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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

PETERSBURG PLAINTIFFS' OBJECTIONS TO BOARD'S NOTICE OF COMPLIANCE

Pursuant to the Court's Order dated April 12, 2012, Plaintiffs City of Petersburg, Mark L. Jensen and Nancy C. Strand ("Petersburg Plaintiffs")[1] submit the following objections to the Alaska Redistricting Board's ("Board") Notice of Compliance with Order of Remand and Request for Entry of Final Judgment ("Notice of Compliance").

1. Introduction.

The Board's Amended Proclamation Plan presents anew the issues that the Petersburg Plaintiffs raised before this Court last year. The Board's arguments and this Court's decision regarding the compactness of Proclamation House District 32 both depended heavily on erroneous advice that the Voting Rights Act required the Board to create a Native "influence" district in Southeast Alaska. With the elimination of this unnecessary constraint, the Board failed to take the required "hard look" regarding what districting of Southeast Alaska best met the requirements of Alaska

[1] Brenda L. Norheim is not participating in this filing, or in further post-remand proceedings, as a Petersburg Plaintiff.

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Constitution Art. VI, §6. For the reasons that the Petersburg Plaintiffs have presented previously, there are other possible districting plans for Southeast Alaska that yield more compact districts than Proclamation House District 32, and this Court either should require the Board to adopt such a plan, or should adopt such a plan itself.[2]

2. Procedural History; Effect of this Court's Prior Ruling.

In Paragraph 13 of their First Amended Complaint, dated August 22, 2011, the Petersburg Plaintiffs alleged that:

> [Proclamation] House District 32 fails to meet the criteria for House districts in Art. VI, §6 of the Alaska Constitution because it is not compact as demonstrated by the greater compactness achieved in other redistricting plans proposed to the Board. Thus, House District 32's lack of compactness constitutes an error in redistricting.

The Petersburg Plaintiffs and the Board moved for summary judgment on the issue of the compactness of Proclamation House District 32. On December 12, 2011, this Court issued an order denying the Petersburg Plaintiffs' motion and granting the Board's motion.[3] The Petersburg Plaintiffs did not petition for review of the Compactness Order. The Petersburg Plaintiffs having stipulated to dismiss the other claims presented in their First Amended Complaint, the Compactness Order effectively terminated their participation in this action.

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[2] The Petersburg Plaintiffs also submit that these alternative plans would result in a district for Petersburg with superior socio-economic integration. See Affidavit of Kathy O'Rear, Petersburg City Clerk, that accompanies this memorandum.

[3] Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness, December 12, 2011 ("Compactness Order").

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This action proceeded to trial on the claims of Plaintiffs George Riley and Ron Dearborn ("Riley Plaintiffs"). Both the Riley Plaintiffs and the Board petitioned the Alaska Supreme Court for review of this Court's decision on the Riley Plaintiffs' claims. Rather than ruling on the Riley Plaintiffs' claims of errors in redistricting with regard to specific Proclamation Districts, the Alaska Supreme Court held that the Board had failed to follow the redistricting process mandated in *Hickel v. Southeast Conference*[4] in creating its Proclamation Plan:

> In *Hickel v. Southeast Conference*, we considered a Proclamation Plan that, like the Plan in this case, "accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution." We cautioned that while compliance with the Voting Rights Act takes precedence over compliance with the Alaska Constitution, "[t]he Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised." We then described the process the Board must follow to ensure that our constitutional redistricting principles are adhered to as closely as possible. After receiving the decennial census data, "[t]he Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan then must be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements."[5]

The Court concluded that, "[b]ecause it did not follow the *Hickel* process, the Board cannot meaningfully demonstrate that the Proclamation Plan's Alaska constitutional deficiencies were necessitated by Voting Rights Act compliance, nor can we reliably decide that question."[6] The Court remanded the case to this Court "with instructions

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[4] 846 P.2d 38 (Alaska 1992).
[5] *In Re 2011 Redistricting Cases,* Supreme Court No. S-14441, 2-3 (March 14, 2012) (footnotes omitted).
[6] *In Re 2011 Redistricting Cases,* 3.

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to further remand to the Board to formulate a plan in accordance with this order."[7] After remand by this Court, the Board on April 5, 2012 adopted an amended Proclamation of Redistricting ("Amended Proclamation").[8] The Amended Proclamation is the subject of the Petersburg Plaintiffs' present objection.

