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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES)
)
)

Case No. 4FA-11-2209CI

OBJECTION OF *AMICUS CURIAE* FAIRBANKS NORTH STAR BOROUGH TO THE AMENDED PROCLAMATION PLAN

The Fairbanks North Star Borough ("FNSB") hereby objects to the Amended Proclamation Plan filed by the Alaska Redistricting Board on April 11, 2012 ("Amended Plan"). While the Board has made changes to the original Proclamation Plan, the Amended Plan repeats the many of same problems and it includes entirely new constitutional violations. Further, the Board still has not complied with the *Hickel* process set forth by the Alaska Supreme Court.

FNSB, initially as a plaintiff and then as *amicus curiae*, participated in the challenges to the June 2011 Proclamation Plan, focusing on the Board's failure to comply with *Hickel* and the Voting Rights Act ("VRA"); on the obvious lack of socio-economic integration in HD 38; and, on the failure to place the excess population of FNSB into one district, among other errors that the Board committed.[1]

In the new plan, the Board again places 5,756 FNSB residents, the majority of which are in Ester and Goldstream, in a house district that extends to the Wade-Hampton communities on the Bering Sea.[2] The balance of the excess population is

[1] *See* FNSB's Complaint in the Nature of an Application to Compel Redistricting Board to Correct Redistricting Errors and Brief of Amicus Curiae Fairbanks North Star Borough.
[2] Exhibit A, p. 14 of 96. The exhibits referenced in this Objection are those included with the Alaska Redistricting Board's Notice of Compliance With Order of Remand and Request for Entry of Final Judgment.

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then distributed among the 5 remaining FNSB house districts.[3] Instead of correcting errors, the Board repeats the same constitutional violations, and adds new ones: the excess population of FNSB is not placed into a single district, Ester and Goldstream residents are separated from FNSB and placed into a district that is not socio-economically integrated, the FNSB districts are intentionally overpopulated, and incumbents that represent FNSB voters are paired when the Board specifically worked to ensure incumbents in other areas of the state were not, all of which works to dilute the effectiveness of FNSB voters.

I. The Board failed to comply with the *Hickel* process set forth by the Alaska Supreme Court.

In its Order dated March 14, 2012, the Alaska Supreme Court provides:

> "The *Hickel* process provides the Board with defined procedural steps that, when followed, ensure redistricting follows federal law without doing unnecessary violence to the Alaska Constitution. The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socio-economic integration; it may consider local government boundaries and should use drainage and other geographic features wherever possible. Once such a plan is drawn, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is non-compliant, make revisions that deviate from the Alaska Constitution when deviation is 'the only means available to satisfy the Voting Rights Act requirements.'"

The record indicates that the Board never intended to fully comply with the *Hickel* process[4] that the Court requires. The Board's attorney described the Supreme Court's requirement that it comply with *Hickel* mandate as "form over substance."[5] The Board did not sit down and attempt to draw all 40 house districts in compliance with article VI,

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[3] *Id.*
[4] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992).
[5] See video of Michael White, March 27, 2012, retrieved from http://whatdoino-steve.blogspot.com/2012/03/redistricting-board-attorney-responds.html.

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section 6, which is what the Court in fact ordered. Instead, the Board started with 36 of the districts it had previously drawn and which were part of the Proclamation Plan which was invalidated because it focused on VRA requirements when it was drafted. The Board called these 36 districts the "*Hickel* template" and judged all other plans by its template.[6] The Board therefore focused on four undrawn election districts that needed to be created.[7] By doing some fuzzy math and determining that it did not therefore have enough population to draw these four districts, it determined it needed to take population from an urban area of the state.[8] In other words, the Board backed itself into the corner of having limited options available to create a constitutional plan. The fundamental flaw here is that the Board assumed that if a district was unchallenged and not invalidated by the court, that it was constitutional, and that it did not have to make any efforts to create a plan from the inception that considered only Alaska Constitutional requirements. This narrow view of the process flat out ignores that other configurations are possible, and that most of these districts were originally drawn with a focus on the Voting Rights Act, not the Alaska Constitution.

The flawed process followed by the Board led it to its self-fulfilling prophecy that only the plan which took population from FNSB was constitutionally compliant. The other plans arguably look as if they were drawn to prove a point rather than a good faith effort at compliance; for example, Hickel 003 took population from the very urban areas of Anchorage (Kincaid, Lake Spenard, and Inlet View) and put it in with the Bering Sea

[6] Exhibit A, p. 4 of 96.
[7] *Id.*
[8] Exhibit 1, p. 4 of 96, para. 4.

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communities, ignoring that there were more rural options available even in the Anchorage area.[9]

The result of the Board not following the *Hickel* process is that it still cannot show that serious violations of the Alaska Constitution are "the only means available" to comply with the VRA. The Board cannot meet its burden of proof to show the violations set forth below were for legitimate, nondiscriminatory purposes.

