IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

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Case No. 4FA-11-2209CI

Memorandum Decision and Order Re: 2011 Proclamation Plan

Executive Summary: Proclamation House Districts 1, 2, 37, and 38 are remanded to the Redistricting Board to be redrawn in harmony with the Alaska Constitution.

I. Introduction and Overview.[1]

A. Alaska Constitution/Federal Voting Rights Act.

The framers of the Alaska Constitution drafted a document that is clear, simple, and precise. Thomas Stewart, one of the animating forces behind the Alaska Constitution, fondly recalls the convention did not want to reveal a mere code of laws, but rather wanted to make the Alaska Constitution *sing*. The founders succeeded in this task beyond all expectations. Determining whether the instant Proclamation Plan can be harmonized with the Alaska Constitution is the task at hand.

The measure of a society is reflected in its ability to bring all its citizens within the pavilion of its basic processes. The hallmark of the American democracy is the ability of its

[1] The court is utilizing Judge Rindner's order to the extent possible for several reasons. It is an accurate survey of the law. It is a logical format. And it is a format that is familiar to the parties and the Alaska Supreme Court. Appendix A to this order contains this court's substantive pre-trial orders. Appendix B contains the plans of the Board and the private groups. Appendix C contains of table of contents for this decision.

citizens to have their voices heard. The concept of one person/one vote is not a chimera but a talisman of the equal protection of law. After the inception of the United States, our society has been shaped by the ballot and the jury box,[2] the "heart and lungs" of democracy.[3]

The devil is always in the details. For the purposes of one person/one vote, the quotidian formula of the Alaska Constitution, based on the U.S. Census,[4] also is clear, simple, and precise. Alaska's willing, and in some ways surprising, acceptance as one of the several states in the United States of America came with the acceptance of federal preemption in different areas. Specifically for our purposes is the Voting Rights Act ("VRA").[5]

Alaska is one of a handful of states that require *preclearance* of any redistricting plan by the federal Department of Justice ("DOJ"). This preclearance process, and the attendant regulations, are the elephants in the redistricting room. All parties recognize the precedence of the VRA in the redistricting process.[6] The inability of the parties to agree on whether VRA

[2] The one lamentable exception where the ballot box failed occurred between 1861-1865; that event ultimately created the need for the Voting Rights Act ("VRA").

[3] Quoting John Adams in his Third Clarendon letter, Appendix A, No.1.

[4] The Constitution of the United States Article I, Section 2 directs that the population be enumerated at least once every ten years. Although that census is primarily used to set the number of members from each state in the House of Representatives and the Electoral College, this decennial federal census is utilized under Article 6, Section 6 of the Alaska Constitution for drawing state house and senate districts.

[5] 42 U.S.C. §1973c (2006).

[6] In *Hickel v. Southeast Conference*, 846 P.2d 38, 62 (Alaska 1992), the Alaska Supreme Court adopted and observed the following priorities relating to redistricting: Priority must be given first to the Federal Constitution, second to the federal voting rights act, and third to the requirements of article VI, section 6 of the Alaska Constitution. The requirements of article VI, section 6 shall receive priority inter se in the following order: (1) contiguousness and compactness, (2) relative socio-economic integration, (3) consideration of local government boundaries, (4) use of drainage and other geographic features in describing boundaries. *Id.* at 62. These priorities were also adhered to by the Alaska Supreme Court in the last redistricting cycle. *In re 2001 Redistricting Cases*, 44 P.3d 141, 142 (Alaska 2002).

Section 5 compliance is sufficient justification for the Board's Proclamation Plan is the gravamen of the instant action.[7]

B. Alaska Constitutional Requirements.

The Alaska Redistricting Board ("the Board") is tasked with creating 40 house districts and 20 senate districts. The ideal number of population for each house district is achieved by dividing the population of the entire state by 40. Each house district should be formed of territory that is bordering or touching, has a small perimeter in relation to the area encompassed, and consists of population that have common interests or connections. Senate districts are created by pairing two house districts that are bordering or touching. The Board must also take into consideration local government boundaries.[8] These requirements are discussed in more detail later in the decision.

C. Homogeneity of "Indian" for VRA Requirements in Alaska.

The minority group of concern in Alaska to DOJ is "Indian." Unfortunately the federal government view of "Indian" is simple homogeny. It does not recognize the rich diversity among various Alaska Natives.[9] For the purpose of this opinion the court will use the term Alaska Native as a more appropriate term in Alaska but the legal meaning will be the same as "Indian" under the VRA.

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[7] See Section I (H) of this order regarding the standard applied in analyzing the Board's choice of plans in face of this necessity.

[8] Article VI, Section 6 of the Alaska Constitution.

[9] The plaintiffs rightfully note the real differences among the various Alaska Natives and the absurdity of considering them all the same for purposes of Section 5. The court need not resolve that issue in this opinion based upon its conclusion that the current federal law is homogeneity. The court is aware of a growing concern for a more multi-factor test that is being championed in Texas and Florida but is not aware those arguments have superseded the homogeneity definition.

D. Primer of Terms.

The following terms are terms of art and used accordingly in this opinion.

1. *Retrogression.* The DOJ measures retrogression by comparing minority strength under the new plan compared to their position under the existing plan.[10] In other words, Natives cannot have less ability to elect a candidate of their choice than they did ten years ago.

2. *Racial Block Voting* occurs when Natives and whites vote along racial lines, voting in "blocks." This means that voting is polarized.

3. *Effective Districts* refers to districts where Natives have an ability to elect a candidate of their choice.

4. *Influence Districts* refers to districts where Natives are able to influence the election but cannot elect a candidate of their choice without the help of crossover votes from whites.

5. *Out migration* refers to the concept that Natives have moved out of rural areas and into urban areas in Alaska, such as Anchorage, Fairbanks, and the Matanuska-Sustina Valley area ("Mat-Su").

6. *Excess population* refers to population from a municipality or borough that is not enough to support a house district on its own.

7. *Benchmark.* The benchmark refers to the number of effective districts in the plan 10 years ago. This number creates a "benchmark" for the new plan, which means that the new

[10] *Beer v. United States*, 425 U.S. 130, 141, 145 (1976).

plan must have the same number of effective districts or it will be found to be retrogressive.[11] Districts that are referred to as benchmark districts throughout the decision are the current districts in place. The Proclamation Plan is the plan the Board has chosen, but has not yet been implemented.

8. *Native Voting Age Population.* Native Voting Age Population ("Native VAP") refers to Natives that are old enough to vote. The percentage of Native VAP in an area is more relevant in establishing a Native district than total Native population.

E. Summary of the Task/Time Line.

All the Board members were appointed over the course of the summer of 2010. The Board had a joint meeting with the redistricting planning committee on 12 September 2010. It spent the next few months setting up, going to trainings, hiring counsel and staff, and practicing with the software. The Board received the official census data on 13 March 2011.[12] The Board had 30 days to take pre-plan public testimony and draft option plans to present to the public at a series of meetings throughout the state. It had a total of 90 days from its appointment to hold public hearings and get feedback on the plans. The final plan was signed on 13 June 2011.

F. Summary of the Dispute.

The plaintiffs claimed the Board violated the Alaska Constitution in several different districts in the areas of compactness, contiguity, and socio-economic integration. The Board acknowledged some of the violations and cites the VRA as a justification for deviating from

[11] There are exceptions. It is possible that a district could be found not to perform, but that is not before the court at this time.

[12] The court notes there is some discrepancy on the date. The Proclamation Report cites 15 March 2011 as the release date of the census data, but there was also testimony the release occurred on 13 March 2011.

strict compliance with the Alaska Constitution. The main issue was whether deviation from the Alaska Constitution was necessary in order for the Board to comply with the VRA.

The plaintiffs also argued that the Board did not give the City of Fairbanks and the Fairbanks North Star Borough ("FNSB") the proportional representation they are entitled to. The Board contended that there is no right to strict numerical representation and that it did not discriminate against the City or Borough of Fairbanks. The main issue was whether the Board had legitimate non-discriminatory reasons for combining population of Fairbanks with other areas outside the City and Borough of Fairbanks.

The plaintiffs also raised arguments regarding the benchmark used to apply the VRA. The plaintiffs essentially argued that the benchmark applied was inaccurate. They also argued that a multi-factor analysis should have been done using factors such as language in order to achieve a more accurate benchmark. This issue was dismissed by the court in a pre-trial motion; however it was preserved for the record.[13]

While gerrymandering was not specifically pled, the plaintiffs additionally argued that the Board made some decisions based on partisan affiliation. The Board denied these allegations.

The plaintiffs also argued that there were due process concerns relating to the timing of the hiring of and analysis by the VRA expert. The Board denied these allegations.

[13] Appendix A, No. 6.

G. Prior Orders/Appendix.

Issues were narrowed by several pre-trial orders. All issue dispositive orders are set out in the attached Appendix A. The reasoning and holdings in those orders will be adopted by reference to the Appendix. Those orders are briefly summarized as follows:

1. 22 September 2011 Order on Motion to Dismiss for Lack of Standing

The Board argued governmental entities (boroughs and cities) are not qualified voters and do not have standing to sue. The court denied this motion.

2. 10 October 2011 Order Granting the Riley Plaintiffs' Motion for Summary Judgment in Part

The plaintiffs moved for summary judgment that Proclamation House District 38 is not socio-economically integrated based on the Board's admission. The court granted the motion.

3. 12 December 2011 Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness

The Petersburg plaintiffs argued that 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.

4. 23 December 2011 Order on the Compactness of Districts 1, 2, and 37

The plaintiffs argued that Proclamation House Districts 1, 2, and 37 were not compact. The court found that they were not compact and granted the plaintiffs' motion for summary judgment on the issue.

5. *23 December 2011 Order on the Contiguity of House District 37*

The plaintiffs argued that Proclamation House District 37 was not contiguous, mainly due to the split of the Aleutian Chain. The court found that Proclamation House District 37 was not contiguous and granted the plaintiffs' motion for summary judgment on the issue.

6. *23 December 2011 Order on the Plaintiffs' Motion for Partial Summary Judgment/Law of the Case: Benchmark Standard*

The plaintiffs argued that the benchmark used to apply the VRA was inaccurate. The court denied the plaintiffs' motion for summary judgment on this issue and held that the benchmark standard was correct.

7. *23 December 2011 Order on the Plaintiffs' Motion for Summary Judgment: Invalidity of House District 38*

The plaintiffs argued that the Board did not make adequate findings regarding whether Proclamation House District 38 was required under the VRA. The court denied the plaintiffs' motion for summary judgment but reserved for trial the issue of whether the VRA justified Proclamation House District 38.

8. *23 December 2011 Order on the Plaintiffs' Motion for Summary Judgment: Invalid Process*

The plaintiffs argued that the Board followed an invalid process by not first attempting to draft a plan that complied with the Alaska Constitution. Plaintiffs asked the court to remand the plan back to the Board. The court denied the motion.

9. 23 December 2011 Order Regarding the Law of the Case and the Splitting of the Excess Population of the Fairbanks North Star Borough

The plaintiffs and the Board ultimately agreed that the burden was on the Board to prove that it had legitimate, non-discriminatory reasons for splitting the excess population of the FNSB into Proclamation House Districts 38 and 6; and that Proclamation House District 38 was necessary under the VRA. The court granted the motion.

H. Necessity and Choice within Necessity.

The plaintiffs contended that a plan chosen by the Board for submission to DOJ for preclearance must be based upon an "absolute necessity" to deviate from the Alaska Constitution.[14] This is a high standard. The Board urges that it need only show that it is "impracticable" to comply with the Alaska Constitution in order to meet the requirements of DOJ.[15] This is a low standard.

The actual standard is whether deviation from the Alaska Constitution is necessary or required under the VRA.[16]

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[14] Standard urged by the plaintiffs in closing argument.

[15] Standard urged by the Board in closing argument.

[16] Citing discussion from *Hickel*, "The Board cited the Voting Rights Act as its justification in creating District 3. District 3 was meant to be a Native influence district. The proposed configuration of District 3 raised the Native percentage of the district two percentage points compared to the old "Islands District." However, such an awkward reapportionment of the Southeast Native population was not necessary for compliance with the Voting Rights Act. An "Island" District can be configured which satisfies the requirements of the Voting Rights Act and which is more compact and better integrated socially." *Hickel v. Southeast Conference*, 846 P.2d 38, 51-52 (Alaska 1992). Our conclusion underscores the error in the Board's methodology in reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution. The Board was advised to expect that any challenges to the reapportionment plan would come under the newly amended section 2 of the Voting Rights Act. Consequently, the Board accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution. This methodology resulted in proposed district 3, a district which does not

The allegation of "necessity" is not, in itself, enough to avoid judicial scrutiny. The court recognizes that there is always choice within necessity. This concept is neither new nor novel. The classic view of choice articulated by Thucydides[17] and shared by Hobbes is that a bipolar international system – Athens/Sparta – is unstable and necessarily leads to war. Choice only follows after that inevitability unfolds, such as which side to ally with, whether to depend on naval battles while retreating behind Athenian walls, and whether to defend the countryside or to depend on foreign food supplies to withstand the Spartan siege (the last choice we know the Athenians got wrong).

It is within the Melian dialogue[18] where the choice within necessity is most apparent. By necessity the Melians had to make a choice, but they were free to choose within that necessity. As the Athenians picked off the weak city-states one by one they gave them the choice to refuse alliance: "The Melians were put in quite the predicament: to save themselves and surrender or have their nation completely destroyed for the sake of independence."

The court finds the Board did take a hard look at difficult plan alternatives for submission to DOJ and that submission of a plan to DOJ for preclearance was necessary. That does not end the inquiry where a proposed plan is contrary to the provisions of the Alaska Constitution. Here

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comply with the requirements of the Alaska Constitution. However, proposed district 3 is not required by the Voting Rights Act, either. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements. *Id.* at 52, n. 22. The standard for overall review of the Board's decision is set out in this court's order in Section IV (D) of this decision.

[17] Thucydides' History of the Peloponnesian War.

[18] This dialogue, contained in The History of the Peloponnesian War, is an account of confrontation by a small neutral island in the southern Aegean Sea and Athens in 416-415 BC. In general, "the dialogue is formally not about the morality of the eventual execution, but about the Melian response to the Athenians' demand that Melos should submit."

the court will take the next step of scrutinizing the choice mandated by necessity to determine whether the Board chose a plan that was most in harmony with the Alaska Constitution. The emphasis on harmonizing the choice of the Board with the Alaska Constitution in view of the necessity of the DOJ requirements is the standard used in the analysis of the Proclamation Plan below.

II. Work of the Board.

A. Make up of the Board.

Governor Sean Parnell appointed John Torgerson[19] ("Torgerson") of Soldotna, Executive Director of the Kenai Peninsula Economic Development District and former state senator, and Albert Clough of Juneau, a retired commercial pilot, as the first members of the Board on 25 June 2010. Albert Cough resigned on 23 February 2011 when he accepted full-time employment with the State of Alaska. Governor Parnell appointed PeggyAnn McConnochie[20] ("McConnochie"), a real estate broker from Juneau, to replace Mr. Clough on the same day. Senate President Gary Stevens appointed Robert Brodie[21] ("Brodie"), a real estate broker and former mayor of Kodiak, on 25 June 2010. The Speaker of the House of Representatives, Mike Chenault, appointed Jim Holm[22] ("Holm") of Fairbanks, a business owner and former state representative, on 8 July 2010. Alaska Supreme Court Chief Justice Carpeneti appointed Marie Greene[23] ("Greene") of Kotzebue, CEO of Nana, Inc., and an Alaska Native, on 31 August 2010. Torgerson was elected Chair. McConnochie was elected Vice Chair.

B. Trainings.

All Board Members and the Executive Director Ron Miller ("Miller") attended redistricting training at the National Conference of State Legislators ("NCSL") Redistricting Seminar in Providence, Rhode Island on 25-28 September 2010. Torgerson, Miller, Mr.

[19] Torgerson lives in the Third Judicial District.

[20] McConnochie lives in the First Judicial District.

[21] Brodie lives in the Third Judicial District.

[22] Holm lives in the Fourth Judicial District.

[23] Greene lives in the Second Judicial District.

Bickford[24] ("Bickord"), and Board counsel, Mr. White ("White"), attended the NCSL Redistricting Seminar in National Harbor, Maryland on 20-24 January 2011.

C. Private Groups.

Several private groups participated in the redistricting process by drafting maps of their own and presenting them at Board meetings. The main groups were Alaskans for Fair and Equitable Redistricting ("AFFER"), Alaskans for Fair Redistricting ("AFFR"), and the RIGHTS Coalition. Some of the maps of these groups are attached in Appendix B of this order.

D. Meetings.

The following is a brief summary of each Board meeting:

13 September 2010

A joint meeting between the Alaska redistricting planning committee ("committee") and the Board took place in Anchorage. Doug Wooliver, the Chair of the committee, briefed the Board on their work which included acquiring office space, computer hardware, and redistricting software. The committee also informed the Board about the DOJ pre-clearance of Alaska redistricting plans, the Board's need to hire staff, independent legal counsel, and a VRA consultant, the Board's budget, and redistricting timelines. The Board unanimously elected Torgerson as the Board Chair and gave the him authority to hire redistricting staff. The Board agreed to allow e-mail for perfunctory items necessary for Board operations.

18 October 2010

Nivasa Srinivasan, an IT person from Network Business Systems, discussed the network set up with the Board. The Board discussed their daily compensation and compensation for travel

[24] Bickford was the assistant executive director and eventually became the executive director.

expenses and cell phones. The Board decided to buy laptop computers. The Board went into executive session to discuss hiring an executive director and a law firm.