The Petersburg Plaintiffs' objection to the Amended Proclamation is not precluded by their decision not to petition for review of the Compactness Order.[9] Res judicata, or claim preclusion, operates to bar claims involving the same parties and cause of action where a court previously issued a final judgment on the claims' merits.[10] To determine "whether two claims are part of the same cause of action" the Alaska Supreme Court "look[s] to the transaction out of which the claims arose, not the legal theories asserted."[11] To determine what "constitutes a transaction" the Alaska Supreme Court considers "whether the facts are related in time, space, origin, or motivation, and whether they form a convenient trial unit."[12]

Under the transaction test used by the Alaska Supreme Court, the Amended Proclamation constitutes a separate transaction from the original Proclamation Plan. First, the Board created the Amended Proclamation months after it created the original Proclamation Plan. Second, the Board created the Amended Proclamation

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[7] *In Re 2011 Redistricting Cases,* 1.
[8] Notice of Compliance, Exhibit A.
[9] In this regard it is significant that this Court specifically invited the Petersburg Plaintiffs' participation. Order Regarding the Board's Notice of Compliance and Adoption of a New Plan, 1 n. 2. (April 12, 2012).
[10] *See* 47 Am. Jur. 2d Judgments § 475.
[11] *Alderman v. Iditarod Props., Inc.*, 104 P.3d 136, 141 (Alaska 2004).
[12] *Plumber v. Univ. of Alaska Anchorage*, 936 P.2d 163, 167 (Alaska 1997). (quoting Restatement (Second) of Judgments § 24(2) (1982) (internal quotation marks omitted)).

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pursuant to the Alaska Supreme Court's direction to employ a different process in formulating its new redistricting plan than the Board used in developing the original Proclamation Plan. The Court indicated that the Board used a flawed process from the inception of its work on the original Proclamation Plan, implying that the Board was to start from the beginning to re-reformulate a redistricting plan. Third, the Board's motivation and direction for the Amended Proclamation stemmed from the Alaskan Supreme Court's remand order. Thus, the Amended Proclamation, including its defects, constitutes a new transaction, distinct from that which created the original Proclamation Plan.[13]

3. The Board's Initial Districting of Southeast Alaska Was Driven by Voting Rights Act Concerns.

The Board's Voting Rights Act expert, Dr. Lisa Handley, prepared a report analyzing the Board's original Proclamation Plan under the Voting Rights Act ("Handley Report").[14] After identifying four House districts and three Senate districts, all located outside Southeast Alaska, as "effective" districts,[15] and one House district,

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[13] Res judicata does not bar causes of action stemming from wrongs occurring after a final judgment. Rather certain changes in circumstances allow a party to bring a second cause of action on the same subject matter. *See, Lawlor v. National Screen Service Corp,* 349 U.S. 322, 325-329 (1955). The Alaska Supreme Court similarly has held that res judicata was inapplicable when the "second suit was based on wrongs that were allegedly committed after [the] first suit...settled." *Finch v. Greatland Foods, Inc.*, 21 P.3d 1282, 1290 (Alaska 2001).

[14] Report of Dr. Lisa Handley (ARB00013329-00013369).

[15] Handley Report, ARB00013349. Dr. Handley defined an "effective" district as a district that consistently elects minority-preferred candidates even when voting is polarized. *Id.*

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also located outside Southeast Alaska, as an "equal opportunity" district,[16] Dr. Handley addressed Southeast Alaska as follows:

> In addition to these five house districts with substantial Alaska Native populations, there is a district in Southeast Alaska (House District 5) that is approximately one third Alaska Native and has elected an Alaska Native to legislative office throughout the decade—albeit not always the Alaska Native-preferred Alaska Native candidate.[17]

The Board's report accompanying its Redistricting Proclamation also took up this theme:

> Another difficult challenge faced by the Board was caused by the significant population loss in Southeast Alaska. This required the region to lose one House district and half of a Senate district. ***It was also necessary to create an Alaska Native "influence" district in the region, House District 34, in order to comply with the federal Voting Rights Act.***[18]

In its Preclearance Submission to the Department of Justice, the Board again stated that the districting of Southeast Alaska was based on the need under the Voting Rights Act to maintain an Alaska Native "influence" district in Southeast Alaska, and also stated that it had designed this district to avoid pairing the incumbent Alaska Native legislator in this district with a non-Alaska Native incumbent:

> Southeast Alaska lost significant population (for example Benchmark District 5 was under populated by 22.02%) thus requiring the region to lose one House district and half of a Senate district. The Board was still able to maintain a district with a significant Alaska Native population which is likely an Alaska Native "influence" district. House District 34 has a total Alaska Native population of 36.96% and

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[16] *Id.* Dr. Handley described this district as having a substantial minority population and that has elected minority-preferred candidates, but does not always elect the minority-preferred candidate. *Id.*

[17] *Id.*

[18] Report to Accompany Redistricting Proclamation of June 13, 2011, 7 (ARB00000581) (emphasis added).

