official, have it signed, and then that would be used to update their address at the polling location.

Q. Okay. Great. And then I think you talked about set-aside ballots?

A. If the voter -- set-aside ballots are available to all voters across the state. In tribal lands, for example, if they're unaware of where they -- where they live or they're unaware of what house number is the correct number or address on their street, they can use a map, point to the map, and it would be then considered a set-aside. The voter would vote the ballot, mark the ballot, and it would be set in the set-aside envelope.

After the election is over, Secretary of State's Office will work in conjunction with the county auditor, 911 official or the sheriff's office, as appropriate, to determine if that address is missing and needs to be added to the system or validate that that address is a correct address. And then we would inform the county auditor that that ballot should be counted or not counted as a result of what that determination

is.

Q. Sure. Have you had direct involvement with all of these programs or mechanisms, Brian?

A. I have.

Q. And if a person was to, you know, be curious about where these mechanisms and programs are found, where would that person look?

A. On our vote.nd.gov website.

Q. Is this described in the Century Code or in regulations anywhere?

A. It's in administrative rules, I believe.

Q. So these programs are in the administrative rules in North Dakota?

A. Yes.

Q. Okay. Specific to the maps, Brian, does the Secretary of State's systems that you've described track whether -- whether those maps have been utilized to date during any statewide election contests?

A. They -- they are. In our electronic poll book, as a poll worker is going through the process of checking in the voter to give them a ballot, if a map is used, there's a button that they would indicate -- that would create a report for us to follow up and provide that information to the county auditor and then eventually to the tribal officials.

Q. So if that had been utilized, you would see somewhere in a

report that it was utilized?

A. Correct.

Q. Has it been utilized?

A. It has not, to my knowledge.

Q. But you have personally trained county auditors and instructed county auditors that this is something that needs to be there at those polling locations, correct?

A. Correct.

Q. And your understanding, it has been at those locations.

A. It has.

Q. The set-aside ballots, does that also only -- that you described -- sorry -- does that only apply on reservation lands?

A. A set-aside ballot can you used for -- is used for the reason where you may not have remembered to bring your driver's license or your ID to a polling location and/or you've -- you have address information that is different than what is on your ID or what we have on our central voter file. If that's the case, any voter is allowed to vote a set-aside ballot.

On tribal lands, the difference is that we will also provide that list to each tribe, as these are all the set-aside voters that were within that county, for the tribe to verify if those addresses are valid addresses or if those are tribal members. Now we provide the list of all set-asides, so there may not be -- the list isn't exclusive to just tribal members,

as we are unaware of what tribal members they are. We just provide a list of all set-asides to each tribe after each election.

Q. Has that happened, Brian, since you've been at the Secretary of State's Office?

A. It has happened, yes.

Q. There's been a lot of discussion in this case, and I don't think you were here for it, Brian, but -- about a consent decree, and are you generally aware of the timing of a consent decree that was entered into?

A. I am.

Q. And when-abouts was that?

A. As I understand it, the consent decree was signed around February of 2020.

Q. Were you involved with the negotiations on that consent decree?

A. I was not.

Q. Whether it's a requirement of a consent decree or North Dakota administrative code, you do the same thing, correct?

A. This is the -- the administrative rules state what I must follow.

Q. So these various mechanisms and programs you've described that are in the administrative code, were those in place during the November 2018 general election?

A. They were not.

Q. So I think, Brian, you had talked about some kind of a -- something you wished for, to achieve at the tribes that was another of the programs or mechanisms?

A. That would've been the interactive file. It's been a desire of Secretary of State's Office since I've started to work with the county -- or with the tribal officials in each reservation to have their voter -- or their tribal member list sent to our office so we can keep a current address of the voters within those tribal lands. That way if they provided -- when they come into a polling location, we would already have the most current address if it was different than what the non-driving ID or driving ID would be.

Q. Okay. Is that part and parcel of those administrative codes we talked about?

A. It does.

Q. So that's something that requires the Secretary of State to do something, right?

A. Correct.

Q. And has the Secretary of State's Office done something?

A. Yeah, we have -- I have discussed with the tribal ID -- or with tribal -- or with county auditors, that this would be something that would be desirable. And I've talked to Indian Affairs, Brad Davis, when he was there about the situation. But I've also talked to a couple -- to county officials from time to time, saying that if this was available, this would be

a benefit, and they would -- stated that they would proceed to discuss that with their tribal leaders.

Q. And did they discuss it with tribal leaders, if you know?

A. To my knowledge, I don't know if it happened or not. I have not heard anything back that they would -- wished a desire to have an interactive file.

Q. Have you personally reached out to tribal leaders to have them provide that information from their particular tribes for the interactive file?

A. I have not spoken to a tribal leader, maybe a tribal official that was in charge of the process.

Q. Like what kind of -- like, from what tribes, do you remember?

A. I believe it was -- I've spoken some time ago to Spirit Lake. I also worked -- when I worked with Sioux County, I expressed that that would be a benefit to them as well.

Q. You talked about some funds that are available to assist with the addressing and voter ID issues for the tribes, Brian?

A. Yes.

Q. And what -- what kind of funding is that?

A. There was a -- there are $5,000 set aside for each tribe that would assist with any voter identification issues within their tribal area.

Q. And what triggers that funding to go to a tribe?

A. The tribe would need to notify us that they had expended

that money and then notify our office for reimbursement.

Q. Has your office ever been notified that the funding has been requested?

A. They have not.

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

THE COURT: Thank you, counsel. Ms. Danahy?

MS. DANAHY: Just a few questions, Your Honor.

CROSS-EXAMINATION

BY MS. DANAHY:

Q. Good afternoon -- or I guess it's morning. Good morning, Mr. Nybakken. I represent the plaintiffs in this matter.

You spent some time just now talking about what the Secretary of State has done to assist tribal voters with the North Dakota voter ID law; is that right?

A. Correct.

Q. And those programs are all part of the consent decree that the state entered into in the *Spirit Lake* and *Brakebill* case; is that right?