22 October 2010

The Board held executive session. The Board considered applicants for the position of Executive Director and proposals for independent legal counsel. Deliberations occurred in executive session under AS 44.62.310(c)(2) and AS 36.30.240.

13 December 2010

Brodie was absent. The Board approved its compensation policy. White, the Board's counsel, and an associate, Nicole Corr, briefed the Board on how to comply with the Open Meetings Act and the Public Records Act and how to properly conduct executive sessions.

16 March 2011

The Board held a meeting in Anchorage and took testimony by teleconference. Brodie joined the Board late due to weather problems. The Board announced at the meeting that Al Cough resigned from the Board to take a job at the State of Alaska and McConnochie would be the replacement from the Governor's appointment in Juneau. Denis Morris, President of First Alaskans Institute, Rick Mueller, policy analyst of First Alaskans Institute and Liz Crow, director of the Alaska Native Policy Center gave a presentation concerning how to engage the Alaska Native community to participate in a public process. The Board then took testimony, which included testimony from: Robert Venable from the Southeast Conference; Dave Metheny; Don Gray, Jake Metcalfe, and Deborah Williams from the Alaska Democratic Party; Heidi Schoppenhorst; Tanya Beatus from AFFR; Tom Okleasik from the Northwest Arctic Borough in

Kotzebue; Lupe Maroquin; Jon Bolling from the City of Craig; Jerry Jordan from Sitka; Kristie Smithers; Kanetee Bower, and Sherri Pierce from the Alaska Association of Municipal Clerks; and Leonard Lawson from the Alliance of Reproductive Justice. Randy Ruedrich, from AFFER and Chairman of the Alaska Republican Party, testified about prisoner population attribution and submitted statistics to the Board. White then reviewed the Open Meetings Act. The Board discussed the budget and pre-plan and post-plan strategies in meeting with the public. The Board chose the following pre-plan sites: Anchorage; Palmer; Juneau; Ketchikan; Fairbanks; Kotzebue; Bethel; and a Statewide Teleconference. The Board scheduled meetings to work on maps as a group. The Board chose the following post-plan meeting sites: Anchorage; Angoon; Bethel; Cordova; Craig; Delta Junction; Dillingham; Dutch Harbor; Fairbanks; Galena; Glennallen; Haines; Healy; Homer; Hoonah; Juneau; Kenai; Ketchikan; King Salmon; Kodiak; Kotzebue; Palmer or Wasilla; Petersburg; Skagway; Seward; Sitka; Tok; Valdez; and Wrangell. The Board discussed that Board members would go in two member teams and would look at the transcriptions from the hearings that they did not personally attend. The Board set March 31st at 7:00 p.m. as the last opportunity for public presentation of plans, with written plans allowed to be submitted at any time. The Board decided that if someone wanted more than five minutes to present they should contact the executive director and reserve time. The Board chose not to adopt polices that would protect incumbents or communities of interest. Board members discussed how to access the census data. The executive director became the official spokesperson of the Board. McConnochie was voted the vice-chair of the Board. White, Torgerson, and Miller were placed on the evaluation committee for the VRA expert.

22 March 2011

All Board members were present. The Board clarified the pre-plan sites and elected to have the hearing in Wasilla instead of Palmer due to site availability and changed the meeting time in Kotzebue. The Board also added the post-plan sites of Nome and Cold Bay. The Board then took testimony from: Ron Revis from District 20; Bruce Schulte from District 28; Randy Ruedrich from AFFER; Jennifer Johnston from the Anchorage Assembly; Judy Eledge from District 32; Hal Gazaway from Muldoon; Lora Reinbold from District 32; Natalie Landreth from the Native American Rights Fund; Vitte Otte from MTNT Limited; Heidi Dygas from the Alaska District Council of Laborers; Deborah Williams from the Democratic Party; Jolie Hall from the AFL-CIO; Steve Aufrecht; Bill Noll, Chairman of the Republican Party for District 21; Geri Simon and Peter Giessel from District 17, Berkely Idle, Senator Bunde, and Christopher Kurka from the Alaska Right to Life Political Action Committee; and Jeanie Campbell from Government Hill.

28 March 2011

The Board adopted committee assignments and broke into teams of two. It noted the communities the teams would visit. Greene and McConnochie were assigned Angoon, Hoonah, Craig, Ketchikan, Haines, Skagway, Petersburg, Wrangell, Bethel, Kotzebue, Nome, and Sitka. Torgerson and Brodie were assigned Cold Bay, Dillingham, King Salmon, Dutch Harbor, Kodiak, Valdez, Cordova, Palmer, Kenai, Seward, and Homer. Holm and Miller were assigned Delta, Tok, Glennallen, Healy, and Galena. The Board also adopted a motion to hold hearings on the draft plans in Anchorage on the 18th, in Juneau on the 20th, and then to hold a statewide teleconference on May 6th. The following people presented testimony: Mayor Mack of the

Aleutians East Borough; Scott Icolt from House District 10; Kevin Pomeroy; Joy Huntington; Steve Guiness from House District 6; Brian Hove from Fairbanks; Seth Church from House District 7; Victor Lord from the Nenana Native Council; Natasha Singh representing the Tanana Chiefs Conference; Chiarmen Zeb Woodman of the District 8 Republicans; Michael Dunton; Al Vezey; Steve Joslin and Debbie Joslin from Delta Junction; Kathryn Dodge from the FNSB; Mayor Doug Isaacson from North Pole; Andrew Rymer from Fairbanks; Mr. Walleri from Fairbanks; Kathy Mayo from Fairbanks; Jay Quakenbush from Fairbanks; Mike Prax from Badger Road; John Ragan; Lance Roberts from Fairbanks; and Ian Olson from Fairbanks.

31 March 2011

The Board teleconferenced their meeting in Anchorage. Several people and groups presented maps: Mayor Botehlo and Jim Baldwin from Juneau; Car Marrs and Vince Beltrami from AFFR; Jake Metcalfe from the Rights Coalition; Catkin Burton and David Mayberry from AFFER; and Lance Roberts from Fairbanks. Mayor Walker from the City of Valdez presented a District 12 plan and Brad Fluetch from Juneau presented a map of Southeast. The following people presented testimony: Julie Kita from the Alaskan Federation of Natives; Natalie Landreth from the Native American Rights Fund; Matt Ganley from the Bearing Strait Native Corporation; Murray Walsh from Juneau; Alice Ruby, Mayor of Dillignham; and Mayor Dan O'Hara of Bristol Bay; City Administrator Mike Tvenge, and Ruth Abbot from Delta Junction; David Case for the Northwest Arctic Borough; Dick Croose from Ketchikan; Jaleen Araujo from SeaAlaska Corporation; Lori Davey from District 32; Lynn Gattis from District 14; Deputy Administrator Marvin Yoder from the City of Wasilla; Robin Phillips; City Manager Mark Lynch of Cordova; Robert Venables from Haines; Ron Yeager from District 30; Jim Nygard and Pete Hoepfner

from Cordova School District; Connie McKenzie from Juneau; Gerry Hope from the Sitka Chamber of Commerce; Bill Knoll from District 21; Lois Epstein from District 26; Liz Medicine Crow, David Pruhs Chairman of the District 10 Republican Party; Bruce Schulte from District 28; and Mayor Jim Kallander of Cordova.

The Board scheduled the following meetings in its office to get together and draw maps.

4 April 2011

The Board announced that they hired Dr. Lisa Handley ("Handley") to be the VRA expert. The Board set May 6th as the deadline for public hearings and May 13th as the deadline for public comment. The Board received briefing from White on the issues of counting non-resident military and reallocating the prisoner population. The Board went into executive session to discuss litigation strategy regarding DOJ preclearance. The Board then worked on drawing maps together.

5 April 2011

The Board discussed the rural aspect of the plan and reviewed how other private plans dealt with the rural districts. The Board looked at the AFFER Plan and discussed the Southeast area. The Board also looked at the Bush Caucus Plans.

6 April 2011

McConnochie presented her thoughts on the Southeast plan. The Board also discussed senate pairings and other districts.

7 April 2011

White briefed the Board on the constitutional and practical concerns regarding the non-resident military population and prisoner population. The Board then discussed more map plans.

8 April 2011

Brodie was not present. The Board noted it had received a letter from Lieutenant Governor Treadwell regarding pockets of population outside of military bases. Members discussed the post-plan hearing schedule and travel and added May 6th as a date for the presentation of additional plans 9-12. The Board then worked on maps.

9 April 2011

White discussed his memo on the VRA and the preclearance requirements. The Board then discussed plans and decided to do nine Native Districts so no unavoidable retrogression would occur. The Board adopted Board Option 1 to present to the public with non-contiguous senate pairings. The Board discussed different versions, one based on deviations and one based on communities. The Board also discussed changes to maps and deviations, specifically the deviations around Anchorage and the prior litigation relating to this issue.

10 April 2011

Holm was not present. The Board discussed the Kenai and Kodiak Districts and adopted a version of the area. The Board then discussed the Mat-Su and Anchorage Districts. The Board thereafter discussed Southeast and the Board adopted a Southeast plan. The Board discussed other areas including Eagle River, Fort Richardson, and Fort Elmendorf.

11 April 2011

Handley participated telephonically and walked the Board through their questions. The Board discussed a memo from the City Manager of Valdez which expressed dissatisfaction of Cordova being with Valdez. The Board then discussed map plans.

12 April 2011

The Board worked on the Mat-Su area and other areas of the plan. They adopted versions to take on the road with them.

13 April 2011

Holm participated by teleconference. The Board discussed its drafts and adopted Option 1 and Option 2 and alternative plans of Mat-Su and Southeast.

6 May 2011

Groups listed on the agenda presented map plans. The Board thanked the groups for taking another shot at their plans. Carl Marrs presented the AFFR plan. Jake Metcalfe, Deborah Williams, and Leonard Lawson presented the RIGHTS Coalition Plan. Debbie Ossiander, Barbara Greuenstein, and Larry Baker presented their plan for the Municipality of Anchorage. Randy Ruedrich and David Mayberry presented the AFFER plan. Mayor Luke Hopkins of the FNSB and Chris Stovehook presented a plan for the FNSB. Andrew Guy and Martha Davis presented the Calista Corporation plan.

16 May 2011[25]

The Board announced their Executive Director, Miller, passed away suddenly over the weekend. McConnochie participated telephonically and then had to leave. The Board voted to offer the position of executive director to Bickford and the assistant executive director position to Jim Ellis. The Board approved funds to bring Handley, the VRA expert, to Anchorage on May 24th to meet with the Board and the private groups that had created plans.

17 May 2011

The Board's staff gave presentations on the public hearings that were conducted around the state. Jim Ellis presented testimony. In Barrow only seven people testified because many people were away on a whale hunt at the time of the hearing. Barrow's concerns were: they did not want Native representation to be reduced; they supported expanding the definition of Alaska Native; they wanted to keep District 40 in tact; and they disliked mixing some of the different cultural groups. Twenty-six people testified in Bethel. Bethel was concerned about splitting the villages that were connected due to their language and wanted the Yukon-Kuskokwim Delta, Kwethluk and other villages close to Bethel to be included with Bethel and not pushed to Bristol Bay. Six people testified in Kotzebue. They expressed support for Bush Caucus Plan 4 and for ensuring that Native representation is kept strong. Nine people in Nome testified. The Nome citizens thought it was better to have a smaller number of very strong rural Native districts than to have more that are fragmented and cut across ethnic lines; they did not want the districts to run east to

[25] The court notes that this transcript does not start from the beginning. The Board clarified that they experienced technical difficulties and the audio did not start recording until the meeting was already underway.

west. Twenty-three people testified in Palmer. A wide range of opinion existed in Palmer. There was opposition to the Board's Option 1 and 2 because they felt like Mat-Su's districts were not compact. Fourteen people testified in favor of the AFFER plan, two in favor of the RIGHTS plan, and one in favor of the AFFR plan. People thought roads, streams and lakes should be used as boundary lines and there was concern expressed about splitting Wasilla. In Healey eight to ten people testified. The Healy residents felt they were more an Interior area and did not want to be connected with a coastline and expressed that their votes were small enough in number that they could be ignored by anyone. Delta Junction liked Board Option 1. Delta Junction residents liked that Deltanta was reincorporated with Delta and Delta Junction and wanted to add Dry Creek as well. No one showed up at the Tok meeting. Fifteen people spoke in Glennallen. The Glennallen citizens did not want to be with Wasilla or Mat-Su but wanted to have a Copper River Valley District and be connected with people that have a road system. In Galena a spokesperson for the Native tribes said all of the Yukon villages wanted to stay together and were concerned about splitting the Yukon River. Eric Sandberg presented for Southeast. Sitka did not want to divide the City and Borough and did not want a senate pairing of Sitka with the interior. The largest turnout of Southeast was in Craig. Craig residents did not want to see the island divided among districts and did not want to be paired with a senate district in the interior. Ketchikan did not want Saxman, Pennock Island, and Gravina Island in separate house and senate districts; further, Ketchikan residents did not like senate pairings with Valdez or Kodiak and hinted at legal action. Wrangell did not mind being with Ketchikan but did not want to be separated from the Stikine River. Petersburg wanted to remain in a single district and noted that they were in the process of forming a Petersburg Borough. Skagway wanted to be paired with Haines instead of Juneau and therefore did not support Board Option 2. Haines preferred

to be paired with Skagway and did not want to be paired with Juneau. Angoon did want to loose a rural Southeast District which would understand the subsistence lifestyle; they wanted to be represented by Native legislators and preferred to be paired with Sitka instead of Juneau. Hoonah also wanted to remain in a rural Native and Southeast District.

Handley answered questions about necessary numbers. Bickford then presented more information from the public hearings. Kodiak did not want to be split up and preferred a Kodiak-Seward Senate Pairing over a Kodiak-Ketchikan senate pairing. Cordova preferred to be paired with Haines, but would be satisfied being paired with Kodiak. Cordova residents, however, did not want to be paired with Valdez or any area north of Valdez. Unalaska wanted District 37 to stay the same as much as possible and expressed some concern about a Senate Kodiak-Aleutian pairing. Cold Bay stated that Bristol Bay was very integrated and was concerned about including villages from the Yukon-Kuskokwin area into District 37. Seward preferred to be paired with Kenai Peninsula but would be paired with Kodiak; however, they did not want to be paired with Ketchikan. Cold Bay also stated they would like Crown Point, Moose Pass, and Primrose to be included if possible. The people of Homer supported different plans. Valdez preferred Board Option 1 and liked the Valdez-Ketchikan senate pairing but did not want to be with Anchorage or the Kenai Peninsula. King Salmon preferred the Bristol Bay Borough Proposal and did not want interior areas to be added to their district. No one appeared for the Dillingham meeting. The people of Kenai had differing concerns and had concerns over where the Eddy Road should be. The Board then discussed developing the final plan.

18 May 2011

Holm participated by teleconference. The staff did a presentation of the amended private party plans including two alternate plans of the RIGHTS Coalition, AFFER-9, Bush Caucus Original 5-1, Bush Caucus Alternate 5-1, and the AFFR plan. White discussed his memo on Native out migration and how Native population has increased in urban areas over the last ten years. The Board discussed meetings to develop the final plan and then discussed further changes in the map plan, specifically in Southeast and the North.

19 May 2011

Two members participated by telephone. The Board looked at further information on the issues of meeting the benchmark and on deviations in their own plans and other private plans. The Board briefly discussed hiring consultants on socio-economic integration issues. The Board then continued to work on development of the final plan.

20 May 2011[26]

The Board discussed using the GoToMeeting for web conferencing. The Board discussed where they were in the process of getting the meeting and hearings transcribed. The Board discussed the fact that four private groups were presently signed up to present plans: AFFER; the RIGHTS Coaltion; Calista Corporation; and AFFR. The Board noted that it was going to add the private plans on to their individual computers so that they could work with them. Mr. Sandberg

[26] The court notes it only received a part of the transcript. It notified the Board of the error at the pre-trial conference and gave it an option to supplement the record if possible. The record was never supplemented, so the court assumes that it was a technological problem. The Board noted at the beginning of the transcript that Brodie would be presenting a map of Southeast, however, the actual presentation was not transcribed.

presented an option for the western and rural Alaska areas. **Remainder has not been transcribed.**

23 May 2011

One of the Board's vendors mislabeled the 25 May 2011 transcript as the 23 March 2011 and now an audio recording cannot be located for 23 March 2011. The Board apologizes for this error.

24 May 2011

The Board teleconferenced the meeting. Handley gave a PowerPoint presentation which was also posted on the web. She first discussed generally how to comply with the VRA and then presented the result of her analysis specific to Alaska. Private groups, including the RIGHTS Coalition, AFFER, Calista Corporation, and AFFR presented their revised plans in response to the analysis by Handley. Matt Ganley from Bering Straights Native Corporation and Tom Begich from SeaAlaska Corporation and representing former State Senator Adams commented on proposed plans.

25 May 2011

The Board retained Dr. Steve Langdon as a socio-economic expert. The Board discussed deviations, the analysis of Handley, polarized voting areas, and the final plan.

26 May 2011

Torgerson was not present and Holm was lost telephonically for awhile. Bickford noted that the public comment period was over. The Board discussed the Kodiak/Aleutian senate pairing in conjunction with Handley's analysis and the North Slope Borough and Valdez areas. Greene, Holm, and McConnochie expressed concern that they were not going to be able to comply with the public comments. Brodie commented that some things should be handled differently by the Board in the future, specifically that absentee ballots should be counted back to their respective precincts and that procurement should go through the legislature instead of the governor. The Board discussed the map and different senate pairings further.

