IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI.

RILEY PLAINTIFFS' OBJECTIONS TO THE BOARD'S NOTICE OF COMPLIANCE

COMES NOW, the Riley Plaintiffs to give notice of objections to the Board's Notice of Compliance filed on April 11, 2012, pursuant to the Order of this Court of April 12, 2012 as follows:

OBJECTION 1: THE BOARD FAILED TO FOLLOW THE "HICKEL PROCESS" AS DIRECTED IN THE SUPREME COURT MANDATE.

a) The *Hickel* Process and Its Rationale. This matter is on remand from the Alaska Supreme Court,[1] which invalidated the Board's Initial Proclamation Plan (hereinafter referred to as "Initial Plan") because the Board was unable to "meaningfully demonstrate that the Proclamation Plan's Alaska Constitutional deficiencies were necessitated by the Voting Rights Act compliance" nor could the Court "reliably decide that question."[2] The Supreme Court ordered that "the Board must follow the *Hickel* process,"[3] which the Court defined as follows:

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1 *In Re 2011 Redistricting Cases,* Supreme Ct. No. S-14441, Order (March 14, 2012)
2 Id., at 3 it should be noted that the Court's holding presumes that the Plan contained state constitutional deficiencies.
3 Id, at 5 The term "Hickel process" refers to the process outlined at *Hickel v Southeast Conference*, 846 P.2d 38, 51 n. 22 (Alaska, 1992) See *In Re 2001 Redistricting Cases,* Supreme Ct. No. S-14441, Order (March 14, 2012), at 2

> The Board must first design a plan focusing on compliance with the article VI, section 6 requirements of contiguity, compactness, and relative socioeconomic integration; it may consider local government boundaries and should use drainage and other geographic features in describing boundaries whenever possible. Once such a plan is draw, the Board must determine whether it complies with the Voting Rights Act and, to the extent it is not compliant, make revisions that deviate from the Alaska Constitution when deviation "is the only means available to satisfy Voting Rights Act requirements." [4]

In addition, the Court noted,

> In order to expedite further judicial review we recommend that the Board make findings, in furtherance of the *Hickel* process, that the initially designed plan complies with the Alaska Constitution, that it either does or does not comply with the Voting Rights Act and, if the latter, that the new Proclamation Plan ultimately adopted by the Board deviates from the requirements of the Alaska Constitution to the least degree reasonably necessary to ensure compliance with the Voting Rights Act.[5]

The Court's order mandating this process is more than elevating "form over substance." While the process originally was intended to avoid "partisan gerrymandering" and promote "trust in government",[6] subsequent US Supreme Court decisions have demonstrated that the *Hickel* process is to ensure "compliance with federal constitutional law by ensuring that traditional redistricting principles are not subordinated to race."[7] Stated otherwise, the Court noted that the *Hickel* process serves to avoid racial gerrymandering claims.[8]

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4 Id., at 4
5 Id., at 6 n 15
6 Id., at 4
7 Id., at 5
8 Id., at 4 citing *Bush v Vera*, 517 U.S. 952, 958-60 (1996) and *Miller v Johnson*, 515 U.S. 900, 920 (1995)

b) Deviation From The *Hickel* Process. There is no question that the Board did not follow the *Hickel* process. In it is written findings,[9] the Board explains that it started with the Initial Proclamation Plan, left thirty-six (36) of the initial Proclamation Districts intact, and focused its efforts on redesigning only four (4) districts.[10] This is clearly not the *Hickel* process, but rather a correct the initial plan with minimum deviation process. Such a process, which pre-supposes and cements 90% of the prior plan in place from the beginning, has a clear determinative effect on the resulting process since it artificially constricts available options, and guides the process to merely repeat the deficiencies contained in the initial plan.

The Board further deviated from the Hickel process by beginning with a "Hickel" template (created by staff before the Board met) that contained obvious violations of the Alaska Constitution, including breaking various borough boundaries' in multiple directions; creating a Denali Borough under-populated district with only 2,500 people; fixing Native villages in Kodiak, Prince William Sound, Cook Inlet and Southeast into predetermined districts and unavailable to be located with other rural Native areas. etc.[11]

The Board's first substantive discussions had nothing to do with any of

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9 Written Findings In Support of Alaska Redistricting Board's Amended Proclamation Plan, (Exhibit A Notice of Compliance, at 4
10 Written Findings
11 See Exhibit E Notice of Compliance, at 1

the *Hickel* plans. Rather, the Board heard a presentation from Member Brodie on the "fix" for District 1 and 2 of the Initial Plan, which were declared invalid by this Court.[12] The Board next went on to redraw the Fairbanks area without touching HD 38,[13] which evinces a strong predisposition to preserve a district that this Court held violated the Alaska Constitution's requirement of socioeconomic integration, and which was ultimately preserved in the Amended Plan. Thus, the Board did not begin by drawing a plan intended to meet the Alaska Constitution; rathe it immediately began work using the invalidated plan as a template and working around the edges to fix problems.

After the Board set its direction to fix Fairbanks, the Board than elected to use the Initial Proclamation districts for Southeast, Kodiak, Kenai, Anchorage, Mat-Su and North Slope.[14] In regards to Southeast, the Board expressed a serious misunderstanding of this Court's prior order. The Board staff characterized this Court's ruling as holding that Southeast complied with the compactness standards of the Alaska Constitution, rather than the proper holding that the SE districts were "compact enough" in light of the needs of the VRA.[15]

This process perverted the *Hickel* process by producing 'straw-man'

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12 See Exhibit B.1 Notice of Compliance, at 24: 18 et. seq.
13 Id., at 35;17
14 Id., at 41
15 Id. 41

plans that were intended to fail. Not surprisingly, all the Hickel plans but one failed, and the resulting plan looks remarkably similar to the Initial Proclamation Plan. Cementing 90% of the invalidated plan in place and artificially restricting consideration to only 10% of the resulting plan, necessarily pre-determined that the Amended Plan was going to be similar to the Initial Plan. This was clearly not a *Hickel* process, but was a straw-man process which disingenuously attempts to satisfy the form of the *Hickel* process, while violating the substance of the *Hickel* process.

Moreover, the various *Hickel* options did not attempt to comply with the Alaska Constitution. According to the Board's attorney, the "Hickel" option plans did not comply with the Alaska Constitution.[16] Indeed, Chairman Torgereson noted that the process was going the wrong way when he noted that the staff-developed plans appeared to be unconstitutional, but the Supreme Court had directed the Board to begin with a plan that complied with the Alaska Constitution.[17] This observation was clearly correct, in that the staff got the process backward, trying to create a number of unconstitutional plans rather than trying to create constitutional plans.

In the end, the Board counsel opined that only one of the four draft "Hickel" option plans was constitutional,[18] which left the Board with no

16 See Exhibit B.2 Notice of Compliance, at 15:25 et. seq. : 18 et. seq. Andf 25: 6 et. seq.
17 Id., at 25: 13-18
18 Id. 30, et. seq.

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alternative but to make that plan their "Adopted Hickel plan". The false implication of such a process was to conclude that there was only one plan that complied with the Alaska Constitution, and that there was no other plan that would comply with the Alaska Constitution. Again, this was not a Board-led deliberative process to select one of many possible plans that could comply with the Alaska Constitution, but rather a disingenuous "guided" process, led by staff and counsel, who presented the Board with all but one "constitutional plan." The Board Counsel opinion than eliminated any viable alternative, leaving the Board without any real choice other than the one option offered by Board counsel and staff as the only constitutional option.

Throughout the Board proceedings, the Board Chair and staff expressed obvious criticism of the Supreme Court's mandate.[19] Moreover, the Board Counsel gave a public interview in which he specifically acknowledged that the Board was engaged in a process which elevated "form over substance."[20] The process used by the Board was a process designed to limit and guide the Board by fixing 90% of the plan using districts from the previously invalidated plan, creating "Hickel" options that were clearly intended to be unconstitutional, and staff offering only one constitutional plan. The process was a guided staff dominated process that claimed to be a

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19 See for example, Exhibit B.2 Notice of Compliance, at 5; 12: 8-25; 15:14-22
20 http://www.viddler.com/v/981c28eb

"*Hickel*" process, but lacked any substantive element of such a process.