A. Correct.

Q. And that consent decree was the result of litigation; is that right?

A. As I understand it, yes.

Q. And, in fact, it was the culmination of seven years' worth of litigation. Does that sound right to you?

A. It sounds correct, yes.
Q. There were three separate cases that were brought that were resolved by that consent decree? Does that sound right?
A. I would -- it sounds correct, yes.
Q. And those cases were brought by Native American voters and two Native American tribes. Does that sound correct?
A. Yes.
Q. And the lawsuits challenged the residential address requirement; is that right?
A. Yes.
Q. And the claims underlying the consent decree were that the residential address requirement discriminated against Native voters. Does that sound right?
A. From what I recall, yes.
Q. And the claim was that the law discriminated because Native voters disproportionately lack both residential addresses and ID's that reflect a residential address. Does that sound right?
A. According to the lawsuit, yes.
Q. The consent decree is a federal court order, right?
A. I'm unaware of that.
Q. The lawsuits that we're talking about --
A. Right.
Q. -- were brought in federal court?
A. The consent decree is --

1 **Q.** In the --
2 **A.** -- what we follow, so --
3 **Q.** The consent decree --
4 **A.** Yes.
5 **Q.** -- was entered by a federal court?
6 **A.** Yes.
7 THE COURT: One at a time, please.
8 **Q.** (MS. DANAHY CONTINUING) And does it compel the Secretary
9 of State to take all of the actions that you've described
10 today?
11 **A.** As I understand it, yes.
12 **Q.** And if your office wasn't taking those actions, it would
13 be in violation of a federal court order; is that right?
14 **A.** I am not aware of what -- or what our office should do.
15 I'm only aware of the administrative rules that are in front of
16 me.
17 **Q.** So you're aware of the consent decree, however.
18 **A.** The consent -- I'm aware of a consent decree, yes.
19 **Q.** And you're aware that the consent decree is a federal
20 court order --
21 **A.** Yes.
22 **Q.** -- that compels the Secretary of State --
23 **A.** Yes.
24 **Q.** -- to take action.
25 **A.** Yes.

Q. And that if you do not take those actions --
A. Correct.
Q. -- you would be violating that order.
A. I would assume so, yes.
Q. You weren't in the courtroom on Tuesday, were you, Mr. Nybakken?
A. I was not.
Q. And you didn't hear Ms. Brown's testimony, did you?
A. I did not.
Q. So you didn't hear her testimony that despite the actions that the secretary has taken that you've described today, members of the Spirit Lake Tribe are still being turned away from the polls because of issues with their ID's. You didn't hear that, did you?
A. I did not.
Q. And you didn't hear her testimony that when she voted in person in 2022, there was no map at her polling place that voters could point to to verify their address. You didn't hear that?
A. I was -- I did not hear that.
Q. Do you have any personal knowledge of whether there were maps in polling places in 2022?
A. It's instructed that all auditors must have their maps available, but I did not hear of any -- any issues where there was not maps available, to my knowledge.

1 **Q.** But you didn't travel to Benson County and --
2 **A.** I did not travel to Benson County.
3 **Q.** -- see if there were maps in a polling place?
4 **A.** I did not.
5 THE COURT: Please, one at a time.
6 THE WITNESS: I'm sorry.
7 MS. DANAHY: I apologize.
8 **Q.** (MS. DANAHY CONTINUING) If there's no maps in the polling
9 place, it'd be pretty hard for Native American voters to
10 utilize that system; is that right?
11 **A.** That particular system, yes.
12 MS. DANAHY: I don't have any further questions.
13 THE COURT: Mr. Wiederholt, any redirect?
14 MR. WIEDERHOLT: None, Your Honor.
15 THE COURT: You intend to release the witness,
16 correct?
17 MR. WIEDERHOLT: Yes, Your Honor.
18 THE COURT: And there's no objection, Mr. Gaber or
19 Ms. Danahy?
20 MR. GABER: No, Your Honor.
21 THE COURT: Thank you. Mr. Nybakken, thank you.
22 Thank you for being --
23 THE WITNESS: Thank you.
24 THE COURT: -- here and for your testimony. You may
25 step down, and you may stick around or you may go as you

please. Your obligation is complete.

THE WITNESS: Thank you.

THE COURT: Thank you. Mr. Phillips.

MR. PHILLIPS: The defense rests, Your Honor.

THE COURT: Very well. Will there be any rebuttal witnesses?

MR. GABER: No, Your Honor.

THE COURT: On behalf of the plaintiff, are there any motions that you wish to make or renew at this time, or would we just go right into closings?

MR. GABER: No, I think we could go right to closings, Your Honor.

THE COURT: On behalf of the defendant, any motions or any of the like?

MR. PHILLIPS: No motions, Your Honor. And we're prepared to move forward with the close as well.

THE COURT: Okay. We've been in here for roughly 45, 50 minutes. We can certainly start. Since there's no jury here, we can maybe relax a little bit in terms of formality. And maybe -- I see that per Judge Senechal's order the parties were each afforded an hour for closing; is that correct? Your understanding, Mr. Gaber?

MR. GABER: That's right. I personally don't plan to take that long.

THE COURT: Okay. Why don't we do this then? Why

1 don't we have the plaintiffs close, see where we land. If we
2 land at break time, we'll take the break. If we don't, we'll
3 proceed with defendants. I don't intend to interrupt either of
4 you during your closings. That's my point, and so the
5 plaintiffs may close, and if it takes a while to get set up,
6 that's just fine.
7 MR. GABER: Thank you, Your Honor. I would like to
8 reserve 15 minutes for rebuttal. Again, I don't think it will
9 actually be that long.
10 THE COURT: Absolutely.
11 MR. GABER: Thank you. I'd like to start by thanking
12 Your Honor and the Court's staff for a very well-run trial and
13 for welcoming us into your courtroom. As well, I would like to
14 thank our opposing counsel, who throughout this case have shown
15 professionalism and courtesy. I'd also like to thank my
16 cocounsel and our fantastic support staff. And most of all,
17 I'd like to thank our clients, the Turtle Mountain Band of
18 Chippewa Indians, the Spirit Lake Tribe, Collette Brown, Wes
19 Davis, and Zachery King for reminding us why we are here.
20 This is a very simple case. The 2021 North Dakota
21 redistricting plan reduced from three to one the number of
22 legislators Native American voters in northeastern North Dakota
23 have the opportunity to elect. This is a textbook case of vote
24 dilution, and it violates Section 2 of the Voting Rights Act.
25 For decades District 9 was contained wholly within

Rolette County, with a 75 percent Native voting-age population. It elected a Native American to the state Senate since 1990 and two Native American-preferred state House candidates.