27 May 2011

The Board discussed the final map plan developments. The Board also looked at Handley's concerns about problems with the VRA in private plans.

28 May 2011

The Board discussed using a GoToMeeting account. The Board noted that some letters and e-mails had come in. The Board then discussed the final map plans including the complication in pairing Kodiak, the over population of the Fairbanks area, and the complications in Southeast. The PAM-E, PAM-2 and 5/28 plans were adopted in concept.

31 May 2011

The Board streamed the meeting on the webinar. The Board discussed some of Handley's analysis, particularly that a Kodiak/Dillingham pairing would not meet the appropriate benchmark and that Saxman could remain with Ketchikan and still meet a suitable benchmark.

The Board noted that it may put a team together to present the plan to the DOJ in Washington, D.C. The Board then discussed the final map plans. The Board adopted the Nikiski to Seward option.

1 June 2011

The Board went into executive session. The Board discussed the final map plans. The Board made a change to the Southeast map and adopted the PAM-E 1 Southeast version and the Board worked on the Fairbanks area.

2 June 2011

The Board discussed cleaning up the transcripts to put in names, instead of identifying Board members and staff as "unidentified speaker." The Board discussed the Fairbanks area and adopted Holm's plan as edited by Eric Sandberg. The Board then worked on the Mat-Su area and adopted a version of the Mat-Su plan. The Board then discussed the Anchorage area and how the private plans tackled this area. The Board looked at the Peters Creek boundary. The Board voted on whether to move 1,500 people out of Eagle River into District 15, which was denied 3-2. The Board adopted their northern most Anchorage boundary to follow Parks Creek and intersect with Little Peters Creek.

3 June 2011

The Board discussed their schedule until June 14th. The Board noted that they received a letter from the City of Kodiak. The Board discussed the Anchorage area with the northern boundary they adopted. The Board discussed whether they should adopt a policy on deviations. The Board recessed and came back and looked at more maps that they had worked on and that staff

had cleaned up. Greene and McConnochie discussed pairing the Aleutian Chain differently to raise the Native VAP number.

4 June 2011

The Board discussed the Southwest area and the new Bethel district. The Board then went into executive session. Thereafter the Board discussed the Mat-Su area and adopted a version of the Mat-Su and Valdez District 12. The Board then discussed the Anchorage area. The Board adopted the MJE maps as a basis for drawing maps for that weekend. The Board then discussed Brodie's Anchorage map.

6 June 2011

The Board received a letter from Kodiak. The Board then discussed final plan development and looked at changes the staff made to the plan over the weekend. The Board voted the Anchorage plan into the final draft plan. The Board voted Mat-Su into their final draft plan. The Board adopted District 12 into their final plan. The Board adopted the Southeast version of the plan. The Board adopted the Fairbanks version of the plan. The Board went into executive session. The Board adopted the rural districts concept into the final plan. The Board adopted the Kenai Peninsula three house seats in concept. The Board adopted instructions for their staff on making technical changes to the boundaries as they work on the metes and bounds. The Board adopted senate pairings. The Board then briefly discussed truncation and whether the senators would have to run for office.

7 June 2011

The Board discussed how they would number/letter the districts. The Board held off on discussing truncation issues and which seats would be two years and four years.

13 June 2011

White discussed his memo on truncation and the assignment of senate terms issues. He recommended that Senate Districts D, F, H, J, L, N, R, and S be truncated and that Senate District P should not be truncated. Under his recommendation, nineteen senate seats would be up for election, nine of those would be two year seats, and ten would be four years seats. The Board adopted the recommendation. The Board also adopted the resolution containing reasoning why they could not strictly adhere to state constitutional mandates. The Board discussed edits to the proclamation. The Board then adopted the Proclamation of Redistricting by a unanimous vote. The Board then went into executive session.

14 June 2011

The Board did a ceremonial signing of the Proclamation of Redistricting. The Board authorized White to accept service of any future lawsuits. Torgerson advised the Board that the Open Meetings Act still applied until the Proclamation Plan had been approved by the courts. Torgerson discussed that he was going to work on getting a Constitutional Amendment that would keep the House district sizes smaller to allow for the growth of the state. Each Board member made closing comments.

III. Legal Proceedings

The Alaska Constitution allows challenges to the Proclamation Plan. Article VI, Section 11 states, "[a]ny qualified voter may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting."[27] In accordance with Article VI, Section 11, three lawsuits were filed in superior courts throughout the State and were consolidated under the caption, In Re: 2011 Redistricting Cases, *Riley, George et al v. Alaska Redistricting Board*, Consolidated Case No. 4FA-11-2209 CI.[28] All of the lawsuits named the Board as the defendant. The plaintiffs all had standing to bring the lawsuits and this court has original jurisdiction under the Alaska Constitution.

In addition, the court granted several motions for various groups to participate as *amicus curiae,* including the Ketchikan Gateway Borough,[29] the Fairbanks North Star Borough, the Aleutians East Borough, and Bristol Bay Native Corporation.

The court issued a Scheduling Order on 26 July 2011 setting a ten day trial to begin on 9 January 2012 and to conclude on 20 January 2012.[30] The court held regular status conferences with the parties once a month beginning on 5 August 2011.

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[27] The Alaska Supreme Court has broadly interpreted the concept of standing, favoring the increased accessibility to judicial forums. Accordingly, "any qualified voter" is authorized to institute and maintain a reapportionment suit seeking to correct any errors in redistricting. *Carpenter v. Hammond*, 667 P.2d 1204, 1209-10 (Alaska 1983). In a pretrial decision, this court held that the right to bring such a suit was not limited to individuals, but included governmental entities as well.

[28] For purposes of finding the case in Courtview or at the counter of the court house, the official title is *Riley, George et al v. Alaska Redistricting Board*, Consolidated Case No. 4FA-11-2209 CI.

[29] The Ketchikan Gateway Borough ultimately chose not to file an *amicus* brief.

The case started off with three plaintiffs: the Fairbanks North Star Borough ("FNSB"), George Riley ("Riley") and Ronald Dearborn ("Dearborn"), and the City of Petersburg.

On 19 October 2011 the Petersburg plaintiffs filed a motion to dismiss a portion of their claims, while simultaneously filing a motion for summary judgment on the issue of compactness of Proclamation House District 32. The Board filed a cross motion for summary judgment on the issue of compactness. The court ruled in the Board's favor, which effectively left Petersburg with no claims to pursue. Petersburg did not file a motion for reconsideration. There has been no final judgment issued and Petersburg did not petition for review with the Alaska Supreme Court.

On 25 October 2011 the FNSB filed a motion to dismiss its entire action, which the court subsequently granted.[31] However, the court allowed the Riley/Dearborn plaintiffs to pursue the claims raised in the FNSB's complaint.

The trial ultimately consisted of one set of plaintiffs, Riley and Dearborn, residents of Ester and the Goldstream Valley. Neither Riley nor Dearborn testified.

[30] The normal trial day in Fairbanks is 8:30 to 1:30 with the afternoon being available for other matters. For this case the court utilized full trial days from 8:30 to 4:30.

[31] Tim Beck was also a named plaintiff with the FNSB. FNSB dismissed Beck's claims along with the FNSB claims.

IV. Applicable Law

As discussed earlier, litigation predictably arises systematically with announcement of the new redistricting plans. As a result, this court is guided by a series of Alaska case law and must recognize the practices established by the Alaska Supreme Court in prior redistricting cases. In addition to state requirements, federal law also applies. A discussion of applicable state and federal law follows.

A. Article VI, Section 6 of the Alaska Constitution.

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> The Redistricting Board shall establish size and areas of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

As the *Hickel* court ruled, "[c]ontiguity, compactness, and relative socio-economic integration are constitutional *requirements*."[32] In order to be constitutional, a house district may not lack any of these characteristics.[33]

These requirements prevent gerrymandering or intentional vote dilution.[34] "Gerrymandering is the 'deliberate and arbitrary distortion of district boundaries and populations

[32] *Hickel v. Southeast Conference*, 846 P.2d 38, 44 (Alaska 1992).

[33] *Id.* at 45.

for partisan or personal political purposes.' The term 'gerrymandering,' however, is also used loosely to describe the common practice of the party in power to choose the redistricting plan that gives it an advantage at the polls."[35] The court will discuss each characteristic below.

1. Contiguity.

"Contiguous territory is territory which is bordering or touching."[36] As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every part without crossing the district boundary (i.e. the district is not divided into two or more discrete pieces)."[37] Because of Alaska's large size and numerous archipelagos, absolute contiguity is impossible.[38] To accommodate Alaska's unusual shape, a contiguous district may contain some amount of open sea.[39] "However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim."[40] Accordingly, the Alaska Constitution provides for the additional requirements of compactness and socio-economic integration.[41]

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[34] *See id.*

[35] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1667 n.28 (Alaska 1987) (quoting *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)).

[36] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992).

[37] *Id.* (quoting Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 84 (1985).

[38] *See Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992).

[39] *See id.*

[40] *Id.*

[41] *See id.*

2. Compactness.

The term "compact" as used in the Alaska Constitution means "...having a small perimeter in relation to the area encompassed."[42] "'Compact' districting should not yield 'bizarre designs.'"[43] The compactness inquiry looks to the shape of a district. As the *Hickel* court ruled:

> Odd-shaped districts may well be the natural result of Alaska's irregular geography. 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 redistricting.[44]

When analyzing compactness, the court should "look to the relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[45]

3. Relative Socio-Economic Integration.

Election districts must be composed of relatively socio-economically integrated areas according to Article VI, Section 6 of the Alaska Constitution. The term socio-economic integration was explained by delegates of the Alaska Constitutional Convention as:

> Where people live together and work together and earn their living together, where people do that, they should be logically grouped that way.
>
> ....
>
> It cannot be defined with mathematical precision, but it is a definite term, and it is susceptible of a definite interpretation. What it means is an economic unit inhabited by people. In other words, the stress is placed on the canton idea, a

[42] *Id.* (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983) (Matthews, J., concurring)).

[43] *Id.* (quoting *Davenport v. Apportionment Comm'n of New Jersey*, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div. 1973)).

[44] *Hickel v. Southeast Conference*, 846 P.2d 38, 45-46 (Alaska 1992).

[45] *Id.* (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska 1983) (Matthews, J., concurring)).

> group of people living within a geographic unit, socio-economic, following if possible, similar economic pursuits. It has, as I say, no mathematically precise definition, but it has a definite meaning.[46]

This description supports the view that election districts were intended to be composed of economically and socially interactive people in a common geographic region.[47]

In order to satisfy this constitutional requirement, the Board must provide "sufficient evidence of socio-economic integration of the communities linked by the redistricting, proof of actual interaction and interconnectedness rather than mere homogeneity."[48]

The requirement of relatively integrated socio-economic areas "helps to ensure that a voter is not denied his or her right to an equally powerful vote."[49] Furthermore, the Alaska Supreme Court has commented on this requirement as follows:

> [W]e should not lose sight of the fundamental principle involved in reapportionment- truly representative government where the interests of the people are reflected in their elected legislators. Inherent in the concept of geographical legislative districts is a recognition that areas of a state differ economically, socially and culturally and that a truly representative government exists only when those areas of the state which share significant common interests are able to elect legislators representing those interests. Thus the goal of reapportionment should not only be to achieve numerical equality but also to assure representation of those areas of the state having common interests.[50]

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[46] *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 878 (Alaska 1974), quoting Minutes, Constitutional Convention 1836, 1873)).

[47] *Carpenter v. Hammond*, 667 P.2d 1204, 1215 (Alaska1983).

[48] *Hickel v. Southeast Conference*, 846 P.2d 38, 46 (Alaska 1992) (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1363 (Alaska 1987).

[49] *Hickel v. Southeast Conference*, 846 P.2d 38, 46 (Alaska 1992).

[50] *Id.* (quoting *Groh v. Egan*, 526 P.2d 863, 890 (Alaska 1974) (Erwin, J., dissenting)).

The term "relatively" means that they will "compare proposed districts to other previously existing and proposed districts as well as principal alternative districts to determine if socio-economic links are sufficient."[51] The term "relatively" does not mean "minimally," nor does its use intend to weaken the constitutional requirement of integration.[52]

The Alaska Supreme Court has noted, however, that this requirement is given "some flexibility by the constitution since districts need be integrated only 'as nearly as practicable.'"[53] The Alaska Supreme Court has further noted that, "the flexibility that this clause provides should be used only to maximize the other constitutional requirements of contiguity and compactness."[54]

In the previous redistricting cases, the Alaska Supreme Court has identified several specific characteristics of socio-economic integration. These include: service by the state ferry system; daily local air taxi service; a common major economic activity; shared fishing areas; a common interest in the management of state lands; the predominantly Native character of the populace; and historical links.[55] When examining socio-economic integration, the Alaska Supreme Court also has been persuaded by other factors, including: geographic proximity; link

[51] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).

[52] *See id.*

[53] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 n.10 (Alaska 1992).

[54] *Id.*

[55] *Hickel v. Southeast Conference*, 846 P.2d 38, 46 (Alaska 1992) (discussing *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987)).

by daily airline flights; shared recreational and commercial fishing areas; and dependence on a community (Anchorage) for transportation, entertainment, news and, professional services.[56]

In *Groh v. Egan*, the court stated that "patterns of housing, income levels and minority residences" in an urban area "may form a basis for districting, [although] they lack the necessary significance to justify" large population variances.[57] The court also indentified transportation ties (ferry and daily air service), geographical similarities, and historical economic links as more significant factors.[58]

The Alaska Supreme Court has ruled that a borough is, by definition, a socio-economically integrated area.[59]

4. Senate Districts.

By its terms, all the requirements of Article VI, Section 6 do not apply to senate districts. The Alaska Supreme Court previously has ruled, "the provisions of Article VI, Section 6 which set forth socio-economic integration, compactness and contiguity requirements are inapplicable to redistricting and reapportionment of senate districts.[60] Under the 1998 Amendment, Article VI, Section 6 now mandates that "[e]ach senate district shall be composed as near as practicable of two contiguous house districts." The other Article VI, Section 6 requirements of compactness

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[56] *See Hickel v. Southeast Conference*, 846 P.2d 38, 46 (Alaska 1992) (discussing *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1362-63 (Alaska 1987)).

[57] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992), quoting *Groh v. Egan*, 526 P.2d 863, 879 (Alaska 1974).

[58] *Id.*

[59] *Hickel v. Southeast Conference*, 846 P.2d 38, 52 (Alaska 1992).

[60] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1365 (Alaska 1987).

and socio-economic integration were not added and not made applicable to senate districts by the 1998 Amendment. Thus, these requirements do not apply to senate districts.

Furthermore, it is well established that redistricting may require truncation of senate terms. As the Alaska Supreme Court ruled in *Egan v. Hammond*:

> A need to truncate the terms of incumbents may arise when reapportionment results in a permanent change in district lines which either excludes substantial numbers of constituents previously represented by the incumbent or includes numerous other voters who did not have a voice in the selection of that incumbent. The discretionary authority to require mid-term elections when necessary is well established.[61]

B. Equal Protection/Population Variances.

In Kenai Peninsula Borough, the court established that, "[i]n the context of voting rights in redistricting and reapportionment litigation, there are two basic principles of equal protection, namely that of 'one person, one vote'—the right to an equally weighted vote—and of 'fair and effective representation'-- the right to group effectiveness or an equally powerful vote."[62]

1. One Person, One Vote.

The principle of "one person, one vote" is quantitative in nature.[63] "[A] State must make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[64] "Whatever the means of accomplishment, the overriding

[61] *Egan v. Hammond*, 502 P.2d 856, 873-74 (Alaska 1972).

[62] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987).

[63] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).

[64] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), quoted in *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska 1987); and *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).

objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the state."[65]

"[A]s a general matter an apportionment plan containing a maximum population deviation under 10% falls within a category of minor deviations. The state must provide justification for any greater deviation."[66]

The Alaska Supreme Court has recognized "several other state policies which may also justify a population deviation greater than 10 percent."[67] In *Kenai Peninsula Borough*, the court noted that the state's desire to maintain political boundaries is sufficient justification, provided that this principle is applied consistently.[68] The Alaska Supreme Court has also rejected other policies as inadequate justifications for population. In *Groh*, the court held that the:

> ...mining potential in the [Nome] area and the need for a 'common port facility' did not justify a 15 percent overrepresentation where 'the makeup of the population both to the north and the east [did] not vary significantly from that of the adjoining villages within the Nome [election district] boundaries.'[69]

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[65] *Id.*

[66] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1366 (Alaska 1987), quoted in *Hickel v. Southeast Conference*, 846 P.2d 38, 48 (Alaska 1992).

[67] *Hickel v. Southeast Conference*, 846 P.2d 38, 48 (Alaska 1992).

[68] *See Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1360 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38, 48 (Alaska 1992).

[69] *Hickel v. Southeast Conference*, 846 P.2d 38, 48 (Alaska 1992) (quoting *Groh v. Egan*, 526 P.2d 863, 877 (Alaska 1974).

The Alaska Supreme Court addressed the issue of deviations that are below the 10% threshold, but still do not contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty."[70]

As the body of redistricting case law grows, albeit slowly because of the decennial nature of the process, the Board may receive guidance that is new to it. For instance, in 2001 the Board analyzed the acceptable deviation for districts in the Anchorage bowl area solely under the federal standard of 10% being acceptable deviation. This was an accurate application of the federal standard. However, the Article VI, Section 6 of Alaska Constitution was amended in 1998 to require a state constitutional standard of equality of population in the districts to be "as near as practicable." The Alaska Supreme Court cited this amendment in the context of the Anchorage bowl and noted that newly available technology made "it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas." [71]

In the 2001 case the Board believed deviations within ten percent in the Anchorage area automatically satisfied constitutional requirements and made no effort to reduce deviations below that figure. The Alaska Supreme Court held that the burden shifted to the Board "to demonstrate that further minimizing *the deviations would have been impracticable in light of competing requirements imposed under either federal* or state law."[72] The proposed plan was

[70] Alaska Const. art. VI, § 6. Under the federal equal protection clause, a state must make an "honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." Reynolds v. Sims, 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

[71] *In re 2001 Redistricting Cases*, 44 P.3d 141, 145-146 (Alaska 2002).