The Board did not use a "*Hickel*" process. Rather, the Board used an amended plan process, beginning with the invalidated plan and making changes to the invalidated plan that it hoped would now pass legal muster. The Board's process clearly violated the mandate of the Alaska Supreme Court.[21]

OBJECTION 2: THE BOARD FAILED TO CONDUCT HEARINGS AS REQUIRED BY THE ALASKA CONSTITUTION.

The Board was further isolated by the decision to not permit public comment, and to limit any and all analysis to the Board Counsel who criticized third-party plans using criterion that differed from that applied to staff generated plans. The process clearly violated the Alaska Constitution, which provides that "the board shall adopt one or more proposed redistricting plans. The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board."[22] There is no question that the Board should have held hearing on the draft plan. To do otherwise was to violate the Constitutionally mandated

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21 In his taped interview referenced above, and in filings with this Court related to the vacated scheduling order, Board Counsel has articulated the theory that this Court and the Alaska Supreme Court lacks the Constitutional authority to mandate a process. The Plaintiffs' previously felt that litigating such the constitutional issue was not necessary. However, the course of process used by the Board clearly is intended to raise this constitutional issue. That issue must now be litigated as discussed below.

22 Sec. 10, Art. VI, AK CON.

process that require the Board to conduct public hearings on the proposed plan.[23]

OBJECTION 3: THE PLAN FAILS TO CORRECT PRIOR VIOLATIONS OF THE ALASKA CONSTITUTION CONTAINED IN THE ORIGINAL PROCLAMATION PLAN, AND INCLUDES NEW VIOLATIONS OF THE ALASKA CONSTITUTION.

a) Socioeconomic Integration of HD 38. HD 38 of the Amended Plan contains the familiar violation of Art. VI, Sec. 6 of the Alaska Constitution, which requires that districts be socioeconomically integrated. The Distinct continues to have Wade Hampton villages in the same district as Ester/Goldstream. While the Findings acknowledge the similarity between HD 38 in the Initial and Amended Plans,[24] the Board's findings do not acknowledge that the new HD 38 violates the Alaska Constitution. Nonetheless, the District violates the Alaska Constitution's requirements of socioeconomic integration for the same reasons that the District did under the former plan.

b) Inequality Between Districts: Increased Deviation in Fairbanks Districts and Overall Plan Deviation. Additionally, the Board found new and different ways to violate the Alaska Constitution in dealing with the FNSB excess population, and to dilute the voting strength of the FNSB voters.

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23 The undersigned requested that the Board hold a hearing and allow comment from the Plaintiffs.
24 Notice of Compliance, at 8

Specifically, the FNSB's surplus population is 8, 806.[25] The Amended Proclamation Plan places 5,756 of these residents living in the Ester/Goldstream area, in HD 38.[26] The remaining 3,050 FNSB residents are spread evenly across the remaining districts within the FNSB (i.e. HD 1-5).[27] Of course, this violates Art. VI, Sec. 6 of the Alaska Constitution, which requires that "Each (district) shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty." The Court in *2001 Redistricting Cases*[28] held that this provision of Alaska's Constitution required the Board to minimize deviations in urban areas. Under the prior plan, deviations in the Fairbanks HD 1-6 and 38 were 1.40%, 1.51%, 2.03%, 1.96% 2.08%, 3.61 and -4.10%.[29] Under the Amended Plan, the deviations for these districts are 3.34, 3.72, 3.71, 3.29 3.12, -4.95[30] and -5.06.[31] The deviation in the districts entirely within the FNSB doubled and are the highest positive deviations for any districts within organized boroughs in the Amended Plan. The systematic overpopulation of the districts completely within the FNSB has the same dilution effect as splitting the surplus population between two districts: the proportional representation of Fairbanks under the plan is intended to be five (5) districts rather than the 5.5 districts to which the FNSB is entitled under principles of "fair and effective

25 ARB 6584-6586
26 Notice of Compliance, at 7
27 Id.
28 *In Re 2001 Redistricting Cases,* 44 P. 3d, 141, 145-146 (Alaska, 2002)
29 Joint. Exhibit 36
30 Of course, the Board removed Fairbanks population from Amended HD 6. In doing so, the district went from an overpopulated district (+ 3.61%) to one of the third most underpopulated district (-4.95%)
31 Notice of Compliance, Ex. A at 68

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representation" required by Alaska's equal protection requirements.[32]

Previously, the Board rejected such an approach because they knew it to be unconstitutional.[33] The Board did not explain why it thought this was a good idea for the amended plan. It is clearly possible to keep the deviations in Fairbanks lower than used in the Amended plan,[34] and the inflation of the deviation in the Fairbanks districts to absorb the surplus population violates Art. VI, Sec. 6 of the Alaska Constitution.

The Amended Plan also increases the overall plan deviation. The overall plan deviation for the Initial plan was 7.65%,[35] while the overall plan deviation for the Amended plan is 9.05%[36] The deviations among the Fairbanks districts under the Initial plan was a combined 6.18%. Under the Amended plan, the overall deviation among Fairbanks Districts is 8.78%. Thus, while the overall plan deviation is greater than the combined deviation in Fairbanks districts, there is no question that the combined deviation for Fairbanks Districts is the largest deviation among boroughs.[37] Thus, the increase in the overall plan deviation is unnecessary and violates Art. VI, Sec. 6 and Alaska's Equal Protection Clause.

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32 *Hickel*, supra, at 46
33 Test. Of Jim Holms, Tr.384:8- 385:2
34 Upon information and believe, all third party plans submitted by Calista, AFFR and the Rights' Coalition all provided lower deviations for Fairbanks Districts. Cf. Notice of Compliance Ex. H.
35 Joint. Exhibit 36
36 Notice of Compliance, Ex. A at 68
37 Cf. Notice of Compliance, Ex. A at 68

c) **HD 37 Compactness & Contiguity and Socioeconomic Issues.**

The Amended Plan places Nunivak Island, portions of the Bethel Census area, the Alaska Peninsula and the Aleutian chain in the same district. The district is not compact since it still contains the 900+ mile expanse across the Bering Sea to link Mekoryuk with Adak. This Court previously held that this configuration was non-compact. Additionally, the district is not contiguous at two places. Mekoryuk (Nunivak Island) is separated from the Bethel Census Area by more than just water. The closest landfall to the island is a peninsula (containing the villages of Chefornak, Kipnuk and Kwigilingok) that is between Nunivak Island and the villages East of the mouth of the Kuskokwim River and is in another legislative district. Additionally, the Bristol Bay Borough (within HD 36) divides the North portion of HD 37 from the Alaska Peninsula in HD 37. Clearly, the Board believes that all sins may be absolved by water. Of course, as this Court has noted with the Aleutians, there are limits to the ability to use water for contiguity.[38]

Finally, the configuration of HD 36 and 37, slices and dices the Calista and Bristol Bay Regions. Generally, the ANCSA regional boundaries are indices of socioeconomic integration that should be respected in redistricting.[39] The configuration of HD 36 and 37 needlessly has portions of the Calista and Bristol Bay regions in both districts. The configuration mixes

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38 Hickel, at 54
39 *Hickel, at 53.*

terminal and intercept fisheries communities in the same districts. It groups communities that are differentially affected by mining proposals in the same districts. It separates communities that are similarly affected by the same mining proposals. The effect is a mishmash of socioeconomic interests and relationships that makes no particular sense.