The 2020 census, which was plagued by an undercount of Native Americans, revealed that District 9 needed to expand its population and, therefore, reach into nearby counties. The legislature could have done this in at least two ways. One option would expand District 9 eastward into nearly 100 percent White Towner and Cavalier Counties. Doing so would drop the district's Native voting-age population by 20 percentage points.

A second option would expand District 9 southward into Benson County, which would unite together the Turtle Mountain Band of Chippewa Indians and the Spirit Lake Tribe, a configuration that would still drop its Native voting-age population, but by 8 percentage points instead of 20.

The next slide shows that this decrease in population has the dilutive effect that we've talked about in this case. The benchmark district is at 74.4 percent NVAP. Option 1 to the legislature, the option it ultimately chose with a 20 percentage drop, and the option proposed by plaintiffs, which would take its Native voting-age population to the national median among such districts and thereby prevent an actual -- or allow an actual opportunity to elect Native American-preferred voters. As I said, the legislature chose

the first option.

The result of that decision, a super majority, 80 percent NVAP district in Subdistrict 9A, with nearby Native American voters fragmented among District 9B and 15, and a state Senate district with an actual electorate that in ordinary electoral circumstances is 60 percent White.

The 2022 election tells the story of this vote dilution. Native American incumbent, Senator Richard Marcellais, was -- lost, defeated by his White opponent. Longtime Native American-preferred state representative, Representative Marvin Nelson, lost in Subdistrict 9B. Native American candidates for the state Senate and the state House in District 15 lost their elections, including Plaintiff Collette Brown in this case.

Only District 9A elected the Native American candidate of choice, Representative Jayme Davis. The region, which has the largest concentration of Native American voters in the entire state, saw its representation in the legislature cut by two-thirds. This is a plain violation of Section 2.

Now, to prove a Section 2 violation, plaintiffs must satisfy the three *Gingles* preconditions. The first, that it is possible to draw a reasonably configured majority-minority district; the second, that the minority population -- here, the Native American voters -- are politically cohesive; and the third, that the White majority usually votes as a bloc to

defeat the Native American-preferred candidates.

Now, it's not disputed in this case that plaintiffs satisfied the first *Gingles* prong. Indeed, as Dr. Hood testified, the enacted plan itself creates a majority-minority reasonably configured district. Plaintiffs have also proposed alternative plans that satisfy *Gingles* 1. With an NVAP around 66 percent, these districts would actually perform to allow Native Americans to elect their preferred candidate.

Now, as Dr. Collingwood testified, the proposed plans are reasonably configured. They are more compact than other districts in the map, and they are more compact than districts that Dr. Hood has previously testified as himself thinking to be reasonably compact in other cases.

And just looking at the plan reveals that it is no different than the configuration of other districts across the state. It respects traditional districting principles. The plan satisfies population deviation requirements. It has similar county splits to other districts in the enacted plan. It splits zero municipalities, and it unites communities of interest, such as the Turtle Mountain trust lands and reservations.

The first demonstrative plan that's shown on the screen has zero precinct splits within its borders, and in total this plan would require changes to a single voting precinct in Ramsey County, minimizing the work and changes

needed to address implementation of a plan like this.

Now, plaintiffs' map performed better than the enacted plan on some measures, admittedly slightly worse on some measures, and they perform essentially the same overall. Indeed, this plan bears no resemblance to the Rorschach test-like plans we've seen in other states where Courts have found problems.

Now, just last week the Supreme Court confirmed in the *Allen versus Milligan* case that this task of assessing *Gingles* Prong 1 is not to be a beauty contest between the plaintiffs' maps and the state's enacted plan. Nevertheless, we would submit that if the Court were to conduct such a beauty contest, the plaintiffs would fair quite well.

I'll turn next to the *Gingles* second precondition, which is about political cohesion among Native American voters. Now, defendants opened their case by conceding that Native American voters in the area in Districts 9 and 15 are politically cohesive and that there is extreme racially polarized voting in that region.

Defendants only argument is that we cannot conduct ecological inference in Subdistricts 9A and 9B because they're too small, there aren't enough voting districts in those districts.

This argument has four problems. First, as Chairman Azure testified in unrebutted testimony, there is political

cohesion between Native Americans voters on both sides of the 9A and 9B divide between the reservation lands and the off-reservation trust lands.

Second, as Dr. Collingwood testified, given the high level of polarization in the district as a whole, it is mathematically impossible that there is not cohesion among Native American voters in 9A and 9B. And although we all had to endure the math exercise yesterday, that established it as well with Dr. Hood's testimony.

He testified that the lowest cohesion rate for the 2022 presidential election that could be mathematically possible in District 9B was 80 -- or 64.8 percent. In District 9A he testified that the lowest possible cohesion in that election among Native American voters was 84.6 percent, clearly well above the level that Courts across the country have found to satisfy the second *Gingles* precondition.

Now, third, if this argument about ecological inference in subdistricts were to be accepted, it would immunize those districts from challenge under the Voting Rights Act and provide an incentive for states to draw small districts with few voting precincts such that they could be dilutive but not challenged under Section 2. That is not the way that the law works.

Fourth, and perhaps most importantly, Dr. Hood ultimately agreed that his own analysis and assumptions in the

Walen case were the same as Dr. Collingwood's and that he too found that Districts 9A and 9B had cohesion among Native American voters. Defendant's arguments -- defendant's counsels' arguments to the contrary are not evidence.

Now, defendant does not dispute that the third *Gingles* precondition, whether White bloc voting usually defeats Native American-preferred candidates, is firmly established in Subdistrict 9B. This means that it is conceded that the enacted plan reduces from two to one the number of state House representatives that can be elected by Native American voters in the region compared to both the benchmark plan and plaintiffs' demonstrative plans. This alone establishes a violation of Section 2.

