

EXHIBIT 2

Initial Objections

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa)
Indians, Spirit Lake Tribe, Wesley Davis,)
Zachary S. King, and Collette Brown.)

Plaintiffs,)

v.)

Alvin Jaeger, in his official capacity as)
Secretary of State of North Dakota.)

Defendant)

**OBJECTION TO SUBPOENAS TO
PRODUCE DOCUMENTS**

I. INTRODUCTION

Plaintiffs Turtle Mountain Band of Chippewa Indians, Spirit Lake Tribe, Wesley Davis, Zachary S. King, and Collette Brown issued *Subpoenas to Produce Documents* upon North Dakota State Senators Ray Holmberg, Nicole Poolman, and Rich Wardner, and North Dakota State Representatives Bill Devlin, Mike Nathe, and Terry B. Jones, commanding them to produce protected documents by October 29, 2022.

Plaintiffs also issued a *Subpoena to Produce Documents* upon North Dakota Deputy Attorney General Claire Ness, formerly a member of the Legislative Council staff, commanding her to produce protected documents by October 30, 2022.

Because there are important privilege and public policy concerns affected by the subpoenas, the North Dakota Legislative Assembly and the respondents hereby submit this written objection to Plaintiff's *Subpoenas to Produce Documents*, pursuant to Federal Rule of Civil Procedure 45(d)(2)(b) and 45(e)(2).

II. FACTS

On September 29, 2022, Plaintiffs issued six *Subpoenas* upon the North Dakota Legislators.¹ These *Subpoenas* all commanded production of the following documents:

1. All Documents and Communications regarding Native Americans and/or Indian Reservations and the 2021 Redistricting Process or Maps.
2. All Documents and Communications regarding tribal input, including regarding written submissions or verbal testimony from tribal representatives, with respect to the 2021 Redistricting Process or Maps.
3. All Documents and Communications regarding redistricting criteria for the 2021 Redistricting Process or Maps.
4. All Documents and Communications regarding District 4, District 9, or District 15, and, where applicable, any subdistricts of these districts, including documents and communications regarding the applicability of the Voting Rights Act to these districts and subdistricts.
5. All Documents and Communications regarding trainings provided to legislators in preparation for or as a part of the 2021 Redistricting Process.
6. All Documents and Communications reflecting the identity of map drawers in the 2021 Redistricting Process.
7. All Documents and Communications related to racial polarization or demographic studies conducted by the Redistricting Committee or Legislature as a part of or in preparation for the 2021 Redistricting Process.

On September 30, 2022, Plaintiffs served a *Subpoena* upon Deputy Ness, making an identical command for production of documents relating to the seven topics listed above.

III. LAW AND ARGUMENT

The North Dakota Legislators and Deputy Ness object to these *Subpoenas to Produce Documents*, because they are unduly burdensome, and because they request documents and communications that are protected by privilege.

A. Plaintiffs' *Subpoenas* are Unduly Burdensome

First, the *Subpoenas*' command is unduly burdensome. It requests the respondents to provide documentation that is readily available to the Plaintiffs online. Both

<https://ndlegis.gov/assembly/67-2021/committees/interim/tribal-and-state-relations-committee> and <https://ndlegis.gov/assembly/67-2021/committees/interim/redistricting-committee> contain the documents and communications responsive to Plaintiffs' *Subpoenas*. These sites are readily available to the public, and contain not only all of the documentation presented to the committees, but also video recordings of the Redistricting Committee meetings and Tribal and State Relations Committee meetings at issue in the case.

Specifically, the website for the Redistricting Committee is directly responsive to Plaintiffs' requests. It contains links to proposed maps, including those proposed by Senator Holmberg, Senator Poolman, Representative Devlin, and Representative Nathe (see request No. 6). It includes video recording of meetings which include training (see request No. 3 & 5), and information regarding demographics (see request No. 7). Further, the videos and meeting minutes reflect not only public deliberations by legislators, but also testimony and communications from interested parties (see request No. 1, 2 and 4). These publicly available documents and communications are readily available for Plaintiffs to access at any time.