[72] *Id.*

found unconstitutional and remanded for the Board to make a good faith effort to reduce the variations.

The current guidance is thus not that the deviation, particularly in urban areas, has to be as low as possible, but rather that minimizing the deviations as low as the technology may practicably allow is not necessary if a larger deviation is required by federal or state law.

2. Fair and Effective Representation.

The principle of "fair and effective representation" is qualitative in nature.[73] The Alaska Supreme Court has stated, "[t]hat the equal protection clause protects the rights of voters to an equally meaningful vote has been inferred from *Reynolds* in which the Supreme Court said that 'the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment.'"[74]

The 1998 amendment to Article VI, Section 6 of the Alaska Constitution eliminated the use of multi-member and single member districts. Prior case law addressing such districts has no precedence in the analysis of the instant plan.

The focus of a fair and effective representation claim has shifted beginning with the last plan from the unique problems of single or multi-member district issues, but geographic proportionality is still considered. The Alaska Supreme Court has ruled:

> In the context of reapportionment, we have held that upon a showing that the Board acted intentionally to discriminate against the voters of a geographic area,

[73] *Hickel v. Southeast Conference*, 846 P.2d 38, 47 (Alaska 1992).

[74] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1367 (Alaska 1987) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555-556 (1964).

> the Board must demonstrate that its plan will lead to greater proportionality of representation...Because of the more strict standard, we do not require a showing of a pattern of discrimination, and do not consider any effect of disproportionality de minimis when determining the legitimacy of the Board's purpose.[75]

Alaska's equal protection clause still imposes a stricter standard than its federal counterpart.[76]

In the *2001 Redistricting Cases*, the Alaska Supreme Court remanded certain districts because the Board limited its view of the permissible range of constitutional options. It noted *Kenai Peninsula Borough* simply held the Board cannot intentionally discriminate against a borough or other salient classes by invidiously minimizing its right to an equally effective vote. If a plan does divide a municipality it will raise an inference of intentional discrimination, but such an inference may be overcome by a demonstration that the plan resulted from legitimate nondiscriminatory policies.[77] Although the examples given for legitimate nondiscriminatory policies in that case sound in state law, certainly compliance with controlling federal law is an equally valid reason to overcome an inference of intentional discrimination.

The *2001 Redistricting Cases* also addressed excess population concerns in the context of combining a portion of the excess populations from two different municipalities. This raised two issues. The first was whether the antidilution rule in *Hickel* would even allow such a district. The current guidance is a "need to

[75] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992); *see also Kenai Peninsula Borough*, 743 P.2d at 1372.

[76] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992); Kenai Peninsula Borough, 743 P.2d at 1371.

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

accommodate excess population would be sufficient justification to depart from the antidilutional rule."[78]

The second issue regarding excess population addressed by *2001 Redistricting Cases* is whether neighborhoods joined with excess population would be sufficiently integrated. In that case the Alaska Supreme Court concluded than any of the subject urban neighborhoods would meet the integration requirements.[79]

The essence of the guidance from *2001 Redistricting Cases* is that the Board must take a hard look at alternatives regarding drawing districts that minimize deviation as much as practicable and also take a hard look at complying with the antidilutional rule. These hard looks do not preclude plans that do not strictly comply with these standards. Rather the Board may submit a plan that deviates from these requirements if required by state or federal law. Although the Board may desire a bright line test, the guidance continues to require the Board to make choices that are most in harmony with the Alaska Constitution even when required by necessity to deviate from state constitutional mandates.

C. Voting Rights Act.

In addition to the state requirements, the Federal Voting Rights Act, 42 U.S.C. § 1973 (2006) governs redistricting of state election districts. This Act protects the voting power of

[78] *In re 2001 Redistricting Cases*, 44 P.3d 141,144 (Alaska 2002).

[79] *Id.*

racial minorities.[80] "Under section 5 of the Act, a reapportionment plan is invalid if it 'would lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.'"[81]

Furthermore, in order to comply with Section 5 of the Act, the Alaska Supreme Court has ruled that a "state may constitutionally reapportion districts to enhance the voting strength of minorities in order to facilitate compliance with the Voting Rights Act."[82]

Section 2 of the Federal VRA, as amended in 1986, "creates a cause of action to remedy the use of certain electoral laws or practices which, when interacting with social and historical conditions, create an inequality in the opportunities enjoyed by voters to elect their preferred representatives."[83] Plaintiffs may have a redistricting plan invalidated if: (1) under the totality of the circumstances, the redistricting results in unequal access to the electoral process; and (2) racially polarized bloc voting exists.[84]

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[80] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992).

[81] *Hickel v. Southeast Conference*, 846 P.2d 38, 49 (Alaska 1992) (quoting *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987)) (quoting *Beer v. United States*, 425 U.S. 130, 141 (1976)).

[82] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 (Alaska 1987); quoted in *Hickel v. Southeast Conference*, 846 P.2d 38, 49-50 (Alaska 1992)

[83] *Hickel v. Southeast Conference*, 846 P.2d 38, 50 (Alaska 1992) (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

[84] *Id.*

D. Standard of Review.

Groh v. Egan,[85] 526 P.2d 863 (Alaska 1974) established the general standard of review to be applied by the courts when exercising jurisdiction under Article VI, Section 11. In *Groh*, the Alaska Supreme Court ruled:

> It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes "error" which would invoke the jurisdiction of the courts. We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate new regulations. We have stated that we shall review such regulations first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not subject for review.[86]

Furthermore, the Alaska Supreme Court has ruled that, "[i]n short, our review is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under Article VI, Section 6 of Alaska's constitution.[87]

The Alaska Supreme Court has never struck down an otherwise constitutional legislative district on the grounds that such a district is "unreasonable." Nor has the court discussed the legal standards by which the concept of "unreasonableness" should be measured. The court's comparison in *Groh* of the reapportionment process to an agency's promulgation of regulations

[85] 526 P.2d 863 (Alaska 1974).

[86] *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866-67 (Alaska 1974)). *See also Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1257-58 (Alaska 1987); *Hickel v. Southeast Conference*, 846 P.2d 38 (Alaska 1992).

[87] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska 1987) (quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1214 (Alaska 1983) (quoting *Groh v. Egan*, 526 P.2d 863, 866-67 (Alaska 1974))).

suggests that the proper standard of review is the one used in *Interior Alaska Airboat Association, Inc. v. State*.[88] Under this test, "in determining whether a regulation is reasonable and not arbitrary courts are not to substitute their judgment for the judgment of the agency. Therefore, review consists primarily of ensuring that the agency has taken a hard look at the salient problems and has generally engaged in reasoned decision making. A court must examine not policy but process and must ask whether the agency has not really taken a "hard look" at the salient problems or has not generally engaged in reasoned decision making.[89]

Accordingly, this court's role is a limited one. The court cannot pick a plan it likes, nor can it impose a plan it prefers. Rather, the court's role is to measure against the constitutional standards; the choice among alternative plans that are otherwise constitutional is for the Board, not the court.[90]

E. Record Before the Court.

Under new Civil Rule 90.8(d), the record before the court consists of:

> The record in the superior court proceeding consists of the record from the Redistricting Board (original papers and exhibits filed before the board and the electronic record or transcript, if any, of the board's proceedings), as supplemented by such additional evidence as the court, in its discretion, may permit. If the court permits the record, to be supplemented by the testimony of one or more witnesses, such testimony may be presented by deposition without regard to the limitations contained in Civil Rule 32(a)(3)(B). A paginated copy of the record from the Redistricting Board shall be filed in the Supreme Court at the same time it is filed in the superior court.

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[88] *Interior Alaska Airboat Association, Inc. v. State*, 18 P.3d 686, 690 (Alaska 2001).

[89] *Id.* at 693.

[90] *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (redistricting plan not rendered unconstitutional simply because some "resourceful mind" has come up with a better one).

On 26 August 2011, the record from the Board, consisting of 23 volumes and 13,474 pages, was filed with this court. The record was later supplemented by the Board to add another volume consisting of 1,318 pages. Numerous witnesses testified both live at trial and by way of designated deposition testimony. Numerous exhibits were also received into evidence during the course of the trial as indicated on the record.

V. Issues for Trial.

There was significant pre-trial motion practice in this case. Seven motions for summary judgment were decided before trial. The plaintiffs alleged that several districts violated Article VI, Section 6 of the Alaska Constitution under the grounds of compactness, contiguity, or socio-economic integration.

The plaintiffs were successful in much of their motion practice. The court ruled Proclamation House District 38 is not socio-economically integrated,[91] Proclamation House District 37 is not compact or contiguous,[92] and Proclamation House Districts 1 and 2 are not compact.[93] The Board asserted the VRA as a justification for Proclamation House Districts 38, 37, and 1. Therefore the Board had the burden of showing that the configuration of these districts was required by the VRA. The Board did not assert a VRA defense to Proclamation House District 2.

Additionally the plaintiffs asserted that Proclamation House District 5 is not compact and that Proclamation House District 6 is not compact, contiguous, or socio-economically integrated. Finally, the plaintiffs made an overall argument that Proclamation House Districts 1, 2, 3, 4, 5, and 6 and Proclamation Senate Districts A-C and S violated geographic proportionality, that excess population should have been placed in one district in order to comply with the anti dilution rule, and that the intent of the Proclamation Plan was to use racial VRA requirements to

[91] Appendix A, No. 2.

[92] Appendix A, No. 4 and No. 5.

[93] Appendix A, No. 4.

achieve partisan gerrymandering. The Board denies all these allegations, some of which were not properly pled.

After the motion practice, the issues remaining for trial can be summarized as follows:

1. Whether it was necessary to deviate from the Alaska Constitutional requirement of compactness regarding the configuration of Proclamation House District 1 in order to create a plan that complied with Section 5 of the VRA.

2. Whether it was necessary to deviate from the Alaska Constitutional requirements of compactness and contiguity regarding the configuration of Proclamation House District 37 in order to create a plan that complied with Section 5 of the VRA.

3. Whether it was necessary to deviate from the Alaska Constitutional requirement of socio-economic integration regarding the configuration of Proclamation House District 38 in order to create a plan that complied with Section 5 of the VRA.

4. Under the claim of geographic proportionality regarding the FNSB, whether the Board had a legitimate, non-discriminatory reason for splitting the excess population of the FNSB.

5. Under the claim of geographic proportionality, whether the City of Fairbanks has a constitutional right to be placed in a single senate district.

6. Whether the plaintiff can prove Proclamation House District 5 is not compact under the Alaska Constitution.

7. Whether the plaintiff can prove Proclamation House District 6 is not compact, contiguous, or integrated under the Alaska Constitution, and if so, whether it was necessary to deviate from the Alaska Constitutional requirements in order to create a plan that complied with Section 5 of the VRA.

8. Whether the choices made by the Board to comply with the VRA were in harmony with the Alaska Constitution.

VI. Trial Evidence.

Trial commenced on 9 January 2012 and concluded on 17 January 2012. The courthouse was opened on 16 January 2012, Martin Luther King Day, for this trial. The court also provided a toll free number for anyone to attend telephonically; this number was posted on the Board's website.

The parties called a total of ten witnesses. In addition to the extensive Board record filed with both the trial court and the Alaska Supreme Court, the parties agreed upon sixty-seven joint exhibits. All joint exhibits were admitted. The plaintiffs had five exhibits admitted.[94] The Board had seven exhibits admitted.

In the last redistricting litigation the Alaska Supreme Court and Judge Rindner properly praised the Board for the quantity and quality of its work under daunting conditions.[95] This court acknowledges that the current Board did even more work and did it in the most open manner of any redistricting process. However, for this section, it bears note that trial counsel for both parties are to be commended for preparing joint exhibits and focusing their presentation on critical issues. In the absence of this spirit of collaboration the trial easily would have taken three weeks.

Redistricting impacts all voters in the state. The court was generous in allowing parties to intervene, but given the exigencies of the case did not allow intervenors to propound

[94] The only plaintiffs' exhibit offered (but not admitted) was a newspaper article.

[95] Judge Rindner's 1 February 2002 Order; *In re 2001 Redistricting Cases*, 44 P.3d 141, 147 (Alaska 2002); *In re 2001 Redistricting Cases*, 44 P.3d 141, 153 (Dissent) (Alaska 2002).

discovery, take or attend depositions, or participate substantively at trial.[96] The intervenors were granted until 23 January 2012 to file their briefs. In order to assist them in that process, copies of the trial log notes were provided to the intervenors and the parties by order dated 20 January 2012. These log notes are neither official nor verbatim but designed to assist in an open review of the process by everyone given the condensed timeframe of the trial.

The following is a summary of the evidence adduced each day of trial. Unless specifically noted, the following is merely a rendition of testimony without findings of fact.

A. Day 1. 9 January 2012. The plaintiff called three witnesses: *Senator Joseph Paskvan*, *Senator Joseph Thomas*, and *Leonard Lawson*.

Paskvan is a senator from current Senate District E. Exhibit J11 shows roughly his district. He currently represents the City of Fairbanks (City), a small area outside the City, and Fort Wainwright. Paskvan was concerned that Proclamation House District 4B omits an area that was annexed by the City, specifically the area containing the Fred Meyers West store. Paskvan noted various tensions between the City entity and the FNSB, including this annexation. Other areas of tension include competition for capital projects, funding in general, and air quality issues. Paskvan was concerned that the Proclamation Plan "fractures" the City between Proclamation House Districts on the east and west side of the City.

Paskvan stated the Senate bi-partisan coalition blocked efforts by the administration to uncouple gas AGIA tax from the oil tax, an effort that was vetoed by the governor. He believes

[96] FNSB was an original party but was allowed to withdraw per order dated 3 November 2011. Counsel for FNSB sat at counsel table with plaintiffs' counsel and the plaintiffs for the entire trial, as did a paralegal for the FNSB. Although FNSB thus was kept apprised of the case as it developed, it did not substantively participate in trial.

the Senate bi-partisan coalition was "targeted" by the administration because of this position and that Holm of the Board drew the current boundaries in order to pair him with another Democratic incumbent, Senator Thomas. Paskvan asserts he can't think of any other legitimate reason to fracture the City.

On cross examination, Paskvan testified that politics are always swirling below the surface. He acknowledged that the City is completely within the Borough and that Fairbanks is a hub for rural Alaska, and that Natives tend to vote Democratic.

Senator Joseph Thomas was elected in 2006 for current Senate District D; he was reelected in 2010. His district includes part of the Borough, Healy, Cantwell, Anderson, and parts of the Denali Borough. He is a Democrat. There are ten Democrats and ten Republicans in the Senate. Thomas is a member of the bi-partisan coalition in the Senate, the Interior Delegation, and the Bush Caucus. Thomas discussed the competing interests between various areas. He testified to his belief that the "finger" in Proclamation House District 1 was done to create contiguity in such a manner as to pair him with Paskvan.

Leonard Lawson is a math and physics major employed by the Alaska Democratic Party. He received training in redistricting from conferences held by the National Conference of State Legislators (NCSL), the software company Maptitude, and had taken a GIS class at UAA that he did not complete. Lawson demonstrated how the Maptitude software worked[97] and described a census block and other information from the U.S. census source. He showed how census blocks could be moved, explained how to count Natives under several categories, and how various reports could be run from the program.

[97] The board used other software from Citygate.

Lawson was involved in the redistricting process. He started off drawing plans for the Alliance for Reproductive Justice which eventually became part of the RIGHTS Coalition. Another group he worked with was AFFR, led by Kay Brown, his current supervisor at the Democratic Party. He received the Board plan from its website. Lawson noted that in the Proclamation Plan the Board's VRA expert, Handley, initially advised the emphasis should shift from majority/minority districts to focus on effective districts. The final RIGHTS plan has four effective house districts and three effective senate districts, because he did not learn the benchmark was actually five effective house districts and three effective senate districts until after he read Arrington's (plaintiffs' VRA expert) deposition in December. Lawson also stated the benchmark standard for the percentage of Native VAP increased from approximately 35% to 42%.

He said the goal of the RIGHTS plan was respect for local boundaries in order to give an effective voice to the voters. He places the population of the City at about 30,000. The RIGHTS plan attempted to draw districts entirely within the City. He believes it is possible to have the east and west part of the City in one senate district. He notes the population of the FNSB justifies approximately 5.5 house seats.

B. Day 2. 10 January 2012. Plaintiffs called two witnesses, *Dr. Arrington*, a VRA expert, and *Joseph Hardenbrook.*

Arrington is accepted as a VRA expert. He was hired by the FNSB to review Handley's report. He eventually did statistical analysis and supplemented Handley's analysis with reconstructed statewide data. Retrogression is defined in the VRA. Arrington testified that he

tries to do an analysis on whether a plan is retrogressive or not. Arrington described some of those tests. He states "effective" and "ability" mean the same thing, in this case whether Natives have the ability to elect their candidate of choice. As described by Arrington, it is more than chance but not certainty because there are no certainties in politics.