d) HD 35 Compactness, Contiguity and Socioeconomic Issues. The Amended Plan also incorporates the Kodiak, Seldovia, Prince William Sound and Yakutat Borough into a single district. These areas contain Native communities,[40] which may be have been used to enhance a Native VRA district. The most significant change between the Initial and Amended Plan is to take the the Native communities of Nanwalek and Seldovia out of HD 35 and submerge these villages into a predominately non-Native district (HD 30) in the Kenai, rather than the adjacent HD 36, which is a VRA district that includes the other Kenai Borough Native community of Tyonek. The Prince William Sound communities and the Yakutat Borough, both of which have significant Native population and were in a Native influence district under the Benchmark Plan, are also submerged in the predominately non-Native district. The changes in the Amended Plan violate compactness,[41]

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40 E.g. Ahkhiok, Aleneva, Chenega, Chiniak, Larson Bay, Old Harbor, Ouzinke, Port Lions, and Tatitlek,
41 The District rings the Gulf of Alaska similar to HD 37 ringed the Bering Sea in the invalidated plan.

contiguity[42] and socioeconomic integration[43] requirements of the Alaska Constitution in a greater manner than the Initial Plan's HD 37. While such a configuration may be justified by various considerations that are not articulated in the record or findings of the Board, the submersion of these Native communities into non-Native dominated districts, rather than placing them in VRA districts, is a contrivance intended to create an unnecessary and illusionary justification to put urban population (as in the FNSB) into a rural area for VRA purposes.

e) Multiple Splits. The Board's filing with the Court does not include a "splits report".[44] Using a corrected plan process, rather than a *Hickel* plan process, incorporated previously unchallenged problems from the invalidated plan. Specifically, the surplus population of the Mat-Su Borough was split into two districts (i.e. HD 11 and 6) as well as the Kenai Borough (i.e. HD 36 and 35).[45] As noted previously, the splits in Kenai and Mat-Su do not have the same dilution affect on proportional representation as the previous split in the FNSB. The Mat-Su multiple splits and the severe

42 The District can only be found contiguous by spanning the Gulf of Alaska in a manner similar to the method used by the Board to construct HD 37 in the invalidated plan. Previously, the jump from Kodiak to the Kenai peninsula mainland connected populated areas. Now that the populated area in the Kenai Peninsula is outside the Amended HD 35 the jump to Kenai is for aesthetic purposes only. Equally, HD 28 protrudes between the western and eastern portions of the Kenai within HD 35. Similarly, HD 6 protrudes between eastern and western portions of Prince William Sound within HD 35.

43 While some of the areas have common fishing interests, the fishing industry of these communities is not integrated. The fishing fleets of these areas fish different areas.

44 E.g. ARB 6584-6586

45 The Amended Plan's split in the Kenai Borough is somewhat illusionary and unnecessary given that the portion of the borough in HD 35 is an unpopulated area.

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underpopulation of HD 6 combine to to have a negative effect upon the proportional representation of FNSB voters. In this sense, the splits in the Mat-Su is a complementary constitutional violation of the packing and increased deviation of Fairbanks districts.

e) Truncated Senate Term Of The Fairbanks Senate Seat. The Amended Plan interjects a new issue into the pattern of discrimination against the City of Fairbanks by unnecessarily truncating the Fairbanks City Senate seat. Specifically, the Board elected to not truncate SD P, which had 86.7% of the population of the previous Senate District, while the Board chose to truncate SD B (the new Fairbanks City Senate district) which had 86.9% of the population of the previous Senate District.[46]

In *Egan v Hammond*,[47] and *Groh v Egan*,[48] the Court recognized the need to truncate Senate seats in the redistricting process, however, the Court found such authority to truncate Senate districts resided with the Governor and was rooted in the Governor's power to call special mid-term elections.[49] Of course, at the time, the Constitution provided that redistricting was done by the Governor.[50] That is no longer the case, and redistricting is done by the Board. However, the Board was never given the power to truncate Senate

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46 Notice, Exhibit A at 95
47 502 P.2d 856 (Alaska 1982)
48 526 P. 2d 863 (Alaska, 1974)
49 502 P.2d, at 881
50 Id.

terms. That power continues to reside with the Governor.[51]

Moreover, the power to truncate Senate terms is restricted to circumstances where there is a "substantial change" between the new district and the benchmark district.[52] In this case, the Board made the irrational decision to find that 86.7% of the population of the previous Senate District in Juneau was not a "substantial change," while the Board found that 86.9% was a substantial change in the case of Fairbanks City. The decision is irrational.[53] The fact that the truncation is directed at Fairbanks, which was the target of a prior attempt to destroy the City Senate district, suggests a continuing discriminatory intent directed at Fairbanks.[54]

The Alaska case law does not indicate what a substantial change might be to justify truncation. In the present case, the Amended Plan truncates three (3) Senate districts that are over 75% of the population of the previous Senate District: i.e SD B, SD L and SD T. All of these districts would be up for election in 2012 for four year terms without truncation. However, truncation has the effect of shortening the terms of the resulting Senator from four (4) to two (2) years. All contain incumbent Senators who are members of the Bipartisan Working Group. The only Senate Seat that is not truncated is SD

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51 Id.
52 502 P.2d, at 873- 874
53
54 Of course, the fact that the incumbent Senator is also a Democrat and the Board is dominated by Republicans could just mean that the Board is engaged in partisan gerrymandering.

P, which is not up for election in 2012, but would only serve out a two (2) year term. SD P is also occupied by a member of the Bipartisan Working Group. The net effect of the truncation plan is to insure that the incumbent members of the Bipartisan Working Group, whose districts contain 75% of the population of the previous Senate District, will have to stand for re-election in 2012 and again in 2014. There is very little question that the truncation plan has a partisan effect.

Moreover, the truncation plan has a discriminatory effect upon SD T, which is a VRA Senate District with a Native incumbent legislator. This is discussed below.

OBJECTION 4: THE DEVIATIONS FROM THE ALASKA CONSTITUTION ARE NOT NECESSARY TO COMPLY WITH THE VOTER'S RIGHTS ACT (VRA).

The Board has not filed its expert report on the VRA compliance of the Amended Plan, and it is impossible to fully analyze the Board's VRA assertions without such a report. As the Court is aware, the Board bears the burden of proof to show that the "deviation from the Alaska Constitution ... is the only means available to satisfy the Voting Rights Act requirements."[55] It is impossible to respond to this issue until the position of the Board's expert is released. Of course, where a party has the burden of proof and the proof of

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55 *In Re 2011 Redistricting Cases,* Supreme Ct. No. S-14441, Order (March 14, 2012), at 4

such fact necessarily requires expert testimony, the failure of the party to produce such an expert presumes an inability to make such a proof and summary judgment for opposing party is appropriate.[56] Thus, at the current time, the lack of any expert report by the Board necessarily implies that the deviations from the Alaska Constitution may not be justified.

Moreover, there are serious reasons to believe that at this time the Amended Plan does not comply with the VRA anti-retrogression standard. The Amended Plan decreases Native VAP in HD 38 from 46.36% to 45.72%; decreases Native VAP in HD 37 from 46.63% to 42.96%; and decreases Native VAP in SD S from 46.85% to 44.24%. It is reported that Dr. Handley had concerns that the these declines might endanger the VRA compliance.[57] This is particularly critical since Dr. Handley used statewide averages of Native and non-Native voter turn out in setting her Native VAP thresholds and was unaware that the Native voter turn out in Wade Hampton is generally lower than the statewide average (particularly in the primaries) and that the non-Native voter turn out in Ester/Goldstream is one of the highest in the State. Despite the fact that the Board did not allow public testimony, both Bristol Bay and Calista have expressed serious concerns about the fact that HD 37 and/or 38 may not be effective Native districts. The Plaintiffs anticipate that Bristol Bay and Calsita, and possibly other Native groups will advise the

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56 *Ball v Birch Horton, Bittner, and Cherot,* 58 P.3d 481 (Alaska, 2002)
57 Tr. Bd. Mtg (3/30/12) at 72-73

Court of these concerns. The Plaintiffs share these concerns.