In addition, Plaintiffs' request is unduly burdensome because they do not allow the respondents a reasonable time to comply. See Fed.R.Civ.P. 45 (d)(1) and (3)(A)(i) and (iv). To the extent there are non-website-accessible documents available, they may consist of communications between legislators, staff and interested parties and constituents. The vast majority, if not all, of these documents are privileged. To the extent there are documents that are not privileged, less than 30 days response time is inadequate to sift through documents and communications and determine what is responsive and (1) not already available to plaintiffs via

¹ The North Dakota Legislators were served on different dates: Sens. Holmberg and Wardner on Sept. 30, Rep. Nathe on Oct. 1, Sen. Poolman on October 6, Rep. Devlin on Oct. 7, and Rep. Jones on Oct. 6 or 7.

the legislature's website, and (2) not protected by privilege. See Pointer v. DART, 417 F.3d 819, 821 (8th Cir. 2005).

B. Plaintiffs' *Subpoenas* Request Documents and Communications Protected by Privilege

The respondents further object because the *Subpoenas* request documents and communications that are protected by legislative privilege, deliberative process privilege, and attorney-client privilege, as well as communications that are work product. See Fed.R.Civ.P. 45(d)(3)(iii).

The documents and communications are protected by legislative privilege. Compare U.S.C.A. Const. Art. 1, § 6, cl. 1 ("The Senators and Representatives....and for any Speech or Debate in either house, they shall not be questioned in any other Place.") with N.D. Const. Art. IV, § 15 ("Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings."). Legislative privilege protects state legislators from producing documents in certain cases. Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections, No. 11 C 5065, 2011 WL 4837508, at *7 (N.D. Ill. Oct. 12, 2011). Legislative privilege "protects documents 'created prior to the passage and implementation [of a bill] that involve opinions, recommendations or advice about legislative decisions between legislators or between legislators and their aides.'" Id. at *9. Further, the North Dakota Century Code protects legislative work product and communications. See N.D.C.C. § 44-04-18.6. The documents and communications sought by Plaintiffs are either readily available online, or are believed to fall into this category – documents and communications that involve opinions, recommendations, or advice about legislative decisions between legislators and other legislators or their aides. They are protected by legislative privilege, and by the protections of N.D.C.C. § 44-04-18.6.

The documents and communications are also protected by the deliberative process privilege, which protects “the legislative decision-making process,” and “the confidentiality of communications with the office-holder involving the discharge of his or her office.” See Doe v. Nebraska, 788 F.Supp.2d 975, 984 (D. Neb. 2011). See also, Brandt v. Rutledge, No. 4:21CV00450 JM, 2022 WL 3108795, at *1 (E.D. Ark. Aug. 4, 2022), Shirt v. Hazeltine, No. CV. 01-3032-KES, 2003 WL 27384631, at *2 (D.S.D. Dec. 30, 2003). The materials requested by Plaintiffs are pre-decisional and deliberative, invoking the deliberative process privilege.

Finally, any communications between Legislative Council staff and members of the legislature are protected by attorney-client privilege (Fed. R. Civ. P. 26(b)(3)) and/or constitute work product. See City of Greensboro v. Guilford Cnty. Bd. of Elections, No. 1:15CV559, 2016 WL 11660626, at *5-6 (M.D.N.C. Dec. 20, 2016).

IV. CONCLUSION

The short timeframe between service of the subpoenas and the response date prevents the respondents from having adequate time to review all non-publicly available information and prepare a privilege log. Moreover, it is believed the vast majority of non-publicly available documents are subject to the privileges addressed above. If Plaintiffs request documents beyond what is available on the Legislature’s website, the respondents will require additional time to review the documents and communications in their possession to prepare a privilege log and / or to provide additional documents. For these reasons, the respondents object to the subpoenas.

Dated this 14th day of October, 2022.

SMITH PORSBORG SCHWEIGERT
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Representatives Bill Devlin, Mike Nathe,
and Terry B. Jones, and Deputy Attorney
General Claire Ness.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2022, a true and correct copy of the foregoing **OBJECTION TO SUBPOENAS TO PRODUCE DOCUMENTS** was served upon the following:

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