Arrington did not disagree with Handley's racial block voting analysis. Specifically, he agreed the benchmark is five effective Native districts in the house and three effective Native districts it the senate. Arrington also agreed that the Native VAP needed for these effective districts is 41.8%,[98] although he thought the numbers in Benchmark House District 6 might need more than 42% depending on overlapping issues because it is a polarized district and white cross over vote is lower. Arrington did not know what to do with the Aleutian Chain and noted lower polarization there, but he agreed that the current Benchmark House District 6 and the Proclamation House District 38 are both effective.

Arrington was very confident Proclamation House District 38 is effective based on the numbers. He did not look at other factors that might overstate or understate Native cohesion. For instance, he did not look at language barriers as impacting the ability to elect nor did he look at political differences among Natives. Arrington testified that he was not aware of anybody who has looked at those differences. He also indicated that packing a much higher concentration of Natives into a district than necessary to elect a candidate of their choice is a factor DOJ looks at. It can be either good or bad, intentional or inadvertent. He expressed no opinion on packing in this case.

[98] This percentage is usually referred to by the witnesses simply as 42%.

Arrington identified the effective districts under the Proclamation Plan as 36, 37, 38, 39, and 40. Arrington believed Proclamation House District 37 is reasonable at 46.6%, and he believed 41.8% in Proclamation House District 38 was good. He testified that Proclamation House District 34 at 32.5% was sufficient because voting there is not usually polarized, and thought Proclamation House Districts 36, 38, and 40 had more Natives than necessary.

On cross examination, Arrington admitted Handley is a competent expert. He reviewed her report and testimony. He did not do a racial voting block analysis. Arrington described the DOJ process as a simple yes or no. He reiterated that Proclamation House District 38 was effective based solely on the numbers. Arrington disapproved of Proclamation House District 38 in the Modified RIGHTS plan and said he would not recommend it because it was lacking an effective district. He opined that the Modified RIGHTS plan did not meet the benchmark but the Proclamation Plan did. Arrington noted that Section 5 analysis under the VRA act is more art than science.

Hardenbrook is a political science major. He is a Democrat but testified he was a Republican at one point. He is Chief of Staff for Senator Thomas and he has experience in political campaigns. Hardenbrook described the Senate Finance Committee as the most powerful committee and that the chairs are Senators Hoffman and Stedman. Hoffman is Native. Hardenbrook also described how local government structure relates to funding and that 90% of the state's revenue is from oil. Hardenbrook testified that the Proclamation Plan leaves open the possibility of no senator from City boundaries and that the pairing of Proclamation House Districts 5 and 6 to create Proclamation Plan Senate District C could result in people from western City having a senator from Delta Junction or Valdez. He particularly thinks funding for

fire districts and roads in the Ester and Goldstream areas would suffer under Proclamation House District 38.

Hardenbrook stated 2002 was a bad year for Democrats in Fairbanks and 50% of their candidates lost. During the redistricting process he spoke with Torgeson, Miller (deceased), and Bickford. He also knows Torgeson from when Hardenbrook was a lobbyist for the University of Alaska Fairbanks. Hardenbrook testified that he had a conversation in March 2011 with Torgeson at the Triangle Bar in Juneau where Torgeson implied the current plan was about payback for prior redistricting plans. Hardenbrook could not recall the exact statement, and believed Torgeson may have confused Hardenbrook with his brother, who looks similar.

Hardenbook also testified that an early Board plan had a "bump" around Thomas's home. Hardenbrook asked Bickford regarding whether Board members had access to the addresses of incumbents. Bickford said no members asked for it and could not get it from the software without his knowledge. He then described the partisan trends in the North Pole, Badger Road, Farmers Loop, Ester, Goldstream, and the Denali Borough areas.

On cross examination, Hardenbrook noted his wife works for Senator Paskvan and under the current plan pairing Senators Paskvan and Thomas, one of them would lose their job.

The plaintiffs rested.

C. Day 3/4. 11 January 2012. The Board called one witness on the third trial day, *John Torgeson*, the Chair of the Board. His testimony continued on the fourth trial day.

Torgerson has been in Alaska since 1950. He currently is the executive director for the Kenai Economic Development District. Previously he was involved in a variety of private sector businesses. He also served eight years as a Republican State Senator from the Kenai Peninsula and served on committees every year. Torgerson also served in various government positions involving agriculture, the Department of Transportation, the ferry system, and aviation. He has traveled extensively around the state.

Torgerson was appointed by the governor. He applied through the Boards and Commissions; he also wrote to the leaders of the house and senate. He was appointed in June 2010 and elected chair in September 2010. The previous redistricting process occurred within the Department of Legislature, which had exempted itself from procurement requirements. The current process was under the Office of the Governor and subject to the state procurement requirements.

Torgerson, along with other Board members and staff, received redistricting training from the National Conference of State Legislators ("NCSL"); they missed the first two sessions but attended the remaining sessions. The entire Board attended an October training. They met with a software vendor and purchased software for the redistricting process during which the VRA chief, as well as the head of the census bureau were present.

Torgerson testified that an interim committee leased Board offices in Anchorage and hired Miller as executive director. The Board brought the software vendor to Anchorage to train Board members. The Board also hired legal counsel through the procurement process. The first legal issue was the Open Meetings Act. They all were advised on the Act and understood it.

According to Torgerson, the Board used information provided by Alaska Department of Labor to begin the process while awaiting the official data from the Census Bureau. This state data identified problems with population shift, disparate growth rates, and a decline of rural population, particularly a loss of 30,000 to 35,000 people in Southeast.

The Board was concerned about how these trends affected traditionally Native districts. Torgeson noted others had observed this trend; a constitutional amendment had been proposed to address the problem, by increasing the number of house districts from 40 to 44 and the number of senators to 22, but voters did not approve the proposed amendment.

Torgerson testified that the Board had demographic concerns from this preliminary data before even getting the official census information, because population growth was occurring primarily in the road and railbelt areas of the Mat-Su, the Municipality of Anchorage, and the FNSB. Torgeson stated that retrogression concerns had been driven into their heads by the VRA training. The preliminary data raised concerns about the concept of one person/one vote and equal protection.

The Board adopted Guidelines that it believed recognized the various issues it was required to consider in this process.[99] The Board was aware the Federal Constitution has precedence but that the Board could not ignore the Alaska Constitution. The Board did not include incumbent protection in its Guidelines because it wanted it to be fair and not political.

[99] All exhibits agreed to by the parties are labeled "J" for Joint. Many of these exhibits are also in the Board record itself. For instance, the Guidelines are in the record as ARB 6029-30. The court will use the Joint Exhibit reference when possible.

The Board finally received the official census data on the Ides of March 2011. This triggered the Alaska Constitution timelines for presenting draft plans and a final plan: the Board had 30 days to draft plan(s) to present to the public at meetings and adopt a final plan within 90 days.

Exhibit J38 is a spreadsheet showing the 2010 census information compared to the 2000 census information with comparative deviations. This information tells him Native areas will need to have population added from an area that had a population growth, which are primarily urban areas. He doesn't believe in the past large numbers of urban voters were added to Native areas to comply with the VRA.

By 31 March 2011 the Board had received about four statewide plans and two regional plans. Torgerson testified that Exhibit E was the AFFER plan, which is the Republican plan. The AFFR Plan is the union plan. The Board looked at all of them. Torgeson said all plans had pieces of sense, but the Board was not sure all would pass muster. He noted that all plans took urban population and included it with Native districts. In Torgerson's mind, the private party plans did not comply with the Alaska Constitution, particularly regarding compactness, and in some cases, socio-economic integration. He believed all the private plans raised these issues.

As discussed by Torgerson, public meetings were held at the Anchorage Legislative Information Office ("LIO"). The room could seat about 150 people and probably about that many drifted in and out of the meetings. The Board chose the LIO because people in other parts of the state could go to their local LIO and be connected.

After receiving the private plans, the Board members divided up to draw plans. Torgerson testified the Board drafted and adopted two options and two alternatives to those options. Exhibit J6 was Board Option 1. These Board options were drafted before the Board received Handley's VRA analysis and were based upon VRA info from 2001 which required 35% Native VAP for an effective district. All plans used the 35% figure. Torgerson noted that no expert had been retained at that time because the expert hire was still going through an expedited procurement process.

After adopting option plans the Board then adopted every plan that was submitted for public hearing. Senate pairings were included in the plans, but Torgeson knew that the plans were not final because no expert had analyzed the data yet. He stated there was no real general discussion on pairing incumbents. The Board never indicated it preferred any of the plans, but took them all to the public hearings with them to receive public comment.

The Board retained Handley on 8 April 2011. It was done by phone because she was in Afghanistan. It was clear she needed to work on the minimum number of protected Native districts and the percentages needed to make them effective. Torgerson understood from Handley's analysis that there was considerably more polarized voting than she originally thought. The increase in polarized voting since the last redistricting plan required an increase from 35% Native VAP to 42% Native VAP to maintain effective Native districts. There were exceptions, however. Less polarized voting occurred in Southeast and that area required only 35% Native VAP. But in the Interior, specifically Benchmark House District 6, polarization had increased. Torgerson indicated the report was not easy to understand and he struggled with it,

but it still said there needed to be nine Native districts with 42% Native VAP except for Southeast which needed only 35% Native VAP.

Torgerson knew DOJ primarily would look at the issue of how Natives elect their candidate of choice, and DOJ could consider Native incumbent pairing. DOJ said they would send out plans to Native groups and leaders. There were different Native concerns. Ketchikan and Kodiak were not happy about being paired for a senate district; Native groups in general were not happy with the pairing of Native Senator Lyman Hoffman from Bethel with Senator Gary Stevens from Kodiak; and the Bush Caucus was concerned about Native voting in general. Torgeson testified that he was somewhat confused by the expert nomenclature, but understood the key Native VAP was 42% and the overall standard was the ability of Natives to elect the candidate of their choice.

The Board sent out its expert report to private parties who had submitted plans, reopened the hearing process, picked a new date for a public hearing, and invited participants and the public to a 24 May 2011 hearing. Torgerson said the Board reopened the public meeting process after receiving the expert report because it was the right thing to do. Handley came to Alaska for this meeting and Torgerson believed all interested groups presented updated plans. The 24 May 2011 meeting ended late on a Friday night. Board and staff members planned on taking the weekend off after traveling around the state presenting plans and before they started working on a final plan.

Sadly and quite unexpectedly, the executive director Miller passed away on that following Sunday morning. Torgerson described the closeness of the Board and staff as they

were thrown together for this difficult and accelerated exercise. Miller's death came as a personal loss to the Board and staff; it also came at a critical time as the Board was attempting to draw its final plan based on the expert report and the input received at the recent meeting. Miller's death resulted in approximately a week of grieving and reorganizing before the process moved forward.

At that point the Board had the census data, the report from its expert, and comment from the public. Shortly thereafter, White and Handley gave presentations. Torgerson said the Board was trying to see if any private groups got it right but the expert said all plans were retrogressive and none would pass DOJ muster. This meant to Torgerson that their work was cut out for them. Torgeson said it was not practicable to comply with both the Alaska Constitution and the VRA.

The Board divided up the task of creating a new plan. Torgerson assigned Board members Greene and McConnochie to work on the rural districts. Greene and McConnochie wanted to do the rural districts; Greene is from Deering; McConnochie is from Southeast. Holm began working on the Fairbanks area, and Brodie worked on Kodiak. Torgeson was the utility player. He drew some plans, but his role changed more to administrative tasks after Miller died.

Torgerson recalled the stress level was high at that point. Plans were drawn on afternoons or weekends. Board and staff would come back and show what progress they had made. Holm could not do the Fairbanks area until the Mat-Su area was addressed. The Board did consider the Alaska Constitution regarding rural districts. It knew Proclamation House District 38 would be a socio-economic integration issue, but the Board also knew it could use the VRA as a "positive defense" if it had to violate the Alaska Constitution.

Torgerson testified the Board looked at Mat-Su as an area for excess population issues. However, after receiving advice from the expert, he did not look at areas other than Fairbanks. He said all proposed plans did combine urban and rural population. He doesn't think they looked at Anchorage. He is not aware of any plan that pulled population from Anchorage

Bickford (originally the assistant to Miller but appointed executive director after Miller's death) drew a plan called the TB plan. Torgerson said the plan was abandoned because of strong opposition by Native groups. In Torgerson's view the TB plan had no chance of passing DOJ scrutiny over the objection of Native groups.

Greene and McConnochie drew the PAM plan (labeled after their first names, Pam and Marie). It raised Native objection about pairing Senators Hoffman and Stevens. Greene and McConnochie went back to the drawing board and drew the PAME plan with the assistance of Eric Sandberg. The PAME plan ultimately was adopted in concept and was the basis for the Proclamation Plan. Torgerson did not have direct contact with Handley regarding this plan, but the Board staff was authorized to contact her. Torgerson says Handley thought the Proclamation Plan was the best chance for DOJ approval rather than the TB and PAM plans. His understanding was the plan needed nine total Native effective districts: five house and three senate, without Southeast. He felt comfortable with the Proclamation Plan concerning the VRA and thought it had the best chance to pass DOJ scrutiny. Before the Board voted, Torgerson was not aware of any other plan that met VRA requirements. Torgerson did not claim there was no other way to do it, but the Proclamation Plan is the only way he could come up with. The Board voted to adopt the Proclamation Plan 5-0. In discussion the Board members listened to each other and worked for consensus. The Proclamation Plan was adopted in concept on 6 June 2011

and formally adopted, after metes and bounds descriptions were finalized, on 13 June 2011. The Board sent it to DOJ along with the expert report and supporting documentation. The DOJ preclearance submission was available and explained on the Board's website. How to object to a preclearance submission is on the DOJ website.

Torgerson recounted that the presentation to DOJ was done in person. The meeting lasted about 1.5 hours and about four to five people from DOJ attended. DOJ had questions on pairing of incumbents, which did not surprise Torgerson. The Board received DOJ approval in October, and DOJ made no additional requests for information from DOJ.

Regarding the challenges raised by the plaintiffs, Torgerson noted that the fundamental problem facing rural Native districts is underpopulation. In Proclamation House District 38, the Board had to find additional population to add to the Native district from somewhere. Private plans had urban population added to rural districts. Torgerson noted the plan submitted by the Borough took urban population from Kenai. The Board decided to take the population out of west Fairbanks. Torgerson basically stated the Fairbanks area had an excess population of approximately 8,000 people, so the Board moved 5,000 people to Proclamation House District 38.[100] According to Torgerson, Handley suggested they take Democrats to add to the rural district. In Torgerson's view, the Board could not comply with socio-economic integration and still have a non-retrogressive plan. Handley did not tell the Board how to draw Proclamation House District 38; the Board drew the district and tried to balance the Alaska Constitution and the VRA.

[100] These numbers are not precise.

Torgerson noted the Board knew there were problems with splitting the Aleutian Chain in Proclamation House District 37. He is aware of the adverse ruling regarding contiguity and compactness but believes the VRA required it.

The Board unpaired Kodiak from Bethel in response to Native concerns about pairing Hoffman with Stevens. The Board then needed to increase Native VAP for Proclamation House District 37 in order to make an effective senate district. Torgerson reiterated Natives groups would have objected to any plan that paired Hoffman with another incumbent. He believed one other group also suggested splitting the Aleutian Chain, which was not his first choice.

Regarding Proclamation House District 1, Torgerson asserted its configuration was influenced by the VRA requirement to add excess population to Proclamation House District 38. The Board tried to get the smallest deviations possible. On the issue of geographic proportionality Torgerson agrees the Board split the excess population of Fairbanks into two different districts. The reason for the split of the excess population was again the need to create Proclamation House District 38. He understood excess population should have gone all into one district if possible. He stated the Board looked at every plan for how to deal with the issue of excess population.

Torgerson denied the Board had any intent to discriminate against the residents of the FNSB. After the required population from the FNSB was placed into Proclamation House District 38, the Board had choices for the remaining excess population. The Board could either put it in one district or split it up across districts. Torgerson contends the Board could not have put it all in one district because it would have violated the deviation rule.

Torgerson stated the senate pairing was designed to help Fairbanks. In his view, the Proclamation Plan effectively provided for 2.5 senate districts by pairing Proclamation House Districts 5 and 6. His reasoning was that Senate Districts A and B are 100% in the FNSB and 55% of the population for Senate District C is in the FNSB. He stated the only FNSB residents not in one of these three senate districts are the residents added to Proclamation House District 38.

Torgerson denied the Board had any intent to discriminate against the City of Fairbanks (City). Although there is no senate district specifically for the City under the Proclamation Plan, the Alaska Constitution only addresses equal protection and contiguity on this point. In his view Senate District B meets those standards.

Torgerson denied any pairings were done by the Board based on partisanship. He stated the Board was not aware of where Senators Paskvan and Thomas lived. Regarding Proclamation House District 5, Torgerson stated the area referred to as the "bombing range" had to go somewhere and he did not see a compactness issue with it. He denied partisan gerrymandering, denied he was an official in the Republican party, denied drawing districts to pair Democrats, and denied substantive redistricting discussions with the Governor, the Lt. Governor, or Republican Party Chair Ruedrich.

On cross examination, Torgerson discussed that Greene was the last Board member appointed and that the Board was complete by 1 September 2010. Nine months elapsed from the time the Board was complete until the draft proclamation plan was completed in April. For seven of those nine months, the Board did not have a VRA expert.

The Board bought laptops with Citygate redistricting programs for Board members. He noted the Board members were all over the board regarding the level of their computer skills.

Torgerson couldn't recall whether Handley needed census data to do racial block voting analysis. He knew the process to hire her took a long time, but couldn't recall when the contract was offered to her. Draft plans were made before Handley was on Board. Torgeson agreed Handley's analysis is critical to the process.