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> an Alaska Native VAP of 32.85%. While several of the alternative plans had a Southeast Alaska Native District with a slightly higher (0.5 to 2.5%) total Alaska Native and Alaska Native VAP, the Board determined that it was more important to keep the incumbent Alaska Native Legislator from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent.[19]

In arguing that Proclamation House District 32 was compact, the Board acknowledged the priority that it gave to compliance with the Voting Rights Act: "The Board's first priority was to draw a map that complied with the federal constitutional requirements, such as one person, one vote; second, the federal Voting Rights Act; and third, the Alaska constitutional requirements."[20] The Board further argued, "Additionally, the Board's Voting Rights Act expert, Dr. Lisa Handley, advised that the Voting Rights Act required an Alaska Native 'influence' district in Southeast."[21] This "influence" district was Proclamation House District 34,[22] which the Board also drew in order to include Alaska Native incumbent Bill Thomas, and to avoid pairing Representative Thomas with a non-Native incumbent—a result which the Board considered very important to securing Department of Justice preclearance of the Proclamation Plan under Section 5 of the Voting Rights Act.[23]

The configuration of Proclamation House District 34 in turn affected the configuration of Proclamation House District 32:

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[19] Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board under Section 5 of the Voting Rights Act, August 9, 2011, 12 (ARB00006356-11791).
[20] Board's Memorandum in Opposition to Motion for Partial Summary Judgment on Compactness and Cross Motion for Summary Judgment ("Board Compactness Memorandum"), 2 (November 4, 2011).
[21] Board Compactness Memorandum, 3.
[22] *Id.*
[23] Board Compactness Memorandum, 3-7.

> The configuration of Proclamation HD-32 was therefore the direct result of the Board's efforts to avoid retrogression and obtain preclearance under Section 5 of the VRA, while also complying as nearly as practicable with the federal constitution's equal protection requirements of one-person/one vote as well as the requirements of Article VI, §6 of the Alaska Constitution.[24]

The Board argued that "[t]o the extent that there is any question as to whether Proclamation HD-32 is 'relatively' compact, the Board's departure from strict adherence to that requirement is justified by its need to draw a redistricting plan that avoids retrogression and therefore complies with Section 5 of the Voting Rights Act."[25]

The Board's usage of the term "relatively compact" in this context shows the inseparability of its compactness argument from its reliance on the Voting Rights Act. The Alaska Supreme Court has stated that the term "compact," as used in the Alaska Constitution means, "'...having a small perimeter in relation to the area encompassed.'"[26] The Alaska Supreme Court has further determined that:

> The most compact shape is a circle. Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness."[27]

The Court also stated that when analyzing compactness, a court should "look to the relative compactness of proposed and possible districts in determining whether a

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[24] Board Compactness Memorandum, 7.
[25] Board Compactness Memorandum, 8.
[26] *See* Alaska Const. art. VI, section 6; *Hickel*, 846 P.2d at 45, *quoting Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983) (Matthews, J., concurring).
[27] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 n. 13 (Alaska 1987), *quoting Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).

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district is sufficiently compact."[28] Thus, the Court used the term "relatively compact" to indicate that compactness was determined by a process of comparison of the district at issue with other "proposed and possible districts." The Board did not use the term "relatively compact" in this sense. Instead, the Board contrasted "relative compactness" with "the 'most' or 'ideal' compactness,"[29] arguing that with the constraints imposed by the Voting Rights Act, Proclamation House District 32 was "compact enough."[30]

4. This Court's Approval of Proclamation House District 32 Is Inseparable from the Board's Voting Rights Act Rationale for the District.

Because it followed the argument presented by the Board, this Court's decision approving Proclamation House District 32 as "compact enough" is similarly dependent upon, and indeed inseparable from, the Board's Voting Rights Act rationale for the district. After alluding to the standard for compactness stated by Justice Matthews in *Carpenter*,[31] this Court immediately acknowledged that in the present case it found reasons for deviating from this standard:

> While it is appropriate to compare the Board's districts to proposed and possible districts when determining compactness, the most compact district does not automatically trump another relatively compact district. There are other concerns to take into account, particularly the Voting Rights Act.[32]

With regard to the Voting Rights Act, this Court noted that Dr. Handley advised the Board to create an "influence" district in Southeast Alaska, which advice the Board

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[28] *Hickel,* 846 P.2d at 45, *quoting Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).
[29] Board Compactness Memorandum, 18.
[30] Board Compactness Memorandum, 26-39.
[31] Compactness Order, 7-8.
[32] Compactness Order, 9.