While the Board did not permit public comment and testimony, a number of groups submitted uninvited proposed plans, including AFFR, the Rights Coalition, and Calista.[58] Because the Board did not provide a process to accommodate public input, the Board did not have an orderly way to review these plans for compliance with the VRA.[59] To the extent that the Board was able to undertake non-expert review of the plans, they opined that the plans complied with the VRA.[60] Assuming that this is correct, the proper question in comparing these plans is whether they do less violence to the Alaska Constitution than the Board plan, or whether there is another possible plan that does less violence to the Alaska Constitution than the Amended Plan. While the Plaintiffs have not had time to review these other plans in detail, they all appear to comply with the VRA and do less violence to the Alaska Constitution.

Moreover, the Plaintiffs are familiar with the "Calista 3 Plan, which was not included in the Board's filings. That plan does contain deviations from the Alaska Constitutional standards, but clearly does less violence to the Alaska Constitution than the Amended Plan and has stronger justification in the VRA because it's HD 38 is clearly a Native effective district. The reason

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58 Notice, supra Exhibit H.
59 Notice, supra., Exhibit B, at 172. See also Id., at 197
60 Id. At 198.

for this is that the Calista 3 Plan puts Ester/Goldstream into the FNSB districts, and places Eielson, Moose Creek and Salcha into HD 38. The effect is to increase the total Native VAP to levels greater than or equal to the Initial Plan, but uses military population that has lower voter turnout than Ester/Goldstream to render the district a clear Native effective district. Thus, the Calista plan addresses the concerns reported by Dr. Handley to the Board about the lower Native VAP in the Amended Plan HD 38.

Additionally, the Amended Plan discriminates against an incumbent Native Senator in SD T, which is unnecessarily truncated, as discussed above. The discriminatory effect of the truncation plan renders the plan suspect under VRA analysis.

Finally, assuming that the Board is correct about HD 38's effectiveness, the simple fact is that plan creates a racial gerrymander. There is no question that HD 38 violates traditional redistricting principles of socio-economic integration and that the Board was single mindedly focused upon diminution of the non-Native voting strength. This is an improper use of the VRA, as suggested by the Alaska Supreme Court. [61]

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61 *In Re 2011 Redistricting Cases,* Supreme Ct. No. S-14441, Order (March 14, 2012), at 4 citing *Bush v Vera,* 517 U.S. 952, 958-60 (1996) and *Miller v Johnson*, 515 U.S. 900, 920 (1995)

OTHER ISSUES:

a) Need To Schedule Hearing. Resolution of the issues raised by the Amended plan will require a hearing. The Court needs to set a scheduling hearing on this matter. However, the Court and the Parties require a full and proper record, including the expert VRA opinion report. It is also anticipated that some discovery may be needed and the Plaintiffs are assessing the situation and will be able to advise the Court of their needs at a scheduling hearing contemplated in the Courts earlier order.

b) The Babcock Process. The architect of the plan struck down in *Hickel* , Tuckerman Babcock, observed in a 1998 article on redistricting, that the Alaska Courts were "predictably unpredictable" in that "each decennial reapportionment is challenged, predictably the State Supreme Court finds the Governor's first plan unconstitutional, and predictably the State Supreme Court allows the second plan to go forward."[62] His observation is a little frightening, because Babcock recommends "The implication for those inclined to egregious partisan gerrymandering is clear: follow the federal rules to secure approval by Justice, and go for all you can get stateside because the only rule the State Courts follow is that the first plan will fail. Then, if history is any guide, the second plan, however amended, will stand."[63] The Courts' considerations should be informed by the Babcock

62 Babcock, Predictably Unpredictable: The Alaskan Supreme Court and Reapportionment, at 121, in Grofman, Race and Redisticting, (Agathon, 1998) (attached)

63 Id., at 122

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process, which seems to have been utilized by the Board rather than the *Hickel* process.

The Babcock process might work if the Courts perceive an impending constitutional crises caused by the need to conduct timely elections and the inability of the Board to craft a proper redistricting plan. The Board has created such a constitutional crises in the present case by 1) rejecting this Court's suggestions in the vacated scheduling order to hold hearings and invite submissions of other plans, 2) defying the Court's mandate to use the *Hickel* process, 3) refusing to hold hearings on draft plans as required by the Alaska Constitution, and 4) choosing litigation over "restraint, compromise, or reining in political manipulation."[64]

c) The Need For Masters and Alternative Resolutions. The Court should not permit a constitutionally flawed redistricting plan to operate, even on an interim basis. And the Court need not do so. The Plaintiffs would suggest the Court consider the appointment of Masters. The Alaska Constitution requires the Court to remand the plan back to the Board if the initial plan is invalidated, however, if the Court invalidates the second plan, the Court "may" refer the plan.[65] The alternative is for the court to appoint

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64 Babcock, supra at 133. Sadly, this latter choice seems in vogue among the states as the Courts in Texas stuggle with similar problems. See Davis v Perry, Case No. SA-11-CV-788 (USDC W.D.Texas)

65 Art. VI, Sec. 11, AK CON.

masters as was done in *Hickel*.[66] The Court should appoint a master to do the job that the Board appears reluctant to do.

Alternatively, timelines are seriously short and a new plan may not be possible in the absence of DOJ Sec. 5 approval. It is not clear that the a Master's plan can be developed and pre-cleared within the remaining time allowed under State law without the Court ordering alterations in the election deadlines. The Section 5 process has not started yet, and will not be able to be started until the VRA expert report is completed. That means that the only alternative to a Masters Interim Plan is to use the Benchmark Plan.[67] This may be the only option left to the Court if the Court remands the plan to the Board for a second time. The Court should consider that implication and option.

Date: April 16, 2012

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66 *Hickel*, supra.
67 See *Riley v Kennedy*, 128 S.Ct. 1970 (2008)

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PREDICTABLY UNPREDICTABLE: The Alaskan State Supreme Court and Reapportionment

Tuckerman Babcock

ALASKANS MAY NOT LIKE TO ADMIT IT, but we are not unique in every respect. Like every other state at least once every ten years the Alaskan state legislature must be reapportioned.

On the other hand, the Alaskan State Supreme Court, if not unique among all state courts, comes close. This court has crafted a legacy that is as predictable as it is unpredictable. Since the first reapportionment case decided by the State Supreme Court in 1965, there have been three decades of reapportionment.[1] Predictably, each decennial reapportionment is challenged, predictably the State Supreme Court finds the Governor's first plan unconstitutional, and predictably the State Supreme Court allows the second plan to go forward.

Each Opinion is written to explain the constitutional violation or violations compelling the Court to conclude that all, or part, of the first plan of each decade be dismissed as unconstitutional. What is unpredictable for those responsible for redistricting in Alaska[2] is embodied in the fact that the Court never applies the same rules twice. Each initial plan has been found unconstitutional, but each for different reasons. A constitutional issue that catches the Court's attention in one case is ignored in the next. An innovative solution in one cycle becomes a fundamental flaw in the next. With that tradition, the would-be Alaskan redistricter might as well ignore (1) whatever reasoning has been advanced by the State Supreme Court; (2) any district designed in the past that has been allowed to

[1] *Wade v. Nolan*, 414 P.2d (Alaska 1966), *Egan v. Hammond*, 502 P.2d (Alaska 1972), Masters Plan 1972, *Groh v. Egan*, 526 P.2d (Alaska 1974), *Carpenter v. Hammond*, 667 P.2d (Alaska 1983), *Kenai Peninsula Borough v. State* 743 P.2d (Alaska 1987) and *Southeast Conference v. Hickel*, CN 1JU-91-1608 Civil, SCN S-5165, December 29, 1995 opinion.