Now, although defendants attempt to dispute that *Gingles* Prong 3 is established with respect to the full District 9, the evidence is to the contrary. As Dr. Collingwood explained, every category of the most probative elections that the Eighth Circuit set out in its *Bone Shirt* decision establishes White bloc voting that usually defeats Native American-preferred candidates in District 9.

As the slide shows, this is the case for 100 percent of endogenous elections in the district, for 100 percent of the most recent, 2022, elections -- that's eight elections -- and 60 percent for contests across all years featuring Native American candidates. And, again, these are the types of

elections that the Supreme Court, the Eighth -- the Eighth Circuit and Courts across the country have repeatedly held to be the ones that are -- deserve the most weight.

Viewing the 2020 and 2022 elections together and without weighing elections differently, there is a 71 percent defeat rate for Native American-preferred candidates in District 9. And if you combine the 2016 election with those two election cycles, it's a 57 percent rate of defeat.

Dr. Hood's analysis is no different. He analyzed the presence of *Gingles* Prong 3 in District 9 in his January 2023 report for the *Walen* case, which is admitted in this case as Plaintiffs' Exhibit 80. Despite issuing that report two months after the November 2022 elections, he entirely omitted those elections from that report. He testified that this was because he ran out of time, but in the six months since he issued that report, he never supplemented it.

Notably, he submitted this report omitting the 2022 elections after he had already received Dr. Collingwood's report that included those elections and after seeing from that report that the inclusion of those elections in his own analysis would reverse his conclusion with respect to *Gingles* Prong 3 in District 9.

Nevertheless, Dr. Hood testified yesterday that his analysis should be updated to include the 2022 elections; specifically, those elections for the state -- for the state

Senate seat in District 9, for the U.S. Senate, for Attorney General, and for the Public Service Commissioner. Doing so would add to his analysis the probative contests that Courts have set out, an endogenous election, the most recent elections, and two elections featuring Native American-preferred candidates.

Now, Dr. Collingwood's unrebutted testimony shows that Native American-preferred candidates lost each of those elections. And if we add those elections to the -- to the analysis that Dr. Hood conducted, the elections that he selected as the most probative both in his report and on the stand, that yields a 60 percent defeat rate for Native American voters in the full District 9.

The Court can stop its analysis there. The election contest chosen by defendant's own expert as the most probative of White bloc voting in this district show that White voters usually defeat the Native American-preferred candidates of choice. That is without weighing the elections differently, without considering whether some elections have special circumstances that warrant them not being considered as highly as other elections. But even if the Court proceeds further in its analysis, the record shows that *Gingles* Prong 3 is met for District 9.

Now, first, the Court can reject outright Dr. Hood's consideration of District 9A in his *Gingles* analysis. As the

Eighth Circuit -- or Judge Gruender of the Eighth Circuit in his concurring opinion and the district court, I would note, in its decision said, "If the state's approach" -- and this is where South Dakota made the same argument, that we have one district that is a super majority Native population; let's count that, along with the other districts for *Gingles* Prong 3. And lo and behold, Native Americans can elect in over 50 percent of the contests.

Here's what Judge Gruender said. "If the state's approach were correct, packing would be both the problem and the solution; that is, having illegally packed Indians into one district, the state could then point out that Indians are sometimes able to elect their preferred candidate in the packed district."

And the Court saw that that was exactly what Dr. Hood did in Table 1 of his report. He added in District 9A, which had a 100 percent success rate for Native American-preferred voters at that 80 percent Native voting-age population, and then concluded with those 36 contests added in, that most of the time Native Americans won -- Native American-preferred candidates prevailed. But as Dr. Hood himself testified, if you take those elections out of the equation, there is, again, a 60 percent defeat rate among Districts 9 and 9B in his own analysis.

The Court also heard substantial testimony from

Dr. Collingwood, from Chairman Azure, from Chairman Yankton, from Ms. Brown that the 2018 elections were unlike any other election in North Dakota history with respect to Native American turnout. The Court heard from Dr. Collingwood in particular, who has analyzed Native American turnout throughout the country, that he has never seen something like this. The highly unusual 2018 election should not be used as evidence to prevent safeguarding Native American voting rights today.

At the end of the day, both experts selected the contests they deemed most probative of White bloc voting. The results of those elections revealed defeat rates of 60 to 100 percent for Native American-preferred candidates in District 9.

The only difference between the experts, Dr. Collingwood transparently reported all of the possible elections to look at and then analyzed the ones that he deemed to be the most probative to reach his conclusion.

By contrast, Dr. Hood eliminated the contests he found nonprobative at the outset, added four more that he agreed should be added to his analysis, and then testified that if Dr. Collingwood were correct in his math and if those four elections showed the defeat of Native American-preferred voters, then we would be correct, that it's 60 percent defeat rate.

The state cannot cherry-pick and overweigh

nonprobative elections as a means to defeat a *Gingles* Prong 3 showing. That would be contrary to the Supreme Court's precedent and the Eighth Circuit's precedent. Plaintiffs have met their burden of showing the presence of the three *Gingles* preconditions.

Now, even though plaintiffs have satisfied those preconditions, they must also show that the totality of circumstances establishes that Native American voters have unequal access to the political process in the region. And plaintiffs have satisfied that showing during the course of this trial across a host of those Senate Factors that Courts look to make that determination. Indeed, and gratefully so, defense counsel conceded a number of those factors in his opening statement.

The factors are shown on the screen, and the Court is familiar with them. They focus on the history of discrimination, in particular voting-related discrimination; racially polarized voting; the extent of election of Native American candidates in the state and in the region; the effects of discrimination on health and socioeconomic factors, among other non-exhaustive considerations.

There are two that are most important, however, and this is established both by the *Gingles* case and by the Eighth Circuit in its *Harvell versus Blytheville School District* case from 1995. And those are the extent to which the minority

group members have been elected to public office in the jurisdiction and the extent to which the elections in the state or political subdivision are racially polarized. Now, both of these factors are present in this case and are, indeed, undisputed.