It wasn't until 17 May 2011 that Torgerson learned about the new Native VAP percentage. He said the Board and private groups were surprised. He stated that at no time did Board members try to create a plan not principally guided by the Alaska Constitution. Torgerson was aware the VRA could excuse compliance with the Alaska Constitution. During much of this time, he was not talking directly with Handley except during meetings. Board members communicated with Handley through White or Bickford.

D. Days 4/5. 12 and 13 January 2012. Torgeson's testimony carried over from Day 3. The Board then called Board member *Jim Holm* and Executive Director *Taylor Bickford*. Bickford's testimony continued through Trial Day 5 on 13 January 2012.

Holm is a long time resident of Interior Alaska and a local Fairbanks business owner. He previously served on the FNSB Assembly and also served as a representative from downtown Fairbanks. He is a Republican. His father was the head of the census in 1960. Holm testified he wanted to be a Board member to make sure Fairbanks was represented as strongly as possible in relation to Southcentral Alaska. He was appointed by the Speaker of the House. Holm had no prior redistricting experience but he did attend the National Conference of State Legislators

("NCSL") training. He was given the lead to draw the Fairbanks area. He was aware the Board cannot ignore the Alaska Constitution but that federal law trumps state law.

The Board agreed it needed to take care of Native areas and deal with the Southeast loss of population first. After those issues were addressed, they planned to deal with the rest of the state. Holm testified the Board needed to do it this way because of the VRA and the population shift to urban areas.

In drawing the Fairbanks area, Holm first looked at excess population. The FNSB grew to 97,000, meaning it had enough population for about 5.5 house districts, so it had to shed population. Holm noted that he didn't know the redistricting software well at the time and it was a preliminary process. He constructed districts during the draft process and it looked like he needed to take population from the west side of the City. Holm thinks all folks in a Borough should be able to vote together if possible.

The Board came up with two option plans, with Fairbanks being treated the same in each option. The Board did take the other private plans on the road. At the time, Holm did not recommend senate pairings because it was a draft plan. He added in senate pairings only after counsel advised him to.

Holm knew the Board needed the right benchmark to comply with the VRA; compliance with the VRA essentially meant no retrogression. To do that with Proclamation House District 38 meant he needed to get the western line of Fairbanks to focus on minimizing deviation. That western line is important. Holm tried to keep Benchmark House District 6 but he couldn't do it.

He needed to put 5,500 people into Proclamation House District 38, and that meant he had about 3,200 left over that he had to put somewhere.

Holm considered the options for the remaining excess population, knowing he needed five seats. He tried to keep the excess population in the FNSB if possible. Holm said the Board wanted to keep urban deviation as low as possible. Adding the excess population to the downtown area would give it too much deviation, so Holm pushed the excess population to the south and the west.

Holm did not particularly like sticking excess population outside of the FNSB. He was not really concerned about senate pairings at that point. He did think Proclamation House Districts 5 and 6 should be paired. It was not his intention to put Proclamation House Districts 3 and 4 together at that time; that pairing came later. His thought was to comply with the Alaska Constitution, the VRA, and to get the greatest amount of representation in Fairbanks.

Holm testified Proclamation House District 1 was influenced by the VRA because Fairbanks had to shed 5,500 people to the west. Holm described it as "apples in a barrel bobbing up elsewhere" or the "ripple" or the "domino" effect. He also described census block problems. In Holm's view, Proclamation Senate Districts A and B are all in the FNSB. He placed the excess population in Proclamation Senate District C which is made up of about 54% FNSB residents. He believed it is a majority. All residents of the FNSB are in Proclamation Senate Districts A, B, or C except for the residents he had to place in Proclamation House 38, which are in Proclamation Senate District S.

In Holm's view, proportionality means one person/one vote. He believed the Fairbanks senate pairings met that goal. He denied intentionally discriminating against Fairbanks. He did make a senate pairing for the final plan. Holm denied any intent to discriminate against City residents; Proclamation House District 38 was short of population, so he used excess population from Fairbanks because it was available and contained Democrats as suggested by Handley. Holm originally thought the percentage needed for a Native effective district was 35% Native VAP, but he later found out it was 42%. To him, it was logical to take population from west Fairbanks. Holm did not define the Proclamation Plan as the only plan, but it was the only one that met all the requirements the Board could come up with during the timeframe.

The Board tried to create a plan that would not draw challenges. The Board knew that Hoffman and Stevens absolutely should not be paired after receiving input from Natives and their own Board member Brodie, who was from Kodiak. Therefore Holm felt splitting up districts was necessary for getting DOJ preclearance and that it was impracticable to comply with both state law and the VRA.

Holm saw no compactness problems with Proclamation House District 5. He put the "bombing range"[101] there because it connected Proclamation House District 5 with Proclamation House District 6 to create Proclamation Senate District C. He denied the decision was based on intent to get an unfair advantage for Republicans.

On cross examination, Holm said the "finger" in question in Proclamation House District 1 was not caused by the ripple effect of adding population to Proclamation House District 38 but

[101] This area is locally referred to as the Tanana Flats. The area is south of Fairbanks and extends south to the Alaska Range. A large part of this area is part of the Fort Wainwright army base and is used for a variety of military exercises.

rather was caused by the effort to minimize deviation. He alone drew the Fairbanks area of the two option plans and both plans were the same for Fairbanks. Holm knew the option plans were not final. Proclamation House District 4 was done at the end of the process. The Board was shooting to get deviations below 1%. The VRA analysis was already done, so he was forced to move in another direction. All of the Fairbanks districts were a choice and were done for minimum deviation.

Holm said the initial idea of Proclamation House Districts 5 and 6 was to get all groups of the people of the FNSB to vote together. For example, he wanted to get farmers together. In Proclamation House Districts 1 and 2 he also wanted to keep military together. In his view, bases don't vote, people vote. Holm described how Proclamation House Districts 3 and 4 do have a point of contiguity. It was small, but if the protrusion in Proclamation House District 1 was brought west, then there would not be contiguity. Holm wanted to pair Proclamation House Districts 1 with 2, 5 with 6, and 4 with 3. Holm specifically denied that the real reason for putting military bases together was to dilute the Democratic civilian vote.

Finally Holm denied drawing districts to protect incumbents. The Fairbanks senate pairing was done on the last day or close to it.

Taylor Bickford testified next. Bickford has a political science background, worked on political campaigns, and had technology skills. He originally was hired as assistant executive director for the Board. Bickford described the start-up task of leasing space, acquiring equipment, and preparing for the task of redistricting. No state records were available from the

2000 redistricting process. He explained that the user friendliness of the redistricting software depended upon the user, and the Board had a diverse computer skill set.

Bickford testified that a VRA expert would not have helped in December 2010 because the expert could not have done a racial block voting analysis without the census data, which wasn't available until 15 March 2011. At the time of the start up, the staff estimated the population of the state based on Alaska Department of Labor ("DOL") figures of about 690,000 people, which turned out to be an underestimate of the actual census population figure. The DOL estimates also suggested Proclamation House District 40 would be underpopulated, which turned out not to be true.

The first Board meeting was 12 or 13 December 2010. The second meeting was 16 March 2011. In January, Bickford went to the NCSL training in Maryland. The Board was practicing with the software. Bickford did more research into the redistricting process, and asked White about getting the Board record from the 2000 process. White provided his private files from 2000. Bickford read the 2000 record and pulled out documents he thought relevant. Bickford testified about how there was no manual from the state on how to do the job of redistricting, he only had the NCSL training for guidance. He was tasked with starting an agency from scratch. Bickford built a website and it went live in January 2011. He set up contacts for social websites and established e-mail accounts and lists. Bickford added e-mails for all 60 legislative offices and many local government e-mails. He tried to look to the actions of the 2000 Board for guidance because that Board operated under the same constitutional amendment.

Bickford set a timeline for hiring an expert based on the timeline of the 2000 process. He learned at the NCSL training that the Board would have a one week warning before the release of the census data. In 2000, the Board had received the data in mid-March. He didn't know exactly when the census data would be released, but he figured mid-March was likely. The timeline clock started with the receipt of census data on 13 March 2011.[102]

Bickford said the Board let the public know the census data was coming. Between January and March he did have some interaction with the public. The public and private groups knew the Board had purchased software and had questions about it.

Once the Board received the census data, the first thing Bickford did was remove the estimated data the Board was practicing with from the DOL and loaded the official census data. The software provider did that at the Board office and then trained Bickford on how to do it and he did for the Board members. The census information was sent to the Board with a lot of data in different layers. Incumbent information is not in the census information. Handley said incumbent information was needed to look at Native incumbents. Eric Sandberg of the Alaska Department of Labor sent that information to him and Miller, but Bickford did not share it with other Board members. He never loaded incumbent information onto Board member computers.

Exhibit J38 is the benchmark data. Bickford wanted to have a spreadsheet for the March meeting. To Bickford, the issues were obvious. Southeast lost more population than an entire house district and the Native districts were underpopulated. In his view if the underpopulated districts were not Native districts, the Board would have eliminated them in their current form.

[102] There is discrepancy in the record whether the census data was received on 13 or 15 March 2011. The court finds Bickford credible on this point and concludes the data was received 13 March 2011.

Bickford noted the public meetings were the opportunity for the Board to get first reactions to the plans. The Board did provide maps showing over/under population figures around the state.

The Native community overwhelmingly said there could be no retrogression in the plan. It was the Native community that wanted the Board to think outside the box. The Native community did not want to diminish Native voting strength and did not want Native incumbents paired. At the time of that input, the Board did not have the current census data and looked to the past plan for benchmarks and standards. In 2000, it was 35% Native VAP. He said the private groups also believed it to be 35%.

The Board then set a deadline of 31 March 2011 for submission of private plans. The plans included statewide plans from AFFR, AFFER, and the RIGHTS Coalition, as well as some regional plans from Juneau and Valdez. The AFFR group was organized labor and Native groups. AFFER was the Republican Party. Bickford stated the origin of the "RIGHTS" plan is not clear, but it probably is from the Democrats. The majority of the presentations of private party plans included narratives and maps.

Bickford explained "shape files" as information contained in the census Tiger files; they were also used by the private parties in their plans. Bickford was tasked with getting shape files loaded into the Board software ASAP. This was the Board's first exposure to these ideas. The majority of private groups used the same software. The RIGHTS Coalition used different software called Maptitude. Bickford could not do anything with the information so he sent it to a GIS expert who converted the data for use with Board software.

Exhibit J12 showed the first RIGHTS plan. Bickford's reaction was that of a rude awakening to problems. The first RIGHTS plan had total Native population but did not have data with Native VAP.[103] The Board had to include Native VAP for use in comparing plans. Exhibit J32 showed the first AFFER plan. It had some of the same issues as the RIGHTS Coalition. The Board looked at the Aleutian House District and had concerns it didn't meet the 35% benchmark. The AFFER plan took excess population out of Fairbanks. Exhibit J33 showed the first plan from AFFR. It had unusual districts and Fairbanks was used to add urban population to rural areas. All these plans took excess population from Fairbanks.

Bickford noted the AFFR report was impressive.[104] The proponents used the same guidelines as the Board. ARB 6263 identified concerns about protecting Native voting strength and loss of population in Southeast as well as additional concerns. The AFFR report also noted that Fairbanks was a hub for rural Alaska.[105]

Bickford stated that after the 31 March 2011 meeting, the Board looked at how the 2000 process unfolded. The Board knew it should adopt plans and take some on the road to get the public's input. At one point Bickford was asked to put together senate pairings. He looked at senate pairings for three Native senate seats and discussed the Southeast problem regarding senate pairings. At that time, Bickford stated the Board did not make any other senate pairings. The Board adopted all proposed plans for the "road tour." The road tour lasted about three weeks.

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[103] ARB 6339.

[104] ARB 6258.

[105] ARB 6319.

The Board spoke with its VRA expert Handley on 11 April 2011. Handley was in Afghanistan at the time and the Board connected with her via Skype. The Board had chosen her as its expert, although the contract was not yet signed because she was out of the country. Her preliminary advice was to start drawing rural districts first. Handley made clear that it was good to start working from old Native VAP figures but that the percentage may change once she did racial block voting analysis based on the census data. Handley said the Board would get the analysis maybe in May. Handley further explained that, not only would racial block voting analysis be important, but that DOJ no longer looked at majority/minority districts but instead at whether a minority group has the ability to elect its preferred candidate of choice.

Bickford stated there was some confusion over nomenclature. The Board adopted a policy for nine Native districts, which at the time meant five effective house districts, three effective senate districts, and one influence district.[106]

Bickford testified that the meeting held in Anchorage on 6 May 2010 was the last public meeting with the Board Option Plans. The Board was open to other plans, and private groups presented plans at the meeting. That public meeting was very well attended. The room was packed and there was substantial online attendance. The nine Native district policy adopted in

[106] Everyone agrees the use of differing terms was confusing. Some of the differing terms include majority/minority districts, equal opportunity districts, effective districts, ability districts, protected districts, and influence districts. Although the plaintiffs contend the use of words such as equal opportunity district versus effective district is not mere nomenclature but rather a difference of substance, the term ultimately used by the Board, and presented to DOJ, was "effective" districts. The Proclamation Plan had eight effective districts: five effective house districts and three effective senate districts. It appears the use of an "influence" district faded away in importance in light of the 2006 changes in the Section 5 analysis. Handley testified that the regulations did not preclude the use of influence districts. For present purposes, any reviewing court needs to be aware that this court denied compactness challenges to the districts in Southeast based, in part, upon the argument that an "influence" district was required. Appendix A, No. 3. It is not clear whether the court would have reached a different conclusion if this information had been fully litigated on that issue. Given the ambivalence of the expert's testimony on "influence" districts, this court will not disturb that ruling.

April was adopted again. The Board worked late that night with Handley. The Board members then agreed to take the weekend off because they had been working hard traveling and would need to work hard starting again on Monday to consider drawing a final plan. Bickford noted that up until then, the Board's primary contact with Handley had been through Miller.

Bickford then described a moment of private sadness. Miller unexpectedly died on the Sunday of that weekend. His death came as a tremendous shock to Bickford and the Board. When Bickford went to work on Monday, the entire Board was grief stricken, and the normal process of the Board obviously was disrupted that week. Bickford later was made acting executive director, a position that eventually was confirmed by the Board and became permanent.

Bickford identified Exhibit S as e-mails to Handley. He knew the expert was waiting to hear about any new plans. Normally he would have put the private plans into the Board format, which means they would have displayed the Native VAP, but he sent her the private group plans in their original format, which was total Native population and not Native VAP. Handley spoke to the Board on 17 May 2011 about the various plans but noted she did not have the right figures because they had not been converted into Native VAP. Bickford testified that he put the private plans into the correct data that night, and on 18 May 2011 he took the private plans and converted them to their Native VAP figure. He says he told the private groups they needed to use Native VAP figures.

Bickford talked to the expert the week after Miller died. Handley had completed racial block voting analysis and told Bickford that polarized voting had increased. Bickford testified

that he told her the Board and the public needed to know that, and that he wanted her to share this information with the public. He said Torgerson thought it was a good idea to have her available by teleconference, and/or bring her to a public meeting, and reopen public participation based on the new standard.

Handley presented at a meeting on 17 May 2011 but really clarified her standard in person to the public on 24 May 2011. Bickford made Handley's notes from the 17 May 2011 meeting available to the public and sent them to interested groups. The Board reopened the record by talking about it during meetings on the record and sending out e-mails.

Bickford testified that Greene and McConnochie took the lead in drawing Native districts. They were not making much progress, so he came up with his own plan, the TB plan. Exhibit J31 reflected the TB plan. Bickford noted the original Board options and private plans did not meet the 42% standard set by Handley. ARB 407 is an example of the analysis. Greene and McConnochie did come up with a plan with assistance from the GIS person, Eric Sandberg. The plan was known as the PAME plan.

The first time the public saw the TB plan was after the 24 May 2011 meeting. It met the benchmark even though Natives did not like the senate pairings and the northern boroughs did not want to be split. The PAME plan also met the benchmark. It paired Senators Hoffman and Stevens. The Board adopted the PAME plan in concept but Greene was uncomfortable about pairing Native incumbents. Greene and McConnochie drew another plan with the idea of putting together a plan that had three effective senate districts without Native incumbent pairings; and

that would minimize objections from the Native community. Their solution was to split the Aleutian Chain.

Handley said the numbers looked good. Bickford testified that the Board adopted this plan as its Proclamation Plan on 6 June 2011 although it had to undergo clean-up by the GIS staff and the Board staff had to come up with metes/bounds descriptions of the districts. On 13 June 2011 the Board formally signed its Proclamation Plan, shown in Exhibit J41. Bickford said his job was not done; the next step was to receive preclearance from DOJ.

Bickford worked primarily with White to put together material for DOJ. He recalled the Board made its submission in August or September. According to Bickford, DOJ received an objection to the Proclamation Plan from the Alaska Democratic Party but not Native groups. This objection was received by the Board pursuant to a FOI request. The objection was made after the instant action was filed. Exhibit F is a complaint from the Democratic Party.

The plaintiffs' counsel, Mr. Walleri ("Walleri") pointed out on cross-examination that the Aleut Corporation did object to DOJ. Bickford was not aware of this. Exhibit 15 is the objection from Aleut Corporation.

The Board asked for a preclearance hearing with DOJ. Handley had stated Alaska presented the hardest issues she had seen and it would be a good idea to meet with DOJ. The only issue of substance DOJ discussed was incumbents.

Bickford stated the public had notice of the application for preclearance. The entire submission to DOJ was posted on the Board's website. The DOJ website has instructions on

how to object to the preclearance of a plan. The public was given notice of Handley's report when it was put on the website in early August.