followed by creating Proclamation House District 34, which in turn affected the configuration of Proclamation House District 32.[33] Moreover, this Court accepted the Board's rationale for configuring Proclamation District 34 to include Native incumbent Representative Bill Thomas.[34] It was against this backdrop of Voting Rights Act considerations that this Court concluded that "House District 32 is 'compact enough' to satisfy the requirements of the Alaska Constitution."[35]

5. In Fact, No "Influence" District Is Required in Southeast Alaska.

Dr. Handley, whose advice regarding the need for an "influence" district in Southeast Alaska became the cornerstone for the Board's configuration of Proclamation Districts 34 and 32, recanted that advice in her trial testimony:

> Q.· Part of the report here, section 4.0, deals with the benchmark plan, and as you're writing this report for submission to DOJ, what nomenclature are you still using at this point in time in July and August, early part of August of 2011?
>
> A.· I am still using effective and equal opportunity to indicate, again, places on a continuum of ability to elect.
>
> Q. · Now, at some point in time, based upon your other work in this redistricting cycle, did you come to learn ·that your use of this continuum or how you were describing that was not correct?
>
> A. · I did.
>
> Q. · And can you explain for us and help the judge understand how you came, you, yourself, came to that understanding?
>
> A.· I was retained by the Justice Department to assist in the Section V litigation involved with the Texas plans.· Texas, rather than going straight to the Department of Justice, made the decision to go to the District Court [for the District] of Columbia to seek pre-clearance for the plan.
>
> The Justice Department felt that the plans – two of the four plans submitted, the state House plan and the congressional plan, they would object to, and they hired me, first of all, to do the analysis to see

[33] Compactness Order, 10.
[34] Compactness Order, 11.
[35] Compactness Order, 15.

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if I would also object to it, and then to be the expert witness in the trial that begins next week.

Q.· And as part of the work that you performed in that case, as the voting rights expert for the Department of Justice, did you come to learn -- what did ·you come to learn about what the proper nomenclature was?

A.· ***I was told quite specifically that actually the Justice Department was going to interpret the amendment to Section V to mean that ability -- a district either had an ability to elect or did not have an ability to elect, so it was basically a thumbs up and a thumbs down***.

Q.· So the dichotomy then was, you didn't look at whether it was performed 90 percent of the time or 30 percent of the time, just looked at whether it was effective, thumbs up, or not effective, thumbs down?

A.· Whether usually elected the minority-preferred candidate or whether it usually did not.

THE COURT: · So usually being what, 50 percent?

THE WITNESS: · Never had to decide whether it 50 percent or not, always found that it was more than 50 percent. · I suspect the Justice Department would say maybe not on 50 percent. · Again, I, myself, have never had to make that call.

THE COURT: · Go ahead.

BY MR. WHITE:

Q.· And if part of this analysis, if you look at it and you determine that it's less than 50 percent or it's a thumbs down, what does that mean in terms of the benchmark?

A. · ***That it's not a protected district and that there is not an obligation on the part of the jurisdiction to create an effective minority district to represent that ·district in the count, so to speak.***

Q.· Now, as part of your advice to the Board in determining how it should best go about attempting to obtain pre-clearance, did you advise them that you thought it was a good idea for them to meet with the Department of Justice and make a presentation to them?

A.· I did.· I felt that, because we were going in with a plan that was complicated and that we actually had some districts that were less than 50 percent minority in voting age population, that we should explain the circumstances to the Department of Justice.

Q. · And did you attend this meeting with the representatives of the Board?

A.· I did.

Q.· And at the end of this meeting, or after this meeting was completed, did you learn from DOJ what they thought the benchmark in Alaska was?

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> A.· ***Yes.· It was relayed to me that they saw the plan as five protected districts in House and three in the Senate, and they did not comment on the Southeast.***[36]

Thus, Dr. Handley testified at the trial of this action that her advice to create an "influence" district in Southeast Alaska to comply with the Voting Rights Act was incorrect.