The undisputed testimony of Dr. McCool, Dr. Dan McCool, establishes that the election of Native Americans to public office in North Dakota is an extreme rarity. Only two of the 141 state legislators are Native Americans. No state senator, for the first time since 1990, is Native American. No Native American has ever been elected to a statewide office in North Dakota. The presence of racially polarized voting is conceded, and the remaining factors also weigh in the favor of plaintiffs.

Now, there is an undisputed history of discrimination dating back to North Dakota's first Constitution, which required that Native Americans give up their cultural ties in order to vote.

Contemporary discrimination against Native Americans in voting is evidenced by seven lawsuits by Native American -- Native American voters or tribes over the past two decades. Many of these cases are about voting practices and procedures that enhance the opportunity for discrimination and voting, including the use of at-large voting in counties and school districts, voter ID laws that discriminate against Native

American voters by requiring that they have physical street addresses that the state has not assigned to them, and the very case before the Court today.

Not only have Native American voters had to litigate to gain their voting rights, they are today litigating to defend those voting rights in the parallel *Walen* case that's before Your Honor and the other federal judges.

In addition, Dr. Dan McCool testified to a vast gap in poverty rates between Native American and White residents of North Dakota. And Dr. Weston McCool drilled down to the county level in the area specifically under consideration in this case and showed that there are severe disparities in the areas of education, employment, income, broadband access, and healthcare.

Here's how Dr. Dan McCool summarized it. Quote, 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.

Now, the Court has heard a lot of testimony about the responsiveness Senate factor. Most -- the most relevant among that testimony is undisputed. Chairman Azure and Chairman Yankton have testified that they have not heard from their state legislators who were elected in 2022. Chairman Azure

testified that the replacement of Senator Marcellais was a 180-degree turn with respect to the open-door policy the tribe previously had.

The legislature has been unresponsive to the severe loss in revenue caused by the legalization of the e-tab gaming in the state. Collette Brown testified that she goes to the Turtle Mountain legislative representative to get assistance with contacting the legislature on behalf of Spirit Lake. None of this is disputed.

Instead, defendant spent the bulk of his trial presentation faulting the tribes for taking one month to propose a new unified legislative districting plan after the committee's proposal was released.

We spent several minutes tracking the whereabouts of Chairman Azure in the index of the tribal state relations committee meeting transcript, only to find that he was absent during the single mention of subdistricts by a private citizen and member of a different tribe. That meeting at Turtle Mountain, the one shown on the screen here, was one month before the user-friendly census data was released and one day after the nonuser-friendly data was released. The topic of redistricting, as the Court heard, was, quote, "slipped onto the agenda that morning by the legislative committee."

Not only does defendant get the facts wrong, but this myopic defense misses the point of the Senate Factors, and if

adopted, would add an unwritten requirement into Section 2 that plaintiffs in Section 2 cases must first exhaust their legislative lobbying efforts before suing to vindicate their voting rights. That is not the law.

The state's justification for its plan is tenuous, at best. The Turtle Mountain subdistrict was drawn apparently in response to requests from Spirit Lake that it receive a subdistrict, which it did not; that MHA Nation receive a subdistrict, which it did; and that Standing Rock receive a subdistrict, which it did not. Turtle Mountain never requested the subdistrict it was given.

And when Turtle Mountain and Spirit Lake came together to request a different configuration, the legislature said it was too late. They said it was too late the same day that they adopted different changes proposed by other legislators to the legislature plan.

Finally, consider this: Since 2010, the Native American population in North Dakota has grown both in real numbers and as a share of the state's eligible voters; yet, because of the configuration of Districts 9, 9A, 9B, and 15, Native American voters saw their electoral influence decline from 2.1 percent of the legislative seats to just 1.4 percent.

Now, plaintiffs do not seek proportional representation in this case. As this graphic shows, a proportional plan would have three Native American at-large

state Senate districts with a total of nine legislators elected to the state legislature, as shown by the gray figures next to the little blue people on this slide. Plaintiffs' proposed plan would not even bring them halfway to proportionality.

Instead, what we seek is to reverse the decrease in Native American electoral opportunities caused by the 2021 redistricting, which occurred at the same time the Native American population increased. Plaintiffs in this case have proven their right to an equal opportunity to vote in non-dilutive districting configuration.

Thank you, Your Honor. And I reserve the balance of my time for rebuttal.

THE COURT: Thank you, Mr. Gaber.

Mr. Phillips.

MR. PHILLIPS: Your Honor, I don't intend to speak long, but I could still use a brief break, if that's okay.

THE COURT: I think that would probably benefit all. It's 10:20. Let's come back at -- is 10:40 enough time, Mr. Phillips?

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Let's come back at 10:40. We're in recess.

(Recess taken from 10:21 a.m. to 10:43 a.m.)

THE COURT: Mr. Phillips.

MR. PHILLIPS: Yes. Thank you, Your Honor.

Your Honor, you've been here for several days with us and heard the testimony, seen the exhibits, and so I'm not going to rehash all of the evidence today. I just want to point out a few things for your consideration.

First of all, Your Honor, I will point out that the entire legislative record has been admitted into evidence, and it's Defendant's Exhibits 300 through 415 for the Court's consideration. Lots of witnesses testified, but not all of the legislative record was testified to specifically. I would encourage the Court to consider all of that evidence in crafting an order in this case.

And ultimately, Your Honor, what does the legislative record show? It shows that the tribes and Native American individuals throughout the process requested individual reservations to be treated as communities of interest and requested the state to craft subdistricts, where possible, around reservations to benefit Native Americans.

By way of example, the August 17th meeting of the Tribal and State Relations Committee, Nicole Donaghy, executive director of the North Dakota Native Vote, asked for subdistricts, indicated that Turtle Mountain is its own community of interest.

August 26, 2021, meeting of the Redistricting Committee, Collette Brown testified on behalf of the Spirit Lake Tribe, asked for subdistricts, indicated that Spirit Lake

Tribe is a community of interest.

September 1, 2021, the meeting of the Tribal and State Relations Committee, Douglas Yankton testified, asked for subdistricts.