Regarding objections to Proclamation House District 38, Bickford testified the Board did not deny there are socio-economic issues with this district. Fairbanks is the best place to find excess population, and every plan took excess urban population from somewhere. Bickford stated Fairbanks was the best place to take it because of its location. Fairbanks tied better to the Native districts than Mat-Su. Additionally, according to Bickford, Handley stated the Board needed to add crossover votes to rural areas by adding urban Democrats. He testified that the Mat-Su area is Republican and it is hard to get Democrats out of the Mat-Su area.

Bickford noted that the Board looked at the possibility of drawing an urban Native effective district based on the large Native population in Anchorage. He stated that was not possible, because even though there are 20,000 Natives in Anchorage, they are not cohesive enough to draw a house district. Regarding Proclamation House District 38, Bickford stated the Board had to make a choice and the Board's decision was reasonable.

Regarding Proclamation House District 37, Bickford discussed how census blocks work. He noted that the West Aleutians' highest population is Asian 2:1 over Native. He believed that this was an appropriate way to add population to Proclamation House District 37.

Bickford routinely looked at geographic proportionality. In Fairbanks, the excess population had to be split two ways. In the Board's Proclamation Plan the VRA required the Board to put about 5,500 urban Democrats into Proclamation House District 38. The Board could not put more urban votes into Proclamation House District 38 because it would have

lowered the required Native VAP. The Board could choose to draw it tighter, but conversely if all of the excess population was absorbed into the FNSB, it would increase deviation. Bickford stated that the City has 49% control of the senate districts.

Proclamation House District 5 was not a problem from Bickford's view. He didn't see what the "bombing range" has to do with anything. Bickford also stated there were no substantive differences between the Demonstration Plan and the Proclamation Plan.

On cross examination, Bickford described the time-line for hiring a VRA expert and the various trigger dates for Board action. He denied the Board would have been better off if it had hired the expert earlier, because census data was not available until mid-March. The Board put together voter information and GIS information before hiring the expert. The draft plans were based on the state data and nobody expected the benchmarks to change like they did.

In Bickford's view, any plan should be fair whether you are a Republican or Democrat. He tried to remove himself from anything political. The Board consisted of four Republicans and one Democrat. He stated the Anchorage plan involved Randy Ruedrich of the Republican Party but noted the Municipality of Anchorage supported it.

The Board looked to Greene for Native perspective. The expert said the TB plan met benchmarks but Greene did not like it for a variety of reasons. Greene and McConnochie gave the Board more options when they drew the PAM plan but that plan drew objections from a Native corporation. One reason not to use the TB plan was to leave districts 40 and 39 intact.

Bickford noted that the AFFER, AFFR, and the RIGHTS plans all came into Fairbanks for excess population. The AFFER plan proposed to take population out of Ester and

Goldstream. The AFFR plan proposed to take population out of the Eielson end of the City, as did the RIGHTS plan.

Bickford agreed both the TB and PAME plans met Handley's benchmark numbers, but the Board did not feel it was VRA compliant because Natives were against it and he felt that the plans would have a negative impact on DOJ approval. The expert did not say any other plans met the benchmark.

E. Day 6. 16 January 2012. The Board called *Eric Sandberg* and *Dr. Handley.*

Sandberg is a research analyst who works for the Alaska Department of Labor doing GIS work. His supervisor was on the planning committee and Sandberg ended up working for the Board. Sandberg testified that he helped pick out software at the NCSL in Austin and helped gather hardware for the Board. Later he started gathering election results and incumbent information. He received the incumbent layer information from the Division of Elections. No board member ever asked him for incumbent layer information. Exhibit J38 showed benchmark data he put together on the advice of Handley for her use after she was retained.

Sandberg described Tiger data. Census bureau data uses geographic shape files. Shape files are commonly used GIS files, of which the smallest grouping is a census block. It is a feature surrounded on all sides by geographic features such as streets or lakes. Census blocks cannot be fractured.

Sandberg reviewed and analyzed private plans. The private plans often had incomplete numbers regarding Native VAP as well as other problems. The RIGHTS Coalition used Maptitude software, which he had to link to Tiger files and merge the data so he could analyze it.

Sandberg attended public hearings and eventually helped with metes and bounds descriptions in the Proclamation Plan. What stood out to him was the difficulty in drawing the rural areas due to population loss.

On cross examination, Sandberg stated he had information ready for Handley when she was hired. He stated he could have sent her incumbency data earlier had she been hired earlier. He stated she did not ask for registration data but did ask for election results. Fairbanks grew faster than rural areas but not as fast as Anchorage and Mat-Su. According to Sandberg the Board did try to draw plans using population from Mat-Su but it didn't work. The Board tried different plans but mostly focused on Fairbanks due to its excess population. He did not try to fix private proposals but just gave them to the expert after fixing data regarding Native VAP. He presented the plans "as is" even if they contained mistakes.

Dr. Lisa Handley is political scientist. She focuses on election districting. She initially worked just in the United States, but now does work for the United Nations around the world. She currently is working for DOJ in Texas, Georgia, and other places. She does advise some clients regarding Section 5 compliance under the VRA.

Handley testified that Alaska is the first state working with the 2012 election cycle as opposed to the 2011 cycle. Handley thought Alaska submitted its Proclamation Plan before any other state for a 2012 election cycle. She worked here ten years ago on redistricting and was involved with some 1990 voting fraud cases for the attorney general. In the instant matter she was originally retained by the planning committee. She presented a one day seminar to the planning committee and discussed the kind of data the Board would need. Handley testified she

could not do racial block voting analysis in Alaska without the census data because Alaska does not keep voting race registration data. She recalled that she was hired in April when she was in Afghanistan and signed the contract when she returned.

It was in April 2011 when she first spoke to the Board. Her first call was to describe what a VRA expert would do, the databases she would require, and that a DOJ submission would likely involve benchmark analysis. Because of her work with the planning committee she knew the Native districts were underpopulated. She thought the Board should first draw the Native districts, as early as April 2011, because it might be complicated.

Handley testified that she had not done any racial block voting analysis at this point. She described the process of analysis, advice, review, and the need to do a report after a plan was adopted for DOJ preclearance. The first step was to do the racial block voting analysis to determine if a district is polarized and to ascertain cross-over votes. She used three statistical techniques for this analysis. The net result of this analysis was that it told her the minority percentage of Native VAP needed for the minority to have the effective ability to elect its preferred candidate of choice.

Handley completed her racial block voting analysis shortly before the teleconference with the Board in about mid-May. She worked hard and contacted White and Bickford with the results. She prepared notes for her 17 May 2011 presentation. Exhibit J44 showed her notes. The notes were to relay the findings of her analysis. Her analysis revealed that the degree of voting polarization had increased over the last decade. Handley stated she used the wrong terms when she referenced "influence" "equal opportunity" and "effective" districts as being on a

continuum. She subsequently learned her language was wrong after contact with DOJ in another case. Handley testified that the correct definition for effective means the "ability to elect."

Handley testified that this project was particularly complex. In her view, DOJ would not approve four house districts, and there was no way to draw five districts over 50%. She assumed the data she was given from original submissions from private groups were based on Native VAP and she did not know it was total population. She thought she had them in the right data format a week later, after they were run through GIS systems.

Handley's 24 May 2011 meeting covered a legal overview for Section 5 preclearance. Handley testified that she advised the Board of the required benchmarks at this meeting.[107] The VRA was amended in 2006 but there were no new regulations until February. She assumed the Section 5 decisions would be based on a continuum as was done in the past and did not know DOJ would now simply look at it as a dichotomy: either a minority district performed or it did not. The number of districts had not changed, but she was most unsure of Southeast. Handley recommended the Board maintain an influence district in Southeast. The problem, Handley testified, was a decrease in rural Native population. In her view, the Board would need to add urban Democrats to the Native districts. She was there for the presentation of various plans to the Board. She then looked at them in detail. None of the private plans met DOJ requirements.

Handley looked at the Proclamation Plan and found it was not retrogressive. That meant the proposed plan does not diminish a minority's ability to elect their preferred candidate of choice from the last plan. DOJ makes sure there is no intent to discriminate, usually by hearing from minority leaders and the minority community. The purpose of her draft report was to

[107] ARB 9877.

include it with the DOJ submission. Her report was not complete, but it had her racial block voting analysis and benchmarks. Eventually she completed the report and submitted it to the Board. The main purpose of the report was to do the analysis and to let DOJ know it was done and that the Board applied it.

Exhibit J40 was made still using the continuum terms. Handley learned that was wrong when retained by DOJ in a Texas case. She learned that DOJ would interpret the 2006 amendment to be either the ability to elect or not to elect. She advised the Board to meet with DOJ. Eventually she learned that DOJ counted five effective house districts and three effective senate districts in both the Benchmark Plan and the Proclamation Plan. There was no comment on the Southeast district. She asserted the plaintiffs' VRA expert, Arrington, thinks the benchmarks are five/three also.

Handley did a rebuttal report concerning the Demonstration Plan. She concluded the Demonstration Plan did not meet the benchmark. Arrington agreed DOJ would have objected to the Demonstration Plan.

On cross examination, Handley stated she was aware the census data was released about 15 March 2011. She couldn't say whether the state had the data for several weeks at the time she was hired on 8 April 2011. Handley was not available to perform an analysis before mid-April. From April-May, she was working only on Alaska. She feels she had enough time to do the analysis before the 17 May 2011 meeting.

Handley described how she has been doing redistricting for 30 years, since the 1980s. The redistricting language has been around a long time. In 2000, she testified regarding

influence districts in Alaska. Handley denied testifying before Congress regarding the 2006 amendments. She talked about different ways to describe influence and noted the U.S. Supreme Court does not embrace a single definition. Exhibit J44 equated influence with the ability to elect but not consistently. Handley stated the 2006 amendment may or may not consider influence districts depending on how it is defined. The focus of the amendment was on whether the minority has the ability to elect a candidate of its choice. She also discussed primary and general elections, noting that for VRA preclearance a plan needs to have the same number of districts, but not necessarily in the same place. If the preferred candidate of choice is being consistently defeated in primary elections, but they elect the candidate in the general election, it is a protected district. Her regression analysis shows Natives tend to vote Democratic.

Handley did use the terms effective, equal opportunity, and influence on 17 May 2011 and 24 May 2011. Prior to the adoption of the Board Proclamation Plan, she never advised the Board of the need for five effective districts. Her report was not provided in final form until after the Board issued the Proclamation Plan.

Handley did not do new racial voting block analysis. She testified that it was not possible to draw a plan in Alaska that exceeds the benchmarks. She drew no plans in Alaska. She did see other plans produced by the Board that met the benchmarks. She recalled one; it could have been the TB plan. The problem was the Natives groups did not like it. She did hear about PAME but could not recall looking at it. Handley's testimony clarified that the Proclamation Plan was not the only plan that could pass DOJ review. She agreed that under the Proclamation Plan all Native districts are over the required Native VAP percentage. Handley testified that Alaska Natives are all treated the same by DOJ.

Handley advised the Board about adding excess population consisting of Democrats. Although she did not do this on the record, she testified that she certainly informed the Board of this through White and Bickford; and that there was no reason not to say it in front of the Board on the record.

F. Day 7. 17 January 2011. The plaintiffs recalled *Leonard Lawson* on rebuttal.

Lawson testified on rebuttal that he needed to know how many protected districts were required. He attended most hearings. Formatting before 17 May 2011 was not discussed. The first plan was submitted using total population, not Native VAP. He attended the 17 May 2011 meeting and learned the Board was moving away from majority/minority districts and moving to an effective/influence standard. His understanding of effective standard is 42% except Benchmark House District 6 which is 50% and that the Aleutians number is down to 31%. He was given one week to present a plan to meet the new benchmark. He asked White for the standard and he gave it and explained differences between Benchmark House Districts 6 and 37. At the 24 May 2011 meeting the Board did not answer questions. He submitted a plan based on the 17 May 2011 information. The Board did not give format guidance and his plan did include Native VAP. That meeting did not change his understanding of what was needed for the effectiveness standards.

The first Lawson learned of the need for five effective districts was when he read Arrington's deposition in December 2011. The Plaintiffs asked Lawson to do another plan, the Modified RIGHTS Plan, in early October. At that time Lawson still thought the benchmark was four effective house districts, two influence districts, and three effective senate districts. He only

learned about the five/three standard after reading Arrington's deposition in late December 2011. He returned to Alaska at the end of December and drew another plan, the Modified Rights 2 Plan.[108] Lawson contacted White on 6 January 2011, the Friday before trial began. Lawson had been working with Plaintiffs' counsel, Walleri for a while. Lawson stated that Arrington believes this plan would pass DOJ scrutiny.

In Lawson's view his plan was more consistent with the Alaska Constitution. It breaks the FNSB boundary only once and there are no breaks in the Mat-Su Borough at all. He took population from Kenai to put into Proclamation House District 38. Specifically, he put Homer, Seldovia, and Tyonek into that rural district because he thought it would be appropriate.

On cross examination, Lawson stated he created the original Modified Rights plan for plaintiffs' counsel in late September or October and a copy was given to Arrington. Exhibit J55 showed Arrington's report. Lawson says he is not familiar with the report or Arrington's opinion regarding the requirement of five/three effective districts. Lawson was not aware that the total population numbers on his plan were off by 676 people from the census nor did he know his total Native population was off by 266 people. He did recognize his plan breached the Kenai Borough three times and had a district that stretched from Homer to St. Marys.

[108] Plaintiffs appeared on the first day of trial with a new plan that had not been provided to counsel. This did not allow any opportunity for analysis and review by experts. Such an approach is unacceptable under the civil rules and case law. The court declined to allow the plaintiffs to present this new plan in its case in chief for reasons stated in detail at the beginning of the trial and reiterated on the record before Lawson testified on rebuttal. This plan was allowed to be presented on rebuttable for two reasons: to rebut an inference that the Proclamation Plan was the only plan that would pass DOJ scrutiny and to allow the plaintiffs to make their record. This court has not given any weight to this plan on the merits.

VII. Analysis.

A. Partisan Motivation.

The redistricting process is a dynamic exercise in how free citizens organize themselves for voting. It is, like our republican form of government, grounded in politics. However, the process itself is designed to maximize the rights of individual voters over the interests of partisan groups. Aeschylus wrote in his Agamemnon: "Pathei mathos" - we "suffer into knowledge." Alaska, too, has suffered into knowledge concerning the politicization of the redistricting process. The 1998 constitutional amendment changed the process by which redistricting board members are appointed, a process that limits the sitting governor's ability to appoint all the board members. The 2001 redistricting case occasioned the first appellate review of a redistricting plan under this amendment. The instant action is only the second plan arising from the 1998 amendment.

The wisdom of having a board appointed by each of the three branches of government is a laudable attempt to minimize politics in the process. Appointments to the Board "shall be made without regard to political affiliation."[109] The Alaska Supreme Court recognized early, even when the governor made all the appointments, that a bi-partisan board is not required, but general consideration of the members' affiliation and partisan participation may be germane.[110]

The current redistricting process was initiated by board appointments from all three branches of government. The Board ultimately was made up of four Republican members and one Democrat. Presumably the Board will have different combinations of members in 2020.

[109] Article VI, Section 8 of the Alaska Constitution.

[110] *Egan v. Hammond*, 502 P.2d 856 (Alaska 1972).

Although politics may not be entirely ephemeral, there is an undeniable aspect of speculation about who may be in the majority at any time in the future. Testimony at trial established that the largest group of voters in Alaska is not registered Republican or Democrat, but rather Undeclared. In 1990 Alaska elected a governor that not only was not from either main party but rather who ran as the candidate for the Alaska Independence Party.[111] In the last general election Alaska elected a write-in candidate for U.S. Senator that was not supported by either major party. The recognition in *Egan* that the Board appointment process is not the equivalent of "non-partisan" presaged both of these events and is practical recognition that politics is unpredictable.

The court further notes that Paskvan, Thomas, and Hardenbrook testified that the 2001 plan favored Republicans. It was only after state legislators were indicted for corruption in the mid-2000s and the concomitant increase of public awareness of the Corrupt Bastards Club that the tide turned, at least in the Interior, and Democrats were elected to seats previously held by Republicans. Thomas was elected in 2006 and Paskvan in 2009. It is not irony that makes the current plan one that Democrats want to maintain, but rather the mercurial aspect of politics in general.

The instant process was conducted pursuant to Alaska's Open Meeting Act and the record reflects the openness of the entire process. No challenge to the Open Meetings Act is at issue in this action.[112] Despite the controlling law just noted, the plaintiffs argue that the Board

[111] There is a certain *je ne sais quoi* about a state that elects a governor from a party that promotes secession, but also rules, as a matter of law, that secession is not legal. *Kohlhaas v. State, Office of Lieutenant Governor*, 223 P.3d 105 (Alaska 2010).

[112] The plaintiffs objected to some executive sessions held by the Board, but adduced no evidence to support a finding the Open Meetings Act was violated. Additionally Board staff communicated directly with Handley and

was controlled by partisan Republicans and made choices based on partisan affiliation. Specifically they argued the Board was made up of four Republicans and one Democrat. This is not persuasive in itself. They also argued Bickford, the executive director, previously worked for the Republican Party and has worked on Republican campaigns, and that he worked with Greene and McConnochie in the establishment of Native rural districts.[113] These objections do not disqualify the executive director of the Board under any scenario.