[2] State of Alaska, Constitution, Article VI

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stand or have even proposed by the court; and, therefore, (3) strike for as much political advantage as possible without fear of unnecessarily endangering the plan. The implication for those inclined to egregious partisan gerrymandering is clear: follow the federal rules to secure approval by Justice, and go for all you can get stateside because the only rule the State Courts follow is that the first plan will be thrown out. In Alaska, a wise redistricter must accept that the first plan will fall. Then, if history is any guide, the second plan, however amended, will stand. Beside the predictable unpredictability of the State Court, what else confounds redistricting in Alaska?

Alaska is the Last Frontier. The last state where, at close to one person per square mile, Frederick Jackson Turner's thesis may still be put to the test. A minuscule one percent of the land is inhabited and just 3 percent is privately owned. Geographically, Alaska sprawls across an area more than twice the size of Texas; boasts more coastline than the contiguous 48 states combined; displays glaciers as large as some other states; and offers the highest mountain in North America, Mount McKinley. Alaska houses the smallest population (after the 1990 census one can quibble with Wyoming on this point); is crisscrossed by the fewest roads and has the most airports. Finally, an item of vital interest to reapportionment, although not an item of interest, I am sure, to the more than 1,000,000 tourists who visit each year, is that Alaska's geography and population of 550,000 require the most expansive and least populated legislative districts in the nation.

For 1991 those facts were complicated by a decade of skyrocketing population. At just over 33 percent, Alaska enjoyed the greatest percentage increase in the United States. Growth was wildly uneven around the state, causing an explosion in overall deviation of House districts from 14.9 percent in 1984 to 82.5 percent in 1990. House district deviations exceeded 75 percent within every geographic area of the state.

There is no concentration of Asian, Hispanic, or African-American population sufficient to form even 25 percent of any legislative district. However, Native Americans in Alaska make up 15.6 percent of the statewide population (a decline from 16.0 percent in 1980) and can provide a majority or substantial minority in several districts. Certain minorities in Alaska, just as in every other state in the Union, are protected from discriminatory districting by Section 2 of the Voting Rights Act. In addition, Alaska suffers the burden of mandatory preclearance under Section 5.[3] This requirement is particularly onerous because, perhaps

[3]This requirement for preclearance is not related to any historical example of actual discrimination or harm. Indeed. Alaska was allowed to opt out of the Voting Rights Act preclearance requirements during the 1970s. Alaska was covered again solely because a certain percentage of the population has a first language other than English. Despite the fact that no discrimination has ever been demonstrated, the U.S. Justice Department took from November 1991 to April 1992 to approve the first plan and actually entered an objection to the second plan in 1994. In a ludicrous example of micromanagement. U.S. Justice Department attorney Steve Rosenbaum, Chief of the Voting Rights Act Section, insisted that approximately 2,000 people be moved around involving six communities. The effect was to increase the voting age population in a single house district from 51 percent Alaska Native to 59 percent Alaska Native. The district already had an Alaska Native incumbent Representative

unique among states, there is virtually no evidence of racially polarized voting.[4]

The State Constitution mandates a House of 40 and a Senate of 20. Article VI of the State Constitution provides for a five member advisory board appointed by the Governor (members are appointed without regard to political affiliation and cannot also serve on any other government panel, board, commission or be federal, state or local government employees). The five serve at the pleasure of the Governor and need not be confirmed by the Legislature. In fact, the State Constitution provides no participation in reapportionment for the legislature other than appropriation of funds to carry out the task. The State Constitution limits the Court to a review for constitutionality and gives them the authority to compel the Governor to reapportion. This specific limitation on the discretion of the judiciary to adopt plans of their own was ignored in 1972 (at the request of the Governor), was followed in 1983 when an unconstitutional plan was sent back to the Governor for amendment, and then was ignored in 1992 over the earnest objection of the Governor when the Court appointed three Masters and drew up their own plan in a couple of weeks.[5]

The U.S. Bureau of the Census PL94-171 data showed statewide population in April 1990 at 550,043. The Constitution states that after receiving the population figures from the census, this five member board is allowed just 90 days to recommend a final plan to the Governor. After receiving the Board's recommendation, the Governor is allowed 90 days to review the plan and make any change he chooses so long as he describes his change in writing.

Alaska elected a new Governor in November of 1990, Walter J. Hickel, an Alaska Independence Party member who also had been elected Governor in 1966 as a Republican. Governor Hickel took office on December 3, 1990 and in January 1991 replaced the five-member board that had been appointed by former Governor Steve Cowper, a Democrat.[6] The Board retained staff, hired consultants, and for legal advice relied on Virginia Ragle, an assistant attorney general. The Board also relied on the Voting Rights Act expertise of Charles J. Cooper of Potts, Pittman, Shaw and Trowbridge in Washington, D.C.

All of Alaska is covered under Section 5 of the 1965 Voting Rights Act, as amended in 1982, which requires all election law changes to secure preclearance from the U.S. Department of Justice. The Act applies to Alaska not because of any

[4]*Racially Polarized Voting in Alaska*, a study done for the Reapportionment Board, 1991, by Bernard Grofman.

[5]The first Alaskan redistricting in 1961 escaped unchallenged in state court. The redistricting dealt only with a few House districts because the Alaska Senate was based on geography, not population.

[6]Unlike the process in the huge majority of states, the Attorney General in Alaska is appointed by the Governor, is confirmed by the Legislature, and serves at the pleasure of the Governor. Governor Cowper's term expired on noon on December 3, 1990. Draft reapportionment plans were adopted by his reapportionment board on the morning of December 3, 1990. These draft plans were adopted in the absence of population figures from the U.S. Bureau of the Census and these preliminary plans were jettisoned by Governor Hickel's reapportionment board. All public testimony collected by the Cowper board regarding preferred alignments was adopted.

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evidence of past racial animus but because turnout was below an arbitrary threshold in areas where English was not the primary language. The 1982 amendments had never been applied to an Alaskan redistricting. In fact, until presented with a revised plan in 1993, no objection had ever been lodged by the U.S. Department of Justice against any redistricting in Alaska.[7] Indeed, no federal court has ever ruled specifically on the constitutionality of any Alaskan redistricting.

Yet, every Alaskan reapportionment had been declared unconstitutional by the State Supreme Court. There were five previous cases going into this round. Despite rigorous analysis of prior court decisions, and great hopes on the part of the Governor and the Reapportionment Board, the 1991 reapportionment met the same fate as every preceding plan: at least some part of the plan was declared unconstitutional by the State Supreme Court (May 1992).

The 1991 Board took some two months to develop priorities for redistricting. Guidelines directed staff on the development of redistricting scenarios. Both the Board's attorney and contract attorneys advised that every effort must be made to protect individuals covered by the Voting Rights Act from avoidable retrogression in their ability to elect candidates of their choice.[8] The Board was urged not to pair incumbents who belonged to a protected race or language group with incumbents who did not belong to such a group. The Board was advised to devise so-called "influence" districts where people protected by the Voting Rights Act constituted at least 25 percent of the population. Despite honest misgivings about the prevalence or even existence of significant racially polarized voting patterns in Alaska, the Board followed that advice with gusto to help ensure approval by Justice and to preserve as many rural districts as possible. The Board, and their legal advisors, simply held out little hope of convincing the Justice Department that Alaska was not subject to the pernicious polarization and discrimination that gave rise to the Voting Rights Act in the first place.[9] The State had successfully bailed out before the 1975 amendments but did not try to bail out in time following the 1982 amendments.

The Board decided to shoot for keeping overall statewide population inequality among districts to under 2 percent (they later relaxed that standard to 10 percent) while at the same time designing districts avoiding retrogression and respecting individual ethnic and linguistic groups.

[7]In 1994 the U.S. Department of Justice objected to House District 36 because it dropped from 55.6 percent Alaska Native voting age population (VAP) to 50.2 percent. The Governor directed the Attorney General to amend the plan to please Justice attorneys. The Attorney General also negotiated a settlement with the lone challenger to the 1994 plan, the Matanuska-Susitna Borough. The settlement eliminated the 23 percent influence the Borough had in a fourth House district and concentrated Borough population in three overpopulated and underrepresented House districts. The Borough insisted on reducing their influence in the legislature in order to place residents only in districts dominated by Borough voters.