September 8, 2021, in Fargo, Rick Gion, the director of North Dakota Voters First, a partner of North Dakota Native Vote, asked for a subdistrict around Turtle Mountain Reservation.

September 15, 2021, Collette Brown testified again on behalf of Spirit Lake Nation, asked for a subdistrict for Spirit Lake despite the census data not supporting that. When asked if it mattered that the census data did not show a high enough population of Native Americans to assist them in electing their candidate of choice, she didn't provide a response. She deferred to Matt Campbell.

He also testified at that meeting, saying he represented Spirit Lake. He also asked for subdistricts, also asked for reservations individually to be treated as communities of interest and said that he'd provide more data to the committee, but the record doesn't reflect any updates of additional data.

September 15, 2021, meeting of the Redistricting Committee, Nicole Donaghy, executive director of North Dakota Native Vote, asked for subdistricts, asked for reservations to be treated as communities of interest.

Lots of committee meetings, Your Honor, with a consistent theme, consistent testimony provided not only by the tribes, but individual Native Americans discussing and providing to the committees their input on what mattered to them.

September 28 and 29, 2021, the Redistricting Committee holds its last public meeting as an interim committee. It then starts working on a proposed map, proposed legislation, and a memo to legislative management.

A month later, on October 29, 2021, Governor Burgum issues an executive order calling a special session of the legislature. That's to begin on November 8. And, Your Honor, at this stage there are still no corrections to any testimony in the legislative record. Still nobody has come forward saying the Turtle Mountain Reservation, the Turtle Mountain Tribe and the Spirit Lake Tribe want to be treated as a single community of interest, not any testimony whatsoever.

The next day, November 1, 2021, the Redistricting Committee issues its final report with proposed legislation, taking into account all of this information that's been provided to it during the course of months.

On that same day, Turtle Mountain and Spirit Lake for the very first time send a letter to the governor and to the legislative members requesting to be treated as a single community of interest in a single district, the first time this

request is ever made. Still no legislative testimony ever requesting or establishing this, though.

November 8, 2021, a week later, the Joint Redistricting Committee meets for the first time in the -- in the special session of the legislature. This is the very first time that Turtle Mountain and Spirit Lake ever enter legislative testimony making the request that they're asking this Court to order today, essentially the creation of a single district with both reservations.

During that meeting Senator Marcellais sought an amendment, and he indicated in that meeting that he was asked only a week before to propose the amendment. During that meeting he vaguely discussed some shared interests between the two tribes. Again, this is the very first legislative testimony in any meeting at all where somebody has suggested this or requested this.

During that same meeting, Douglas Yankton, the former chairperson of the Spirit Lake Tribe, testified. He didn't add any details, by the way, to the discussion of the shared interests between the two tribes. He simply deferred to what Senator Marcellais had said.

Jamie Azure also testified at that meeting, chairperson of the Turtle Mountain Band of Chippewa Indians. He also didn't add to Marcellais's discussion of the shared interests between the two tribes. He simply deferred to that

testimony.

During that meeting Chairman Azure acknowledged that the reason that this plan was delayed was the two tribes couldn't come together and decide what they wanted to request from the state.

Later that same day, so the same day that the very first legislative testimony was entered on this, the North Dakota House of Representatives met for its scheduled floor debate on the final legislation, the very same day. It held the floor debate, and it ultimately passed the legislation. Your Honor, the request could not have been more last-minute.

The next day the Senate meets, has its scheduled floor debate and passes the legislation. And then the day after that Governor Burgum signs it, and it becomes law when entered by the Secretary of State.

Your Honor, for months the legislative committees gather testimony on the concerns of tribes, on the concerns of individual Native Americans and of other citizens in the state of North Dakota. And I would ask the Court to consider that as part of its analysis of the totality of the circumstances in this case. The state did undertake significant efforts to hear and consider the concerns of Native American citizens and the concerns of the tribes over the course of months.

Your Honor, the redistricting process is a Constitutional duty of the state legislature. This Court

obviously plays an important role in enforcing the Voting Rights Act and protecting rights under that act. But it does not mean that the Court should focus only on the testimony it heard in court and entirely ignore the legislative testimony.

The legislative record is replete with testimony, some of which is from the same individuals who testified in court, establishing that reservations are individually a community of interest, establishing that the creation of subdistricts around reservations is something that was desirable to the tribes and in -- and to individual Native Americans.

None of the trial testimony cancels out the legislative testimony. The state could rely on that legislative testimony, and, in fact, it had to rely on that legislative testimony and so can and should this Court.

Ultimately, Your Honor, all of that said, in many ways this case rises and falls on the application of the *Gingles* factors. Dr. Hood testified at length regarding the *Gingles* factors in his testimony. I'll point out, Your Honor, that Dr. Hood testified that he analyzed the exact same races as Dr. Collingwood in the reports in this case. Dr. Hood analyzed the same races, including the 2022 races.

Opposing counsel has tried to conflate the reports in this case with the reports in the other redistricting case, the *Walen* case. Opposing counsel has tried to make arguments and

do back-of-the-napkin math on how he thinks the *Walen* report impacts the outcome in case.

Your Honor, Dr. Collingwood didn't do a comparison of Dr. Hood's *Walen* report with Dr. Hood's testimony in this case and reach any conclusions. These are simply math exercises done by opposing counsel, nothing in evidence in this case. The experts in this case each issued expert reports and analyzed the same races in their reports. The Court shouldn't conflate the expert testimony in this case with questions and arguments of opposing counsel.

Ultimately, Your Honor, it's our position that Dr. Hood is a more reliable witness who used more sound methodology in analyzing the elements of this case. For example, Dr. Hood relied only on ecological inference; whereas, Dr. Collingwood did not for the Subdistricts, 9A and 9B. Your Honor, sometimes there just isn't enough data to reach a conclusion in a small area. It doesn't mean we get to make up the results and just assume what those results would be if there was data.

It's our position, Your Honor, that District 9 performs better on traditional redistricting criteria as compared to the demonstrative maps, as testified to by Dr. Hood. The state should not be forced to adopt an inferior map when there's been no violation of the Voting Rights act.