II. The Amended Plan unnecessarily dilutes the effectiveness of FNSB voters.

The Amended Plan promulgated by the Board repeats the same pattern of targeting FNSB and diluting the effectiveness of FNSB voters, including the following errors:

1. House Districts 1 through 5 range in percent deviation from ideal from 3.12% to 3.72%.[10] Comparably, deviations in Anchorage districts range from 0.64% to 1.82%, with only two of the districts actually over 0.99%.[11] In the Mat-Su region, deviations range from -4.95% to 0.4%.[12] The Board intentionally overpopulated the Fairbanks' districts based on its erroneous belief that this meant it only split the excess population of FNSB once.[13] The Board therefore failed to make any attempt to minimize deviations, which was clear error.[14] The result is that FNSB residents comprise a total of 5.3 house districts instead of the 5.5 districts to which they are entitled.

2. It is plainly obvious that FNSB does not have connections with communities on the Bering Sea. In fact, there are not even air connections between

[9] Exhibit E, p. 4 of 6.
[10] Exhibit A, p. 68 of 96.
[11] *Id.* See also Exhibit A, p. 19 of 96.
[12] *Id.* See also Exhibit A, p. 21 of 96.
[13] Exhibit A, p. 14 of 96.
[14] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002).

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FNSB and the majority of the communities in new HD 38. It is impossible for a legislator to represent the interests of both groups. The votes of the Goldstream and Ester residents have essentially been thrown out. This same problem exists in the new HD 37 by combining the Aleutians with Bethel. This is not just a violation of the principle that districts must be comprised of relatively integrated socio-economic areas, but also denies voters of the right to an equally powerful vote[15]:

> In addition to preventing gerrymandering, the requirement that districts be composed of relatively integrated socio-economic areas helps to ensure that a voter is not denied his or her right to an equally powerful vote.
>
> [W]e should not lose sight of the fundamental principle involved in reapportionment—truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus, the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests. *Groh v. Egan,* 526 P.2d 863, 890 (Alaska 1974) (Erwin, J., dissenting).

3. The conclusion that "using population from the FNSB creates no proportionality issues" is patently wrong.[16] The Board still splits the excess population of the FNSB. Instead of breaking the excess into two districts, it just distributed a portion of the excess throughout the five remaining districts. This still does not place the excess population into a single district and violates the anti-dilution rule in *Hickel*[17]:

> Dividing the municipality's excess population among a number of districts would tend to dilute the effectiveness of the votes of those in the excess population group. Their collective votes in a single district would speak with a stronger voice than if distributed among several districts.

[15] *Hickel v. Southeast Conference*, 846 P.2d at 46.
[16] Exhibit F, p. 3 of 40.
[17] *Hickel*, 846 P.2d at 52, n. 26.

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Here, the excess group was not only divided, but a portion was put in a district with which it does not, as a matter of law, share similar political and social concerns.[18]

4. The residents of FNSB are clearly a politically salient class of voters, and the Board has intentionally discriminated against them. The Board protected incumbents in other areas of the state, but again specifically failed to do so in Fairbanks and paired two sets of incumbents: Senator Joseph Thomas and Senator John Coghill, and Representative Tammie Wilson and Representative Robert Miller.

In order to negate the inference of intentional discrimination raised by these actions, the Board must justify its actions by proof of a legitimate, non-discriminatory purpose.[19] The Board cannot meet its burden of proof because it has failed to comply with the *Hickel* process.

III. The Amended Plan is not required by the VRA.

FNSB again disputes that the Board was required to extend a Native district hundreds of miles to an urban, non-Native area;[20] to combine the Aleutian Islands with Bethel, a non-contiguous house district;[21] and, to combine these two constitutionally infirm house districts to form a Native senate district[22] in order to comply with the VRA.

The Board again fails to recognize that the VRA does not require it to violate the Alaska Constitution in the manner it has done so in its Proclamation Plan and in its Amended Plan. It summarily finds, "Because plans exist, including the Proclamation

[18] This court ruled on October 25, 2011 that Proclamation HD 38, which is substantially similar to Amended HD 38, is not socio-economically integrated.
[19] *In re 2001 Redistricting Cases*, 44 P.3d at 144.
[20] Amended HD 38.
[21] Amended HD 37.
[22] Amended SD S.

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Plan, that are not retrogressive, there is no unavoidable retrogression."[23] While plans may exist that, by the numbers, are not retrogressive, these plans contain substantial deviations from the traditional redistricting criteria embodied in the Alaska Constitution. The VRA does not require this, and the Court has advised that deviations may only occur if they are absolutely required by the VRA.

DOJ recognizes that there may be circumstances where retrogression may be unavoidable because of shifts in population or other significant changes.[24] The Alaska Supreme Court's March 14, 2012 Order recognizes that, "[T]he Supreme Court has established that under the Voting Rights Act, a jurisdiction cannot unnecessarily depart from traditional redistricting principles to draw districts using race as 'the predominant, overriding factor.'"[25] Consistent with these cases, DOJ has issued guidance on how it analyzes plans for VRA compliance.