Moreover, Dr. Handley's testimony is consistent with both administrative and judicial interpretations of how retrogression is determined under Section 5 of the Voting Rights Act after its amendment in 2006. The Department of Justice has interpreted the 2006 amendment of VRA §5 to focus only on effective districts, rather than influence districts:

> A proposed plan is retrogressive under Section 5 if its net effect would be to reduce minority voters' "effective exercise of the electoral franchise" when compared to the benchmark plan. *Beer v. United States* at 141. In 2006, Congress clarified that this means the jurisdiction must establish that its proposed redistricting plan will not have the effect of "diminishing the ability of any citizens of the United States" because of race, color, or membership in a language minority group defined in the Act, "to elect their preferred candidate of choice."[37]

The U.S. District Court for the District of Columbia has adopted this interpretation.[38]

Thus, in the face of Congress' direction that the Department of Justice focus its preclearance analysis on retrogression in the ability of Natives "to elect their preferred candidates of choice," i.e., on retrogression in the number of effective

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[36] Tr. 809:11 – 812:16 (emphasis added).
[37] Department of Justice, Guidelines Concerning Redistricting under VRA §5, 76 F.R. 7470, 7471 (February 9, 2011).
[38] *Shelby County, Ala. v. Holder*, 811 F.Supp.2d 424, 437-438 (D.D.C. 2011). *See also, Texas v. United States*, ___ F.Supp.2d ___; 2011 WL 6440006, 5 (D.D.C. December 22, 2011).

districts, the Board's concern about influence districts did not justify deviation from the compactness standard in the Alaska Constitution.

6. *On Remand, the Board Did Not Take the Required "Hard Look" at Whether the Districting of Southeast Alaska Complied with the Alaska Constitution.*

Because the Board erroneously constrained its consideration of the districting of Southeast Alaska with its goal to maintain an "influence district," it did not consider all available options for districting Southeast Alaska, including options that clearly would have yielded more compact districts. On remand, the Board was required to take a "hard look" at those other options.

The 2001 redistricting litigation demonstrates the applicability of this "hard look" requirement in such circumstances. The Alaska Supreme Court, after holding that the board's decision regarding the districting of Southcentral Alaska was based on an incorrect interpretation of prior case law, remanded the question to the board in the following terms:

> Because the board was mistaken in its interpretation of the doctrine of proportionality, the board's range of choices was unduly limited. We therefore remand so the board can revisit the question of redistricting Southcentral Alaska unencumbered by this mistaken assumption.
>
> We do not direct the board to join parts of the Municipality of Anchorage and the Matanuska-Susitna Borough in a single district. We merely hold on the record before us that the doctrine of proportionality does not bar joinder. The board must take a hard look at options that it may have ignored based on its misinterpretation of the law.[39]

The "hard look" standard that the Court referred to in the passage quoted above originated in judicial review of administrative decisions regarding environmental

[39] *In re 2001 Redistricting Cases*, 44 P.3d 141, 143-44 (Alaska 2002).

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issues, particularly those involving "best interest" determinations required for sales or leases of state land under AS 38.05.035(e). The Court has described the application of this standard as follows:

> Where an agency fails to consider an important factor in making its decision, the decision will be regarded as arbitrary. As one distinguished judge has put it, the role of the court is to
>
> ensure that the agency "has given reasoned discretion to all the material facts and issues." The court exercises this aspect of its supervisory role with particular vigilance if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a '***hard look***' at the salient problems and has not genuinely engaged in reasoned decision making."
>
> Leventhal, Environmental Decision Making and the Role of the Courts, 122 U.Pa.L.Rev. 509, 511 (1974) (emphasis in original, footnotes omitted).[40]

On remand, the Board plainly failed to take such a hard look at all options for districting Southeast Alaska. The Board describes the "*Hickel* process" that it employed on remand in part as follows:

> 1. As a starting point for complying with the *Hickel* Process, Board staff was tasked with designing several "*Hickel* Plans" for consideration by the Board.
>
> 2. In creating these plans, Board staff was instructed to create a "*Hickel* Template" as the basis for drafting the various options. The *Hickel* Template does not change those election districts from the Proclamation Plan that: (1) were constructed to comply [with] Alaska constitutional redistricting requirements without reference to the VRA; and (2) were either not subject to, or directly or indirectly, affected by any successful legal challenge.[41]

Notwithstanding the Board's acknowledgment in its original Proclamation of Redistricting that Proclamation House Districts 34 and 32, were ***not***

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[40] *Trustees for Alaska v. State, Dept. of Natural Resources*, 795 P.2d 805, 809 (Alaska 1990), quoting *Southeast Alaska Conservation Council v. State,* 665 P.2d 544, 548-49 (Alaska 1983).

[41] Written Findings in Support of Alaska Redistricting Board's Amended Proclamation Plan, 2 (April 5, 2012) ("Board Findings").