Dr. Collingwood's analysis was flawed. He included

1 races in his analysis that did not count in his final results.
2 He ignored races using a post hoc probativeness analysis.
3 Additionally, Your Honor, he assigned less weight to
4 the elections in 2018, a year with higher Native American voter
5 turnout than in other recent years, even though, according to
6 Dr. Hood, this establishes that Native Americans are capable of
7 turning out in sufficient numbers to elect their candidate of
8 choice. Dr. Collingwood says, "On that year we'll just exclude
9 those results." I would urge the Court not to do so, as was
10 the opinion of Dr. Hood.
11 Dr. Collingwood admitted that opportunity to elect
12 means more often than not, 51 percent, essentially, Your Honor.
13 But Dr. Collingwood said he doesn't apply a mathematical
14 formula to his analysis ultimately.
15 Dr. Hood did provide the percentage of elections
16 analyzed in which Native American candidates of choice won the
17 election, and he found that that was a majority of the time.
18 Dr. Hood showed his math on that, and Dr. Collingwood did not.
19 At the end of the day, Your Honor, the Voting Rights
20 Act grants to minorities an opportunity to elect their
21 candidates of choice. It is not a guarantee of election
22 outcomes, and it certainly doesn't guarantee 91 to 93 percent
23 chance of Native Americans electing their candidate of choice.
24 I would request that the Court deny the plaintiffs' requested
25 relief in its entirety.

Thank you, Your Honor.

THE COURT: Thank you Mr. Phillips.

Mr. Gaber?

MR. GABER: Thank you, Your Honor.

I want to start on the responsiveness point, and apologize for my very large laptop on the podium.

THE COURT: That's all right. No worries.

MR. GABER: And with respect to responsiveness -- and the Court heard, as I said, a lot of testimony about that one Senate factor this week -- the Eighth Circuit, in its en banc decision in the *Harvell* case, said that a finding of responsiveness is, quote, "insufficient to counter the other factors in the totality of circumstances." That's 71 F.3d at 1391.

Now, from my perspective, the evidence that the Court heard on the responsiveness question this week is in the plaintiffs' favor. But even if it were in the defendants' favor or neutral, it would not change the overwhelming evidence of vote dilution and an equal opportunity for electoral outcomes presented in this case. That's Number 1.

Number 2, Mr. Phillips mentioned the question of political cohesion within Districts 9A and 9B and said that Dr. Hood testified that ecological inference has to be conducted. The charts that we were looking at during the -- during Dr. Hood's testimony and his cross-examination were his

charts from his report in the *Walen* case where he applied the assumption that the full district's EI analysis applies to both of the subdistricts. That's Dr. Hood's expert opinion that he testified that he stood by when he was on the stand yesterday.

He testified that he agreed with Dr. Collingwood that Native American voters in both of those subdistricts are politically cohesive. In fact, it would be impossible to conclude otherwise when you see results showing 90 percent Native American cohesive vote preferences in the full district and where the Native American population is clumped together in one part of that district. The state cannot overcome that by drawing a line through the middle of that population.

We also heard compelling and unrebutted testimony from Chairman Azure, the person who testified here who knows best the community, and he testified that there is no difference in the political viewpoints expressed by Native American voters on either side of that line.

This is not a criminal case. This is not a beyond a reasonable doubt standard. There is well -- sufficient evidence in the record to show by a preponderance of the evidence that both -- *Gingles* 2 prong is met in both subdistricts. And the fact that both the plaintiffs' and the defendant's expert agrees is alone sufficient on that score.

Finally, I want to address the *Gingles* 3 issue and Mr. Phillips' argument that Dr. Collingwood presented all the

elections and then analyzed a subset of them. I would think that what we would most want from an expert is to show all of the available information and then say, "Here are the elections that are the probative ones. Here's what I'm doing. I'm not putting due weight -- undue weight on older elections. I'm not putting undue weight on elections in which there are atypical circumstances where you show the atypical circumstances, and I'm applying greater weight to the categories that the Supreme Court has said are due greater weight."

The criticism is that Dr. Collingwood did not leave those elections out of his report in the first instance. That's what we heard from Dr. Hood yesterday, that his approach is to just disregard those elections entirely and not show them to the Court or to opposing counsel and instead decide upfront what are the probative ones. The difference, of course, is that under one instance there's transparency with the parties and the Court about what is being analyzed.

Now, it was not my math that showed that Dr. Hood's *Walen* report -- which is an exhibit in this case -- when the 2022 elections that he identified are added to it, show a 60 percent cohesion -- or 60 percent defeat rate for Native American-preferred candidates in District 9. That is the unrebutted testimony, the only evidence in the record as to the results of those 2022 elections, which, by the way, are on the Secretary of State's website and can be easily determined by

the precincts included in the district. There is no dispute that *Gingles* Prong 3 is satisfied, and it is clear from the record in this case.

With that, Your Honor, I rest.

THE COURT: Thank you, Mr. Gaber.

Counsel, I will be brief in my remarks, but we will take a few minutes here. In the final pretrial conference on May 30th, Judge Senechal advised the parties that I would inform you about timing for submission of proposed findings with regards to the trial. And I think what -- what would be reasonable would -- by my calendar, would be June 30th. That would be 15 days from now. If that is something that the parties don't believe is reasonable, I could be persuaded to go to July 7th. Mr. Gaber?

MR. GABER: Your Honor, I think that's reasonable, and particularly in light of the concerns that the state has raised about ensuring that this is decided quickly.

THE COURT: Thank you. Mr. Phillips?

MR. PHILLIPS: Agreed, Your Honor, and for the same reasons. It is urgent that this case is decided quickly.

THE COURT: Okay. So June 30, by June 30th then, and that will be -- that would be satisfactory to the Court.