[8]How can there be retrogression in the ability of a protected group to elect candidates of their choice in the absence of racially polarized voting by the unprotected majority that might usually ensure the defeat of candidates supported by the protected group? Despite Professor Grofman's analysis, the conclusions of the State Supreme Court and the powerful legislative positions held by Alaska Natives (the only significant protected group in Alaska), Section 5 applies to Alaska and the Department of Justice must be appeased. This can lead to ridiculous micromanagement. At least one subset (Athabascan Indians) of the protected group (Alaska Natives) succeeded in persuading Justice to threaten an objection if a single town of 500 people was not moved from one district to another.

The Board held 12 public hearings and incorporated 32 public hearings held by the previous Board. They considered six scenarios for Southeast Alaska; twelve for Rural Alaska; eight for Fairbanks; ten for Anchorage and four for Southcentral Alaska. The Board reviewed in detail three final plans and adopted portions of two.

The final plan included a statewide deviation under 10 percent and an average deviation under 2 percent; the lowest overall and average deviations in state history.[10]

The plan provided for uniform single member districts where each district would elect a single representative and a single senator; the first time in state history that a uniform electoral apportionment was adopted.[11]

The plan maintained the number of Native American majority districts while increasing the percentages of Native Americans in every influence district. This was accomplished despite the drop from 16 percent to 15.6 percent in statewide Native American population. This was the first plan in state history where rural Alaska (where Alaskan Natives are generally in the majority) did not lose at least one seat in the Legislature.[12]

In order to accomplish those ends many Representatives and Senators, both Republican and Democrat, were paired in single-member districts and some towns and boroughs were divided between House or Senate districts. These divisions generated strong opposition from some citizens, towns, boroughs, the State Democratic Party, and five powerful Native American corporations.[13]

[9]In the last 20 years not a single unprotected group candidate defeated a protected group candidate as a result of racially polarized for the state legislature. The only instance of racially polarized voting discovered by Professor Grofman's analysis took place in a district with just 18 percent protected group VAP. In 1996, among other examples, an Alaska Native woman was reelected in a House District four percent Alaska Native VAP with 70 percent of the vote. She defeated a white male challenger in the primary. An Alaska Native man defeated two white men and a black man for his party's nomination and went on to defeat an incumbent white woman for the State Senate. The District had 5 percent Alaska Native VAP. An Alaska Native Representative challenged an incumbent Alaska Native State Senator in a District with 25 percent Alaska Native VAP and went on to defeat a white challenger by a wide margin for the open Senate seat.

[10]The Courts gave short shrift to population equality. In *Southeast Conference v. Hickel*, both the Superior Court and Supreme Court used the 16.45 percent deviation allowed in *Mahan v. Howell*, 410 U.S. 315 (1973) as though it was perfectly acceptable in order to satisfy other objectives. Judge Weeks wrote: "The courts have approved deviations of up to 10 percent as a matter of course and up to 16.4 percent with justifications like many that the board ignored." When the Court was through revising the plan, population deviation was 16.33 percent.

[11]Under the preceding reapportionment, the 40 House members had been elected from 14 single and 13 double-member districts while the 20 Senators were elected using five different types of district configurations.

[12]That plan revised under direction from the State Courts eliminated one of two Native majority Senate districts and reduced two influence districts, one to 36 percent from 41 percent and the other from 48 percent to 25 percent.

[13]The cases were consolidated under *Southeast Conference v. Hickel*.

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Following the Governor's reapportionment proclamation, the Constitution, Article VI, Section 8, allows just 30 days for filing challenges in superior court. Suits were filed against portions of the plan by the Southeast Conference representing cities in Southeast Alaska protesting division of their communities, the Matanuska-Susitna Borough against unwelcome division of their political subdivision and by the Arctic Slope Regional Corporation and the Tanana Chiefs Conference opposed to pairing Inupiat Eskimo with Athabascan Indians instead of the traditional pairing of Yupik Eskimo with Athabascan Indians. The Yupik Eskimo community, represented by the Fish and Game Fund, filed suit to defend the Governor's plan. The Democratic Party filed suit on procedural grounds that eventually demonstrated mistakes in advertising but whose broad hints of gerrymandering were apparently ignored by the Supreme Court in their decision and were not officially part of either the Superior Court or Supreme Court decisions. Indeed, no party brought charges of partisan gerrymandering before the court although many did not hesitate to imply the worst to the press. In court, Arctic Slope and Tanana Chiefs claimed that local incumbents representing their regions were targeted because of their opposition to the Governor in the Legislature. Pending preclearance, the plan could not be put into effect and little progress was made in state court.

The Board finished their work on June 11, 1991. The Governor proclaimed a plan on September 5, 1991. The plan was submitted to the U.S. Justice Department for preclearance on November 8, 1991 and was reviewed by Justice for some five months before it was precleared on April 10, 1992. It was the first statewide plan in the United States to receive preclearance without objection from Justice following the 1990 census.

The same interests filing suit in state court carried their opposition to the Justice Department. However, the Governor had active allies for his reapportionment before Justice. Native American groups in Alaska were divided. Support for the Governor's plan came from five of the nine Alaska Native legislators and five of the twelve Native Regional Corporations established under the Alaska Native Land Claims Settlement Act of 1971. Opposition to the plan came from the remaining four Alaska Native legislators and from five of the twelve Native Regional Corporations. Two Native Corporations and the Alaska Federation of Natives took no public position.

Representatives of the Governor flew twice to Washington, D.C. to meet with Justice Department officials. More information was requested by Justice on December 31, 1991, and a response from the State was sent back to Washington on February 11, 1992. If the pointed questions of the December 31 Justice letter are any guide, they gave considerable weight to objections raised by the opponents of the Governor's plan.

Nevertheless, after additional information and lobbying by Alaska Natives in support of the Governor's plan, the Justice Department eventually entered no objection to the reapportionment. A Justice Department attorney, Robert Kengle,

seemed to be focused on Athabascan Indians and the effect the plan had on their status in a single legislative district. The State countered that (a) the Voting Rights Act did not apply separately to each group of Native Americans in Alaska, and, in any case, (b) the position of Athabascan Indians did not avoidably retrogress under the Governor's plan. They actually increased their statistical advantage. The Athabascan were simply paired with Inupiat Eskimo instead of Yupik Eskimo. While the State did not agree with Mr. Kengle that individual Native American groups had to be considered for purposes of the Voting Rights Act, the Board took individual groups into consideration for socio-economic reasons.

Oddly enough, it was the condition of the Yupik Eskimo and efforts by the Board and Governor to unify the Yupik that led to fierce opposition by Inupiat Eskimo and Athabascan Indian organizations. Traditionally, reapportionment relied on dividing Yupik Eskimo communities along the Western Alaskan coast to round out population for districts otherwise dominated by Inupiat Eskimo to the north and using Yupik Eskimo communities along the Yukon and Kuskokwim Rivers to shore up the underpopulated Interior Alaska where Athabascan Indians predominated.

The 1991 Board united the Yupik into two districts and combined the Inupiat and Athabascan into two. Yupik Eskimo dominated two districts, one district was dominated by Inupiat Eskimo, and one district combined the remaining Inupiat Eskimo population with rural Athabascans. The Athabascans and non-Natives living in the Athabascan region of the new district made up more than 55 percent of that new district population.