DOJ considers whether plans require highly unusual features to link together widely separate minority concentrations in order to meet the benchmark.[26] Preventing retrogression under Section 5 does not require jurisdictions to violate the one-person, one-vote principle, which most commonly arises from substantial demographic changes.[27] Redistricting criteria that a jurisdiction may be required to depart from to create a nonretrogressive plan are those that "require the jurisdiction to make the least possible change to existing district boundaries, to follow county, city or precinct boundaries, protect incumbents, preserve partisan balance, or in some cases, require a

[23] Exhibit A, p. 6 of 96.
[24] 2011 DOJ Guidance at 7472.
[25] *Citing Bush v. Vera*, 517 U.S. 952, 959-60 (1996); *Miller v. Johnson*, 515 U.S. 900, 920 (1995).
[26] 2011 DOJ Guidance at 7472.
[27] *Id.*

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certain level of compactness of district boundaries."[28] Notably absent from the list are two requirements in the Alaska Constitution designed to prevent gerrymandering: socio-economic integration and contiguity.[29] Combining urban areas such as Ester and Goldstream with the extremely rural Bering Sea communities over 600 miles away is the epitome of a plan that requires "highly unusual features" to meet the Benchmark.

Instead of taking a hard look at the flexibility afforded by the VRA, the Board just assumes that it must take drastic measures such as combining urban areas of FNSB with some of the most rural areas of the state on the Bering Sea. The result is that effectiveness of both groups is diluted. Further, the Board's flawed *Hickel* process prevented it from looking at other areas of the state with Native populations that could have been used to create VRA districts that did not ignore logical and natural boundaries.[30] The Board has other options available, and was even presented with a plan that an expert has opined was VRA compliant that did not combine entirely illogical areas of the state.[31] Even assuming the Board has followed the *Hickel* process, its Amended Plan is still not justified by VRA requirements.

IV. The Board committed other errors in the course of adopting its Amended Plan.

The Board ignores that there are other plans that do less violence to the Alaska Constitution than the Amended Proclamation Plan. It appears to have measured compliance by the number of constitutional violations contained in a plan, and except when analyzing its own plan, without regard to the "as near as practicable" and

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[28] *Id.*
[29] *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992)(constitutional requirements ensure that district boundaries fall along natural or logical lines rather than political or other lines).
[30] Amended HD 35, for example, appears to draw Native villages out of an influence district; Amended HD 34 contains 33.90% NVAP but no modifications were considered.
[31] Exhibit A, p. 9 of 96; Exhibit H, p, 27-30.

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"relatively" language in the Alaska Constitution.[32] There are other plans that contain constitutional violations that are not as severe in terms of degree, a concept that has eluded the Board throughout this entire process. The Board further ignores some of the violations in its Amended Plan, such as the lack of socio-economic integration between Bethel and the Aleutians.[33]

The Board did not have public comment at any of its meetings on remand.[34] The Board did not allow the public to participate in the drawing process, and only allowed them "to speak to individual board members if they so desired."[35] The effect of this is that certain board members may have received information that other board members did not receive, and the public was deprived the opportunity to meaningfully participate in the process. There is nothing on the record to indicate what information members of the public may or may not have given the Board members, so it is impossible to know what the ultimate decision is based upon.

The Board's VRA expert used the Proclamation Plan as the Benchmark for purposes of analyzing the *Hickel* plans.[36] This is flatly wrong. The Benchmark is "the last legally enforceable redistricting plan in force or effect."[37] *Riley v. Kennedy* makes clear that in order for a plan to be in effect, an election must actually have been held using the districts.[38] In this case, the Proclamation Plan was struck down as unconstitutional, and therefore cannot legally be used as the Benchmark.

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[32] *See* the Board's analysis, Exhibit A, p. 8-10 of 96.
[33] The Board only acknowledges the violations in HD 38, HD 39 and SD S. Exhibit A, p. 15 of 96.
[34] Exhibit A, p. 7 of 96.
[35] *Id.*
[36] Exhibit G, p. 1 of 4.
[37] DOJ Guidance at 7470 (citing *Riley v. Kennedy*, 553 U.S. 406 (2008); 28 C.F.R. 51.54(b)(1)).
[38] *Riley*, 553 U.S. at 425.

The Board has not provided the court or the parties with a VRA expert's report on the Amended Plan. This type of critical omission thwarts the ability of the parties to do a serious analysis of the Amended Plan.

CONCLUSION

Based on the foregoing, the Board has not complied with the *Hickel* process, and even if it had, the constitutional violations in the Amended Plan are not justified by the Voting Rights Act. It is therefore respectfully requested that the Court enter an Order denying the Board's request for an order on compliance, and enter judgment in favor of the plaintiffs in this matter.

DATED at Fairbanks, Alaska this 16 day of April, 2012.

FAIRBANKS NORTH STAR BOROUGH

By: _____

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THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

IN RE: 2011 REDISTRICTING CASES:)
)
)

Case No. 4FA-11-2209CI

ORDER

THIS MATTER having come before this Court, and having considered the Objections filed by the parties and amicus curiae,

IT IS HEREBY ORDERED that the Alaska Redistricting Board's Notice of Compliance and Request for Entry of Final Judgment is DENIED.

DATED at Fairbanks, Alaska this _____ day of _____, 2012.

_____
Michael P. McConahy
Superior Court Judge

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