Counsel, comment was made about this being about the *Gingles* factors or the three *Gingles* factors and then totality, however you want to slice it. I would certainly -- in your

1 findings -- in your proposed findings, feel free to elaborate
2 on *Gingles* 3. I think that that would be helpful to the Court.
3 And there's been some other comments that have been
4 made at trial that I just want to address, and then I feel
5 there's something that the Court ought to say about this, and I
6 don't do this very often.
7 But, first of all, there's been several apologies, I
8 think, on both sides with regard to the math and the statistics
9 and the like being presented. I have no disdain for that. My
10 first professional job was as a professional statistician for
11 the USDA. I believe I have an undeclared minor in statistics,
12 and I love the numbers, and so -- so there's no need for that,
13 but I appreciate that.
14 Counsel, this is a voting rights action -- Voting
15 Rights Act case. It's a VRA case, and it's unwise for the
16 Court to speculate on what the parties agree and disagree upon;
17 although, the record, I think, and the trial have made it
18 clear.
19 I think if there are two things that can -- that the
20 parties agree upon -- if there's one thing that the parties
21 agree upon, it's that the tribes in this case -- and I'm going
22 to say the tribes throughout the state of North Dakota are
23 desirous to have representation at the state and local
24 government level, and I don't think either side disagrees with
25 that, that they are desirous to have that, and I don't think

either side disagrees with the idea they deserve it either.

You know, there was comments by counsel that proportionality is not required under the Voting Rights Act, and I think there was a comment and a dissent in the Alabama case that -- where -- it might have been Justice Thomas who said that proportionality is not required under the Voting Rights Act. And, indeed, if it were, that would not be Constitutional, something to that effect.

But it does bear mention in this particular case that the plaintiffs in this case are individuals and the Spirit Lake Tribe and the Turtle Mountain Tribe, and there was testimony about the number of members in the tribe. If you -- if you go to the Spirit Lake website and the Turtle Mountain website, Spirit Lake, there's somewhere around 7,560 members, with roughly 2,070 living on the reservation. Turtle Mountain, there's roughly, 3,000 -- 30,722 members with 9,700 living on the reservation.

And Turtle Mountain, counsel, is an area -- as testified by Chair Azure, it's -- it's two townships. It's a 6-by-12 area. We have, what, 53 counties? It's two townships. It's a small area, but it is a very important area particularly with regards to the analysis in this case.

Now, in North Dakota, according to the 2020 Census, has 779,000 people, give or take. And according to the 2020 census, 5.7 percent are American Indian or Alaska Native. Now,

this is where the numbers get a little strange, so, counsel, forgive me if I state numbers that are not as you see them. But, you know, if you go by 5.7 percent of the 779,000 people, that means there's 44,000 people.

Now, depending on what website or source you go to, those numbers are different, but I don't think there's any question here that there's a significant Indian population in North Dakota and that it's in that 5.7 percent area that the North Dakota legislature -- Mr. Gaber, in his presentation, indicated that if there were proportionality, there would be nine members. By my numbers, if there were proportionality, there'd be eight. It doesn't matter. It's a distinction without an inference.

The point is there are 47 senators, there are 94 representatives, and there are not a proportionate number of Native Americans or Indians in the legislature. Again, this is a voting rights action -- a Voting Rights Act action, and proportionality is not what's required, but you can understand that with regards to the perspective of the tribes, just by going to, what does state and local government do.

Dr. McCool spoke to education, employment, income, broadband, healthcare. As somebody who used to instruct state and local government at the UND Law School, I can tell you that that's accurate, but, you know, what does state and local government do? They -- they cover roads. They cover schools

and education, local law enforcement, drug task force funding. I used to chair the Attorney General's Drug and Violent Crime Board, and we awarded out task force money accordingly.

Now, it's nice to see that the State of North Dakota is addressing Indian Child Welfare. When I was a new attorney, ICWA was a new federal act, and that addresses local basic needs. It addresses child sexual abuse, child abuse, and basic Indian child welfare.

There are programs addressing poverty and education and public safety and emergency services and first responders and much, much more there on the reservations, and that's what state and local governments do. And what the tribes are seeking is some representation within the system.

I once knew a young United States attorney back in 2008, who came and met with me when I was Grand Forks state's attorney, and that young United States attorney probably, just like me, had more hair back then. But we met, and he said, you know, "Hey, Welte, for as long as I'm USA, we're going to try to focus on local, state, and federal government responsiveness to the reservations."

And the issue of communication and responsiveness of government at all levels to the tribes has existed longer than any of us in here have lived and is going to exist longer than any of us in here exist, and it has to be addressed. Whether the -- whether the locally elected people are Native, whether

they are -- whether they are White, whether they are some other race, it's got to be addressed.

And to that end, counsel, I do want to say I understand the issue of responsiveness being a factor -- one of the Senate factors, but I also think that the record is replete with evidence and testimony that the state -- that there were members of the state legislature who overtly said, "Hey, we need to comply with VRA. We need to comply with it or we're going to get sued." And I'm not making a find on responsiveness just based on that statement here. I'm just saying that this is something that's out there.

I bring that up because I want to commend, truly, the civility between the parties in this. It adds to the ability of the Court to efficiently analyze what's happening here in a Voting Rights Act contest, and all of you, individually and collectively, should be commended for your civility and your professionalism in doing this and in representing your clients, because I can tell you as an Article III judge, if every case were as civil as this has been and as professional and as well tried, my job would be even easier than it is, and I think justice would be done far more efficiently than it is done in this court.

Regardless of what happens in this case, please remember for your clients that the need for the tribes to have representation at the state and local level, notwithstanding

the fact that they are a nation unto themselves, is so important to what has to be a result of litigation like this and future cases like this. There has to be representation at the state and local government level.

And so for Chair Azure and Former Chair Yankton, if they don't hear from their legislators, I trust that they will -- they'll make sure that their legislators hear from them. I know that -- with regards to the local legislators that I know in my own district, that they want to hear as well from the tribes.

So I think that that is all I have to say. I just want to thank the parties, and the Court will receive the proposed findings from the parties and will anxiously anticipate and await them. This has been a very well-tried case, and it is a difficult case, and the Court takes that charge very, very seriously in making its determination.

So having said that the Court will take this matter under advisement, and the Court will issue its ruling as soon as possible in this matter.

Thank you, all. And we are adjourned.

(Proceedings concluded at 11:15 a.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 15th 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