Once Justice approved the Governor's plan on April 10, 1992, State litigation resumed in earnest. The original complaints filed in September 1991 did not come to trial until April 16, 1992. After a 16-day trial, a Superior Court Judge from Southeast Alaska issued a harsh 106-page Opinion on May 11, 1992 that rejected nine House districts and invalidated the plan. The Judge, who had no experience with reapportionment, was nonetheless unequivocal in his denunciation of the attitude of members of the Board. He criticized the process the Board followed as inadequate and stated in his Opinion that the chair of the Board was evasive in testifying, sometimes "misleading to the point that only persistence in counsel's questioning brought out the truth."[14]

Alaska includes a military population of approximately 55,000 service personnel and their dependents. This represented 10 percent of the total population recorded by the Census for Alaska. The Superior Court also ruled that the Board failed to take a "hard look" at whether non-resident military could be identified and deducted from the population base for reapportionment.[15] According to earlier rulings by the State Supreme Court, the State Constitution permits the deduc-

[14]Superior Court Judge Larry Weeks wrote that the Board Chairman was contradicted by his deposition testimony at least ten times. Interestingly, the Chair of the Reapportionment Board was elected in 1992 to the State House and reelected in 1994 and 1996.

[15]*Southeast Conference v. Hickel.*

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tion of non-resident military from the reapportionment base if nonresidents can be identified.

The Governor appealed. The State Supreme Court took ten days to uphold the Superior Court that certain districts violated the State Constitution and reversed Judge Weeks with respect to the population base, ruling instead that the Governor's inclusion of all military and dependents was reasonable.

The Supreme Court stated that the Board and Governor had needlessly sacrificed socio-economic integration and compactness in order to bolster Native American districts and to achieve "excessive" population equality.[16] The Court even managed to find a lack of contiguity. The 1992 Court held that the Board had an affirmative responsibility to apply the "as nearly as practicable" standards for contiguity, compactness, and relative socio-economic integration outlined in Article VI, Section 6 of the State Constitution and further decreed that political subdivisions inherently represented integrated socio-economic areas.[17] The Court insisted that these state constitutional mandates could be sacrificed only when mandated by the Voting Rights Act.

The State Supreme Court reached its conclusion in June, 1992. The Court's decision and remedy so late in the year required—for the first time in state history—canceling some local school board elections and postponement of the statewide primary for three weeks. In a 3-2 decision it also ordered the Superior Court to adopt an interim plan. Rather than remand reapportionment to the Governor, the Court ignored the plain language of the State Constitution which reads:

> Governor Hickel and Attorney General Charles E. Cole were outraged at the usurpation of constitutional authority granted to the Governor and publicly denounced the court, but with elections pending, they participated in the Court's adoption of an interim plan. Ultimately, the 1992 interim plan left some 75 percent of Alaskans in the districts the Governor originally placed them; the Court adopted a revised map prepared and submitted by the Governor.

Was the Court's plan any better? Most people in Southeast Alaska think so. Statewide, the Alaska Native community remained divided. No changes were made to urban Alaska. The Matanuska-Susitna Borough was still divided, although in seven instead of nine districts. The plan adopted by the Court meandered back and forth across highways in rural Alaska for several hundred miles and divided the tiny Lake and Peninsula Borough (population 1,668) in half, separating the people of that Borough into two house and two

[16]After the Court was through revising the Governor's plan overall population deviation leaped from 9.2 percent to 16.33 percent, as high as any in the United States.

[17]This innovative ruling left organized boroughs (counties) with preferential status while leaving those communities in rural areas of Alaska not organized into boroughs (some 60 percent of the area of Alaska), apparently requiring a greater burden of proof before their interest in being districted together equaled boroughs. The Constitution simply states that political subdivision boundaries may be considered.

senate districts. This latter result was not required by the Voting Rights Act nor did it adhere to the latest Opinion by the Supreme Court regarding the recently discovered preeminence of Boroughs as perfect representations of socio-economic integration.[18]

Was there any way to avoid this fate for the Governor's plan? Can the Governor and Board in 2001 look for clues in the rulings of the Alaska Supreme Court?

I think not. The 1991 Board attempted to avoid the fate of the 1971 and 1981 boards by following the court's own rules to no avail.[19] The 1992 court reversed or ignored their previous reasoning and conclusions.[20]

Three examples should serve to illustrate this point.

ADAK 1972 and 1992

In 1972 the State Supreme Court's own interim plan decided where to place the naval military base of Adak, which sits some 900 miles out at the western edge of the Aleutian chain. This Court-drawn House district skirted around the rest of the Aleutians (an island chain) for more than 1,100 miles until Adak was finally combined with the City of Kodiak, but not the rest of the Kodiak Borough. Zero evidence of socio-economic integration existed and none was referred to by the Court's Masters who devised the scheme. It is impossible to conceive a district less compact. It resembled a 1,100-mile hose with bulbs of population at both ends. It was contiguous only over more than 1,000 miles of water. It was adopted by the Court.

The 1991 reapportionment board took the isolated military base and aligned it over water (about 1,000 miles) with Southwest Alaska. The obvious Court precedent may have deterred the six plaintiffs who filed suit against portions of the Governor's plan from objecting to this, but it did not deter our imaginative State Supreme Court. Acting on its own motion, *sua sponte*, without so much as a reference to the model of its own 1972 plan.[21] the 1992 Court

[18]It was a result of revisions made by Judge Weeks to the plan adopted by his own Masters. He moved a town in the east where people had complained (Cordova) and exchanged them for a town in the north east (Tok) and dividing the Lake and Peninsula Borough. Once Tok was moved and the little Borough divided, people promptly complained. Judge Weeks ignored them. His tinkering serves as excellent evidence of the perplexity in reapportionment and the trials of attempting to accommodate public opinion. People complain largely when something they dislike happens to them. Until it happens they don't have anything to complain about. Where do you draw the line, both literally and figuratively, with public testimony?

[19]During the 1991-92 reapportionment process, the Board carefully reviewed the Court's own prior plans to attempt to discern what it was the Court might find acceptable. The Board applied all previous tests discovered by the Court in the past by which proposed new districts might by measured. Every district proposed by the Reapportionment Board and Governor Hickel had its counterpart in districts previously endorsed or designed by the Court.

[20]The final decision in *Southeast Conference v. Hickel* included yet another new proclamation from the eminent jurists of the State Supreme Court. Perhaps they were a little embarrassed by the similarities between districts designed or approved by them in the past and the new districts adopted by Governor Hickel but declared unconstitutional by the Court. How did they deal with this ticklish problem? The 1992 Court declared that all Court plans were interim in nature and need not necessarily be constitutional.

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rejected the pairing of Adak Naval Base over water with the Lower Yukon River area some 800 miles distant, proclaiming such a district "plainly erroneous." This conclusion was reached despite the substantial improvement in the percentage of Native Americans in House and Senate districts and the endorsement of the plan by all three Alaska Native Regional Corporations whose population was affected.

One Iceworm Is Fine, Two Are a Crowd

The 1983 Supreme Court held that a new House district, stretching for some 800 miles, winding its way through islands and up inland waterways from Annette Island in the South, to Yakutat in the north, was socio-economically integrated except for the City of Cordova.[22] This district was described as the "Iceworm" district by the Court. In order to permit such a novel construction—previous districts had centered on communities moving from north to south. To justify the elongated and weaving Iceworm district the 1983 Court stated in their Opinion that they believed all of Southeast Alaska was socio-economically integrated.

The 1991 plan divided the region and some towns in Southeast to create two districts (instead of one) stretching the length of the region in order to unite almost all Native Americans living in Southeast Alaska in two house districts and one senate district. Such districts would ensure political integration of Southeast House districts and enhance Alaska Native voting influence.

However, the 1992 Court ruled that those districts were not socio-economically integrated as nearly as practicable and ruled them unconstitutional. What is incredible is that the 1983 court admitted that dividing the Southeastern region of Alaska into districts North and South would lead to greater socio-economic integration but elected to defer to the Governor and his Board who desired to maximize Alaska Native influence. This 1981 effort to maximize was not a result of a Justice Department objection, nor was it to avoid retrogression, and the Court admitted it was not required by the Voting Rights Act. Yet the 1983 court concluded a single Iceworm was fine as long as it was confined to Southeast Alaska. They ruled that a district not as socio-economically integrated as practicable was within the proper discretion of the Governor. The 1992 Court proclaimed the opposite. Now the constitution was reinterpreted to require adherence to borough boundaries and to maximize socio-economic integration! Yet, except for one member, the membership of the Court was identical.[23]

[21] In the written decision that followed six months later the Court decreed that since Court plans were interim in nature, they did not have to be constitutional. *Southeast Conference v. Hickel.*

[22] *Carpenter v. Hammond*

[23] The new member had been the Superior Court judge who ruled the whole 1981 plan constitutional and had been overruled by the State Supreme Court.