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"constructed...without reference to the VRA,'" the Board Findings do not indicate that these districts were subjected to any further examination on remand. On the contrary, Board Finding 42 specifically states that the Board did not revisit the districting of Southeast Alaska:

> 42. The Board did not revisit the configuration of the election districts in Southeast Alaska because, despite some comments from the trial court regarding the necessity of Alaska Native influence districts in Southeast, the trial court expressly found that the only legal challenge to any Southeast Alaska district, the city of Petersburg compactness challenge to Proclamation Plan HD 32, was without merit and that HD 32 met the compactness requirements of the Alaska Constitution as summarized below.
>
> a. In opposition to the city of Petersburg summary judgment motion regarding the compactness of HD 32, the Board contended that HD 32 was compact under the Alaska Constitution and only to the extent there was any question as to its compactness was the VRA offered as a justification for departing from strict compliance with the compactness requirement.
>
> b. In its December 12, 2011, Order the trial court specifically found that HD 32 is "compact enough" to satisfy the requirements of the Alaska Constitution.
>
> c. In its February 3, 2012, Memorandum Decision and Order Re: 2011 Proclamation Plan, the trial court reiterated its previous holding noting that (1) the "Petersburg plaintiffs argued that the Proclamation House District 32 was not compact. The Board contended that it was compact. The court found that it was compact and granted the Board's cross-motion for summary judgment"; and (2) while the Board's choice not to pair Alaska Native Representative Thomas "affected all of the Southeast and there was a compactness challenge to Proclamation House District 32, this court ultimately concluded that it was "'compact enough'."

As the Petersburg Plaintiffs have demonstrated above, this Court's decision that Proclamation House District 32 was compact enough had everything to do with the Board's argument that the Voting Rights Act required an "influence" district in Southeast Alaska, and nothing to do with whether House District 32 was compact

when one "look[ed] to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[42]

As the Petersburg Plaintiffs previously have demonstrated, the Southeast Alaska house districts in at least one alternative redistricting plan—the Modified RIGHTS Coalition Plan—are significantly more compact than Proclamation Plan House District 32.[43] For this reason alone, Proclamation Plan House District 32 violates the compactness requirement of article IV, §6 of the Alaska Constitution.

The Modified RIGHTS Coalition Plan and the Amended Proclamation Plan each divide the same area constituting Southeast Alaska into four house districts—the two plans differ only in the manner of that division. Each Southeast Alaska house district in the Modified RIGHTS Coalition Plan also meets the one person, one vote standard under the United States and Alaska Constitutions.[44] Thus, the Modified RIGHTS Coalition Plan's districting of Southeast Alaska may be substituted for that of the Proclamation Plan without affecting any other district in the Proclamation Plan.

In addition to not being relatively compact as compared to the Modified RIGHTS Plan, Proclamation House District 32 fails the "visual" test for compactness

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[42] *Hickel,* 846 P.2d at 45, *quoting Carpenter*, 667 P.2d at 1218 (Matthews, J., concurring).

[43] This discussion appears in the Petersburg Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Compactness, 4-7 (October 19, 2011), and Combined Opposition to Alaska Redistricting Board's Cross Motion for Summary Judgment, and Reply to Board's Opposition to Petersburg Plaintiffs' Motion for Partial Summary Judgment on the Issue of Compactness, 13-19 (November 18, 2011), and in the interest of saving trees, is incorporated by reference here.

[44] Attachment 1 to Affidavit of Leonard Lawson dated October 12, 2011, which accompanies the Petersburg Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Compactness.

advocated by the Board.[45] While necessarily subjective, this test includes at least the following elements:

> Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement. Likewise, appendages attached to otherwise compact areas may violate the requirement of compact districting.[46]

The odd shape of Proclamation House District 32 goes far beyond the necessities of Alaska's irregular geography, and has both of the attributes described above. It extends from the northern boundary of the City and Borough of Wrangell in the southeast to the Canadian border north of Skagway in the west. In between, it detours around downtown Juneau with a corridor of relatively unpopulated territory to the west of Juneau that connects with Skagway to the north, but excludes Haines, and disregards the boundaries of the Haines Borough. It also includes two narrowly attached appendages that incorporate Gustavus and Tenakee Springs. The district selectively collects isolated pockets of population, while excluding other adjacent populated areas, resulting in a district with an unnecessarily elongated and irregular, indeed serpentine, shape.

Moreover, gerrymandering is implicated in the drawing of Proclamation House District 32. The Board Memorandum's justification for the districting of Southeast Alaska,[47] as well as its Preclearance Submission to the Department of Justice, acknowledge that Proclamation House District 34 was drawn explicitly for the

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[45] Board Memorandum, 11-16.
[46] *Hickel,* 846 P.2d at 45-46.
[47] Board Memorandum, 5-7, 34-37.