Borough Busters, That Was Then, This Is Now

In 1982, the Kenai Peninsula Borough population justified 1.5 Senate and 3 House districts. However, the 1984 revised plan divided the Kenai Peninsula Borough into four House districts and three Senate districts. The local government challenged the 1984 plan arguing that their right to equal representation was violated. The 1987 Court dismissed their claim utterly.

In 1992, the Matanuska-Susitna Borough population justified just under 1.5 Senate and three House districts. It was, and is, the fastest growing area in Alaska. The 1992 plan divided the Matanuska-Susitna Borough[24] (Mat-Su) into five House districts and four Senate districts. In the Governor's plan, Mat-Su residents were the majority in two House seats, held 44 and 48 percent of the population in two more, and made up 20 percent in a fifth. In the Senate, the people of the Mat-Su made up a solid 72 percent in one district, 40 percent in a second, 24 percent in a third and 10 percent in a fourth.

The 1987 Court, ruling on the revised 1984 plan, concluded that they should not draw a fine line with respect to whether areas are socio-economically integrated as nearly as practicable. The Court found that the Nikiski portion of the Kenai Peninsula Borough was socio-economically integrated with Anchorage despite the fact that the interaction of North Kenai with South Anchorage is compromised by being 100 miles apart by road, sharing no common services, looking to different daily newspapers and communities where only a very few residents commute.[25]

That was then, this is now. The 1992 Court concluded that Wasilla is not socio-economically integrated as nearly as practicable with Eagle River. This comic conclusion is made notwithstanding the fact that these communities are both members of the same telephone and electric cooperatives, are less than 25 miles apart, share only one daily paper; moreover, up to 40 percent of each community's workforce commutes together into Anchorage on a daily basis.

Every member of the Court who participated in the 1987 ruling participated in 1992. During the intervening five years the Court apparently discovered that Boroughs were actually ideal socio-economic integrated units and that to divide a borough any more than absolutely necessary was an obvious violation of the constitution.[26] The 1992 Court ruled that these 1992 Matanuska-Susitna districts violated the state constitutional provisions mandating socio-economically integrated districts.[27]

The 1992 Court trotted out the description the delegates to the state constitutional convention gave to their concept of socio-economic integration: [W]here

[24] The fastest growing Borough in Alaska during the 1980s and 1990s according to the U.S. Census and the Alaska Department of Labor.

[25] *Kenai Peninsula Borough v. State*

[26] How this Opinion squared with the needless division of the Lake and Peninsula Borough (population 1,668) designed by Judge Weeks and adopted by the Supreme Court remains a mystery. The Governor's final plan (March 1994) reunited the tiny Borough.

[27] Interestingly, the Court's own Masters and the final plan adopted by the Governor maintained a Wasilla-Eagle River House District.

people live together and work together and earn their living together, where people do that, they should be logically grouped that way. A socio-economic unit is described as: "an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a group of people living within a geographic unit, following if possible, similar economic pursuits.[28]

The 1992 Court announced that all boroughs (counties, municipalities) inherently represented integrated socio-economic units, the antiquity or size of the borough notwithstanding. However, the Matansuka-Susitna Borough was compelled by the Legislature in 1965 to organize as a local government. The Borough is the size of West Virginia and was simply modeled after an existing state legislative district. As for being a perfect socio-economic ideal, in the last thirty years, the Borough has contracted once and sought expansion at least twice.[29]

Some Neighbors Are More Socio-economically Integrated Than Others

The 1992 Court went on to declare a new constitutional principle: that it was unconstitutional for any political subdivision of the state to be divided so that excess population went in more adjoining districts than necessary.

Obviously, this could not have been the understanding of the 1991 Board, because no plan had ever been designed with that in mind. Indeed, the Constitution merely states that the Reapportionment Board may consider political subdivisions while drawing districts but gives them no greater weight. On the contrary, the Board determined that equal population, enhancement of the numbers of people protected by the Voting Rights Act, and uniform legislative representation were the primary goals superior to adhering to political subdivision boundaries. Naively, the Board believed the plain constitutional language, prior rulings by the Court, and the Court's own examples when they took a direct hand in drawing districts were safe guides.

For example, the 1992 Court writes:

> It is axiomatic that a district composed wholly of land belonging to a single borough is adequately integrated. . .We recognize that it may be necessary to divide a borough so that its excess population is allocated to a district situated elsewhere. However, where possible, all of a municipality's excess population should go to one other district in order to maximize effective representation of the excess group. This result is compelled not only by the article VI, section 6 requirements, but also by the state equal protection clause which guarantees the right to proportional geographic representation.[30]

While this constitutional principle may be "axiomatic," the 1987 Court approved a plan dividing the Kenai Peninsula Borough in five House seats and three Senate seats.

[28] Minutes of the Alaska Constitutional Convention, 3 PACC 1873 (January 12, 1956).

[29] In 1996, the Alaska Local Boundary Commission recommended to the Legislature the approval of an application by northeastern residents seeking to break away from the Matanuska-Susitna Borough.

[30] Kenai 1352, 1369 and 1372-73 and Southeast Conference, p.29.

Once again, the 1992 Court ignored several of its own previous rulings and discovered heretofore unobserved state constitutional standards. Every decade, without prejudice toward whether the Governor was Democrat, Republican or Alaskan Independence, the Court has found the Governor's plan unconstitutional. In each case the Court has applied heretofore undiscovered rules to justify judicial interloping.

Reviewing Alaska history, we find that the State Supreme Court has substituted its own judgment for Governors Egan and Hickel, compelled Governor's Egan and Hammond to amend their plans, and reprimanded Governor Sheffield by declaring his plan unconstitutional.[31]

The Governor proclaimed a new reapportionment on March 25, 1994. No suits were filed protesting the plan during the 30-day period allowed by the state constitution. It is preposterous to suggest that no suit was filed because Governor Hickel managed to please everyone. Indeed, in 1995 a Yupik Eskimo group had dropped a case pending in federal court and citizens from Nenana to Glennallen were outraged that there were no suits in state court. Even in the election for Governor in 1994, no party or individual filed suit even on the hope that a new Governor might have an opportunity to craft a plan more to their liking. It is reasonable to surmise that the absence of a state challenge was less because the Democratic Party was delighted with the Governor's plan than because everyone recognized the futility of a second round victory in state court. What else can this be due to other than the predictability of our State Supreme Court?

My conclusion is that the State Supreme Court believes every Governor will use reapportionment to create districts that benefit their political agenda, whether party oriented or incumbent oriented. Consequently, the Court believes only by declaring a plan unconstitutional can they exercise restraint on the unbridled political maneuvering of the Governor.

The Governor has absolute authority to reapportion through a reapportionment board that serves at his pleasure. However, the first plan of any governor will be declared unconstitutional by the State Supreme Court. What empirical evidence exists is irrefutable. No effort to read past decisions will spare even the most apolitical Governor or Board from the censure of the Court. The perverse effect of this judicial strategy eliminates whatever meager incentive exists for a governor to practice restraint, work to compromise, or to any real degree rein in political manipulation during reapportionment, round one. Such is the legacy of Alaska's predictably unpredictable reapportionment process.

[31] The 1987 Court found a senate district unconstitutional, concluding that the design of one of the multi-member Senate districts intentionally discriminated against the people of Anchorage and violated their right to equal protection under the Alaska Constitution. In what stands out as a singularly bizarre action the 1987 Court proclaimed that their declaration that the district was unconstitutional was remedy enough. Kenai 1373.

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