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purpose of gerrymandering—to "keep the incumbent Alaska Native Legislator from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent."[48] This fits precisely the definition of gerrymandering in *Hickel*, "the dividing of an area into political units 'in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others:"

> The requirements of contiguity, compactness and socio-economic integration were incorporated by the framers of the reapportionment provisions to prevent gerrymandering. 3 PACC 1846 (January 11, 1956) ("[The requirements] prohibit[ ] gerrymandering which would have to take place were 40 districts arbitrarily set up by the governor.... [T]he Committee feels that gerrymandering is definitely prevented by these restrictive limits."). Gerrymandering is the dividing of an area into political units "in an unnatural way with the purpose of bestowing advantages on some and thus disadvantaging others." *Carpenter v. Hammond*, 667 P.2d 1204, 1220 (Alaska 1983) (Matthews, J., concurring). The constitutional requirements help to ensure that the election district boundaries fall along natural or logical lines rather than political or other lines.[49]

As the Board acknowledges, it "drew Proclamation HD-32 after having drawn Proclamation HD-34..."[50] and "[t]he configuration of Proclamation HD-34, in turn, affected the configuration of the other House districts in Southeast, including Proclamation HD-32."[51] Thus the Board's gerrymandering purpose in drawing Proclamation District 34 also is implicated in the failure of Proclamation District 32 to meet the compactness requirement.

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[48] Preclearance Submission of the 2011 Alaska State House and Senate Redistricting Plan by the Alaska Redistricting Board under Section 5 of the Voting Rights Act, August 9, 2011, 12 (ARB00013486).
[49] *Hickel,* 846 P.2d at 45 (footnote omitted).
[50] Board Memorandum 38.
[51] *Id.* The Board nevertheless argues that the compactness of other Southeast House districts is not relevant. Board Memorandum 19-22.

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7. Conclusion.

With the districting of Southeast Alaska no longer constrained by requirements of the Voting Rights Act, the Board admittedly failed to take the required "hard look" to produce the districting of Southeast Alaska best met the requirements of Alaska Constitution Art. VI, §6. The Board's arguments and this Court's previous decision regarding the compactness of Proclamation House District 32 both depended heavily on the erroneous advice of the Board's Voting Rights Act expert that the Voting Rights Act required the Board to create a Native "influence" district in Southeast Alaska. The Board thus should not have accepted this Court's prior decision regarding Proclamation House District 32 as an endorsement of that district's compliance with the compactness requirement of Alaska Constitution Art. VI, §6 in the absence of Voting Rights Act requirements. For the reasons that the Petersburg Plaintiffs have presented previously, there are other possible districting plans for Southeast Alaska that yield more compact districts than Proclamation House District 32. This Court either should remand this matter to the Board with instructions to adopt such a plan, or in the interest of the expeditious completion of the redistricting process, adopt such a plan itself.

DATED this 16th day of April 2012.

BIRCH HORTON BITTNER & CHEROT
Attorneys for Petersburg Plaintiffs

By: _____
Thomas F. Klinkner, ABA #7610112
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of April, 2012, at 11:45 a.m. a true and correct copy of the foregoing was served on the following in the manner indicated:

Michael D. White; mwhite@pattonboggs.com Patton Boggs LLP 601 W 5th Avenue, Suite 700 Anchorage, AK 99501	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Michael J. Walleri; walleri@gci.net Jason Gazewood; jason@fairbanksaklaw.com Gazewood & Weiner PC 1008 16th Ave., Suite 200 Fairbanks, AK 99701	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Joseph N. Levesque; joe-wwa@ak.net Walker & Levesque LLC 731 N Street Anchorage AK 99501	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Jill Dolan; jdolan@co.fairbanks.ak.us Fairbanks North Star Borough P.O. Box 71267 Fairbanks, AK 99707	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Carol Brown; cbrown@avcp.org Association of Village Council Presidents P.O. Box 219, 101A Main Street Bethel AK 99550	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Natalie A. Landreth; landreth@narf.org Native American Rights Fund 801 B Street, Suite 401 Anchorage AK 99501	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
Marcia R. Davis; mdavis@calistacorp.com Calista Corporation 301 Calista Court Anchorage AK 99518	☐ U.S. Mail ☐ Facsimile ☑ Electronic Delivery ☐ Hand Delivery
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BIRCH HORTON BITTNER & CHEROT

By: Christine Manson
Christine Manson

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES.	)
	)
	)
	)
	)

CASE NO. 4FA-11-2209CI

AFFIDAVIT OF KATHY O'REAR

STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT

I, KATHY O'REAR, being first duly sworn upon oath, depose, and state as follows:

1. I am the City Clerk of the City of Petersburg.

2. Attached hereto is an accurate and complete copy of a letter dated March 30, 2012 that I submitted to the Alaska Redistricting Board on behalf of the Petersburg City Council.

3. The information in the letter is derived either from my personal knowledge, or from the sources cited in the letter.

4. To my knowledge, the Alaska Redistricting Board did not consider the information in the attached letter in approving its Amended Proclamation Plan on April 5, 2012.

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FURTHER YOUR AFFIANT SAYETH NAUGHT.

Kathy O'Rear

SUBSCRIBED AND SWORN to before me this 16th day of April 2012, at Petersburg, Alaska, by Kathy O'Rear.

Debra K. Thompson
Notary Public in and for Alaska
My commission expires: 3/6/2014

OFFICIAL SEAL
DEBRA K. THOMPSON
NOTARY PUBLIC-STATE OF ALASKA
My Comm. Expires March 6, 2014

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CITY OF PETERSBURG
P.O. BOX 329 • PETERSBURG, ALASKA 99833
TELEPHONE (907) 772-4519
FAX (907) 772-3759

March 30, 2012

Delivered via email

To: Alaska Redistricting Board

Fr: Kathy O'Rear, City Clerk

Re: Redistricting in Southeast

Dear Board Members:

I submit this letter on behalf of the City of Petersburg City Council, asking that you please give reconsideration to your most recent Redistricting Plan and consider placing the City of Petersburg, and immediate surrounding area, with communities that are similar to our economic and rural life styles.

We understand that developing a plan that meets the needs of the total State population is difficult and you have had many factors to consider. We know you have tried your best to address all federal and state requirements and for the most part, the balance of the State appears satisfied with your outcome. However, we again ask you to consider placing Petersburg in a district similar to that as proposed in the North Native Plan presented by the City and Borough of Juneau. Or, redraw boundaries based on our June 7, 2011 letter to more or less "swap" the proposed House District for Petersburg and Haines. This change would align both Petersburg and Haines with communities that they are more similar with.

In addition to the information provided in our June 7, 2011 letter, please consider the following as information that demonstrates that Petersburg has very little similarities with Juneau/Douglas:

1) Using Census data from the Redistricting Board's website, Petersburg is much more aligned with Wrangell and Sitka when it comes to the percentage of native population. Haines, Skagway and Juneau have a much lesser native population. Petersburg has a 16.10% native population, close to the 16.20 & 16.80 percentages of Wrangell and Sitka. Whereas, Skagway has only 3.50%, Haines 9.20% and Juneau 11.80%.

2) Under ADF&G standards, Petersburg is considered a "subsistence area" based upon the economy, culture and way of life in our region, whereas Juneau is considered "non-subsistence". Furthermore, all areas of Petersburg and its proposed borough are compatible with and of rural Alaskan character. There is no urban/rural separation. The Federal Subsistence Board deems the Petersburg area as "rural" in character for the purpose of subsistence management. By contrast, the Federal Board has designated Juneau as of urban character....so, the Juneau residents do not receive subsistence priority.

3) Commercial fishing permits for Petersburg, (demonstrating our reliance on the industry for nearly the whole or our community's livelihood) highly outweighs those of Juneau, Haines and Skagway combined.

4) Petersburg does not have a deep water port for large cruise ships. We have very few cruise ship stops in Petersburg and those are of vessels with small amounts of people, holding 250 passengers or less, not 2,000 plus people on each ship. The bulk of our tourism comes from "independent" travelers, not groups of travelers.

5) Our largest government employer within the community is "local government"; followed by the Federal Forest Service agency, then State services. State government tops the bill in Juneau.

6) Our downtown area consists of only 3 blocks of Main Street, with a small variety of commercial businesses, providing basic needs. It is not spread out over separate large areas, offering "box sized" shopping centers; we have no traffic lights, we have only 2 jet flights daily and a few state ferry stops weekly. We do not have daily face to face State agency services such as: access to our legislators; child and social services; state trooper and prosecutor services; or a variety and choice in health care services and providers.

These differences demonstrate that we have little, if nothing, in common with Juneau that would give us equitable opportunity for proper representation. Our rural needs would continually be overshadowed by the large urban based population, tourism and government driven Juneau.

Also, it is the City Council's belief that it would be more fair and equitable for the total State of Alaska to retain its existing districts until the Board comes up with an acceptable alternative plan, versus going to the Proclamation Plan for a short duration of time.

The Petersburg City Council meets this coming Monday to consider any actions that may be open to our community. Council is in firm belief that we need to maintain our representation relationships with the communities of Sitka and Wrangell. Communities we have much more similarities with than Juneau, Douglas or Skagway.

Thank you for your time and consideration.

Sincerely,

Kathy O'Rear, MMC
City Clerk

Cc: City Council Members
City Manager Steve Giesbrecht
Tom Klinkner, Legal Counsel