Perhaps the most troublesome allegation came from Hardenbrook, Chief of Staff for Senator Thomas, who testified that he had an informal conversation with Torgerson at the Triangle Bar sometime in March. Hardenbrook claimed that Torgerson implied that there would be payback against the Democratic Party. That is the extent of any direct evidence that the Board acted in a partisan manner. Interestingly, the plaintiffs never cross-examined Torgerson about this statement. The court is manifestly aware that evidence of intent is rarely capable of direct proof, but the court does not find Hardenbrook credible on this point of an "implied" payback threat. Hardenbrook actually said he could not recall what Torgerson said, but only that his response was more towards payback than fair process for the plan. Although the Triangle Bar is not Suite 604 of the Baranof Hotel, a statement of this magnitude would not be implied nor vaguely remembered. The court does not find Hardenbrook credible on this point.

The plaintiffs took exception that the Board accepted a proposed plan for Anchorage submitted by AFFER. Randy Ruedrich, the Chairman of the Alaska Republican Party, was part

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relayed her advice to the Board. The court does not find this administrative use of staff to consult and coordinate with its expert violated the Act in this instance.

[113] Trial Testimony of Bickford.

of the group. The plan was also supported by Anchorage Mayor Sullivan and the Anchorage Clerk.[114] The essence of this argument was that the Board did not look at Anchorage for purposes of utilizing excess population because of partisan influence. The Democrats' plan, the Modified RIGHTS Plan, did not take excess population from Anchorage. The FNSB plan and the Demonstration plan presented at trial took population not from Anchorage but from Kenai under the former and aligned Homer, Seldovia, and Tyonek with rural areas under the latter. The court finds it was not unreasonable for the Board to take excess population from Fairbanks. Therefore the court finds that the argument of unlawful partisanship in regards to the Anchorage Districts to be without merit. However, on remand, there is no reason the Board cannot consider taking excess population from *any* area that has excess population.

The plaintiffs have a variety of additional partisan concerns, including that Holm informally consulted and sought the input of several Republicans about redistricting outside the Board processes, but did not discuss redistricting in a similar manner with any Democrats.[115] They contend he was concerned and took steps to insure that he did not draw Representative Tammy Wilson nor Senator John Coghill out of their districts who are Republican incumbents,[116] but on the other hand, he paired two incumbent Democratic Senators, Senator Joe Paskvan and Senator Joe Thomas in Proclamation Senate District B, which is comprised of Proclamation House District 4 in which Senator Paskvan resides and Proclamation House District 3 in which Senator Thomas resides.[117]

[114] Trial Testimony of Torgerson and Bickford.

[115] Trial Testimony of Holm.

[116] Trial Testimony of Holm.

[117] Trial Testimony of Senator Thomas and Senator Paskvan.

The plaintiffs also point to the Board's choice for selecting the Democratic areas of Ester and Goldstream for inclusion into a predominantly rural Native effective district.[118] The plaintiffs note that the AFFR plan placed Eielson population into the rural district because of the historic low voter turnout in the military base.[119] Handley testified that she would not be concerned about adding military population to the rural district because it would not harm the effectiveness of the Native vote.[120] Nonetheless, Holm advocated keeping as much military population in Republican areas of the FNSB districts,[121] which he knew would have the effect of enhancing the civilian Republican vote.

Handley had previously written an article explaining how "at the state level, helping to elect more (minorities) will also help elect more Republicans."[122] The article explained that advocacy for the strongest minority effective districts would necessarily help Republicans because the resulting plan would pack Democrats. The plaintiffs contended this was significant circumstantial evidence that the "shedding" of Democrats from the Ester/Goldstream area, by the implementation of a plan to create "as strong Native districts as possible" and in excess of benchmark standards, merely implemented the blueprint contained in Handley's article to manipulate the VRA for partisan gain.

The plaintiffs also made partisan allegations with respect to Proclamation House District

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[118] Trial Testimony of Torgerson and Bickford.

[119] Trial Testimony of Bickford.

[120] Trial Testimony of Handley.

[121] Trial Testimony of Holm.

[122] Plaintiffs' Exhibit 10.

1. These allegations were discussed in a pre-trial order and were ultimately denied.[123] The Board responded that the plaintiffs did not plead a claim for partisan gerrymandering and that there is no merit in their partisan allegations. The court agrees with the Board and finds the plaintiffs' claims alleging gerrymandering are unpersuasive and were not properly pled.

The court notes that the plaintiffs are Democrats. Their comparative plan throughout the process was the Modified RIGHTS plan which was one of the groups supported by the Democratic Party. The Board testified that they attempted to draw the Anchorage Districts themselves, but they received comment that they were ignoring historical boundaries. Since the Board did not have a Board member from the Anchorage area, they deferred to the Mayor of Anchorage. The Board's policy on contact with others was that there was no policy. There was no limit on who could contact the Board or who the Board could speak to regarding redistricting.

Torgerson, Holm, and Bickford all testified that they were proud of the plan and that they were not influenced by their partisan affiliation. The court finds this testimony credible.

B. Process.

The plaintiffs have raised due process issues related to the timeline of the hiring of the VRA expert and problems in her analysis. A timeline of the hiring and participation of the VRA expert is necessary to explain the issues.

1. Timeline.

Before the Board process began, the planning committee hired a VRA expert to consult with them. They hired Handley, the VRA expert who was also chosen by the Board. She gave a presentation on what a VRA expert would do and the type of data needed.

[123] Appendix A, No. 4.

The census data came out on or about 15 March 2011. On 16 March 2011 White, Torgerson, and Bickford were placed on the evaluation committee for the VRA expert. A handful of individuals responded to the RFP[124] sometime in the beginning of March. On 31 March 2011 private groups presented plans, including AFFR and AFFER.

Torgerson let the Board know on 4 April 2011 that Handley was chosen. She was officially hired as the Board's VRA expert on 8 April 2011. On 9 April 2011, the Board adopted a resolution to create nine protected Alaska Native districts. On 11 April 2011, Handley made a presentation to the Board via teleconference from Afghanistan. She gave a general overview of the VRA as well as an outline of what work she would perform for the Board. Handley strongly urged the Board to draft the Native districts first given the demographic difficulties with which the Board was faced.[125] She also explained that ten years ago in Alaska, a district with 35% Native VAP routinely elected a Native-preferred candidate.

Handley returned to the U.S. in the end of April and began her Racial Block Voting analysis for Alaska. On 13 April 2011 the Board adopted plans to take on the road for public comment. This included Board Options 1 and 2 with alternatives. The Board also took the plans of the private groups with them. However, all of these plans were working under the impression that a district with a 35% Native VAP would elect a Native preferred candidate.

On 6 May 2011 the three major private groups, AFFR, AFFER, and the RIGHTS Coalition, presented their statewide plans. These plans used Native total population instead of

[124] The court notes that after the 2001 redistricting cycle, the budget for the Board was transferred from the legislature to the Governor's office. Board members and staff testified that under the Governor's office, the Board had to submit an RFP for every service it required, including a VRA expert, and this process inherently took more time to hire necessary components than if the budget had been under the legislature.

[125] Handley knew of the demographic difficulties due to her work with the planning committee.

Native VAP. This meant that the Board staff ultimately would have to convert them into Native VAP in order to analyze them. The staff was given the weekend off and planned on working on the conversion the following week.

On Sunday, 8 May 2011, the Board's executive director Miller unexpectedly passed away. In addition to the emotional effect on the Board and its staff, Miller's death had the expected disruption to the Board's administration and process.

The week after Miller's death was obviously one of grief and confusion. Bickford became the executive director and Jim Ellis became the assistant executive director. The following week Handley was advised of Miller's passing. Bickford did not have time to convert the private plans to Native VAP before he sent them to Handley on 10 May 2011.

Sometime in early May, Handley completed her preliminary Racial Block Voting ("RBV") analysis. She telephonically communicated the results of her analysis to Bickford and White telephonically sometime between May 10 and May 13.

Handley's RBV analysis found that voting in Alaska had become more polarized over the past decade (2002-2010). Accordingly, she advised that the overall statewide standard for creating an "effective" Alaska Native district had increased from 35% Native VAP to a minimum of 41.8% (42%) Native VAP.

On 17 May 2011, Handley appeared telephonically before the Board and explained the findings from her RBV analysis. Handley discussed her findings about the benchmark and reported that Benchmark House Districts 37, 38, 39, and 40 were "effective"[126] Native

[126] Handley explained that "effective districts are districts that provide minority voters with the ability to elect candidates of choice to office." ARB 3880, lines 1-3.

districts.[127] Handley reported that Benchmark House District 5 was an "influence"[128] Native district.[129] Handley stated in regards to Benchmark House District 6 that she "wouldn't call it effective" because it did not always elect the Native preferred candidate.[130] She referred to this district as "equal opportunity" or "influence."

The degree of racially polarized voting had increased since 2000. Handley concluded that in order for a legislative district to be an effective district in which the Native population had the ability to elect a candidate of their choice, the district would have to have 42% Native VAP statewide, with two exceptions: Benchmark House District 6 which had greater polarized voting and would require 50% Native VAP; and Benchmark House District 37 which was "not polarized at all" and could be effective at "anything down in the 30's(%)".[131]

Handley reported that Benchmark Senate Districts T, F, and C were "effective" Native districts.[132] Handley reported that the benchmark to avoid retrogression of Native Voting strength for the 2010 plan was four effective house districts and two influence districts and three effective senate districts.[133]

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[127] ARB 3881, lines 16-19.

[128] Handley did not explain what an influence district was, however, it is generally understood that an "influence district" is a district in which the minority community, although not sufficiently large to elect a candidate of its choice, is able to influence the outcome of an election and elect a candidate who will be responsive to the interests and concerns of the minority community. Redistricting Law 2010, (National Conference of State Legislatures, Nov. 2009) at 69.

[129] ARB 3881.

[130] ARB 3881, lines 1-7; ARB 3886, lines 5-6.

[131] ARB 3877-78.

[132] ARB 3882, lines 3-9.

[133] ARB 3881, lines 12-13; ARB 3882, lines 3-4.

Handley's notes from this presentation were subsequently acquired by Board staff to help clarify Handley's presentation.[134]

Handley also advised the Board that the AFFR, AFFER, and RIGHTS Coalition proposals were all non-retrogressive.[135] However, this was based on her review of the plans with the wrong data.

On 24 May 2011 the Board invited all of the private groups to present plans under the new standard. A number of groups made formal presentations to the Board: AFFR; AFFER; the RIGHTS Coalition; and Calista Corporation. The Board also received new and revised plan submissions from the Bering Straits Native Corporation and Tom Begich, a consultant to several Alaska Native interests. Handley also attended the Board meeting in person. She gave two presentations: one a primer on the federal VRA, and another on the results of her RBV analysis. She then listened to the presentations of all of the third party plans. After the public hearing, Handley sat down with Board counsel and Bickford and they reviewed each of the new plans presented for compliance with the VRA. Handley advised Board counsel that none of the third party plans met the benchmark and thus each was retrogressive and did not comply with Section 5 of the federal VRA.

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[134] The notes clarified Handley's definition of influence districts as meaning "districts (that) provide minorities with an opportunity to elect minority-preferred candidates to office but only if white voters provide sufficient support for the minority-preferred candidates to win." The notes clarified that Handley fixed the benchmark as being four effective house districts, House Districts 37-40, and two influence or equal opportunity districts, House Districts 5 and 6, and three effective Senate Districts C, S and T. The notes clarified that Handley determined that Board Option plans were retrogressive because they only provided for four effective house districts, two influence house districts, and two effective senate districts. The notes only opined that the AFFR adjusted draft plan was non-retrogressive, but did not reference the other plans. There is no written or oral communication by Handley to the Board in the Board record retracting her opinions that AFFER, adjusted AFFR, and the RIGHTS Coalition plans are non-retrogressive, nor any latter statement in the record by Handley to the Board stating that any of these plans are retrogressive.

[135] ARB 3917-18; ARB 3922-23.

On 6 June 2011 the Board ultimately decided on their final plan. Staff worked on putting in the metes and bounds over the next few days and it was formally adopted by the Board on 13 June 2011.

On or about 4 August 2011, several weeks after adoption of the Proclamation Plan, Handley submitted her final report.[136] The purpose of Handley's report was to support the Board's DOJ submission and was not intended to be used by the Board in its deliberations, which predated the report.[137] In discussing the benchmark plan, Handley opined that the VRA benchmark was four effective house districts, two equal opportunity districts, and three effective senate districts.[138]

2. Timing of Hiring the VRA Expert.

The plaintiffs and two of the *amicus curiae*[139] argue that Handley should have been hired sooner. They point out that the late hire contributed to late analysis which meant that the Board and the private groups were working under the wrong standard and did not find out about the correct standard until shortly before the deadline. They argue that this meant the third party groups therefore did not have any meaningful input into the process.

The court starts off by noting that in Alaska the analysis that is done by the VRA expert cannot be done before the census data comes out because Alaska does not retain voter

[136] Exhibit J40.

[137] Trial Testimony of Handley.

[138] ARB 4206-08.

[139] "The Board did not timely retain an expert," FNSB Brief p 9. "BBNC understands that Dr. Handley is a highly respected expert, but the Board simply should not have hired someone who did not have the time to devote to Alaska and who could not provide the necessary analysis in a reasonable time frame. Instead there seemed to be little consideration of the fact that Dr. Handley could not meet the deadlines, and that the public would not have access to the standard until very late..." Bristol Bay Native Corporation Brief p 8-9.

registration by race. So Handley could not have properly analyzed the Alaska census data until 15 March 2011.[140] She was hired on 8 April 2011 and presented her analysis in May.

Bickford testified that the Board issued its Request for Proposal ("RFP") for its VRA expert on 23 February 2011. The Board created a committee to review the candidates who responded. As stated earlier, there was testimony that because the Board's budget was under the Governor's office, the hiring process took longer than normal because the Board had to submit an RFP for everything. There was also testimony that the Board was working on changing this process for the next round of redistricting. The court finds that this RFP process played a part in delaying the hiring of the VRA expert and was out of the Board's control.

It is also unclear whether the Board could have found a VRA expert to start sooner than Handley did. There was testimony that there are about 25 VRA experts.[141] These experts work on elections and voting issues around the country and around the world. Handley was chosen and officially hired while she was working on a project in Afghanistan. Had the Board chosen another candidate, it is possible that candidate also would have been in the middle of another project in a different country or state. While Handley certainly could have been hired earlier, the court does not fault the Board for the time frame. It appears that complying with the VRA will continue to be a challenge for Alaska in the future. The next Board thus should take note of the problems this Board experienced and consider start date and availability of an expert closely.

The court understands the argument of the private groups. Since the Board and the groups were working without the analysis of a VRA expert for the first half of the process, much

[140] The court notes that it would have been possible to have a VRA expert start with the same data from the Alaska Department of Labor that Board members practiced with; however, they would also have needed to do their analysis again with the official data. Had there been significant changes, it would have created the same problems of people working under one percentage and finding out later it was actually a different percentage.

[141] Testimony of Arrington.

of the Board's and the private groups' work with respect to the Native districts between mid-March and mid-May is without meaning. This indeed is frustrating. However, because this was a problem for both the Board and the private groups, this is less an issue of process. The court also notes that the Board does not claim the Proclamation Plan is the only plan that is not retrogressive. The TB Plan and the PAME Plan also satisfied the benchmark. Torgerson also testified at trial that there could be other options that would have met the benchmark, but this is the only one they could come up with in the time-frame.

3. Nomenclature.

Another component of the due process claims regarding the VRA expert were the terms she used. Throughout the redistricting process Handley referred to Benchmark House District 6 as "not effective," "equal opportunity," or an "influence district." She was corrected on her terms by someone from DOJ after the process was over and admits that those terms should not be used in Section 5 analysis. However, she testified at trial that even though she may have used the wrong terms, her analysis was correct.[142]

The plaintiffs argued that the changing of the terms is not mere nomenclature and did have an effect on the process. They argued that these terms imply that Benchmark House District 6 was not effective and question whether the Board really needed to create five effective districts or whether four would have been sufficient. They also contend the language used was confusing. For example, Bristol Bay Native Corporation, who is a part of the AFFR group,

[142] Testimony of Handley.

stated they had no idea what percentage of Native VAP was required to create an equal opportunity district.[143]

The issue was addressed by this court through a pre-trial motion and order.[144] The plaintiffs additionally argued at that time that the benchmark the Board used was also flawed because it did not take into account factors such as language and did not do a deeper analysis. The court ultimately ruled that the benchmark was nine Native districts (five effective house districts, three effective senate districts, and one influence district in Southeast).

The court agrees that the nomenclature was confusing. However, no matter what terms were used to describe Benchmark House District 6 throughout the process, Handley ultimately deemed it an effective district and the plaintiffs' own VRA expert, Arrington, agreed with her.[145] While more analysis can always be done, the deeper analysis the plaintiffs point to is analysis that these experts normally do not do. This court continues to hold the benchmark standard is correct in regards to the five effective house districts and three effective senate districts. The court previously ruled that the necessity for an "influence" district in Southeast was appropriate *based on information present at that time.*[146] Since that decision the evidence suggests that an "influence" district is not required under the VRA, but rather the test now is simply whether a district has the effective ability to elect the minority candidate of choice. Handley, however, testified that the 2006 amendments and the February 2011 regulations to the VRA do not

[143] Bristol Bay Native Corporation Brief p 7.

[144] Appendix A, No. 6.

[145] The court notes that while it is expensive, private groups also may hire VRA experts.

[146] Appendix A, No. 3.

preclude the use of an influence district. This court is not disturbing the previous ruling based on Handley's admittedly ambiguous testimony, but if the Alaska Supreme Court determines an "influence" district is not needed, then the difficult issues of how to draw house and senate seats in Southeast must necessarily be revisited.

The court notes that there were other factors that contributed to the due process claims. Miller's unfortunate death of course had an impact on the process. While it created confusion and delay, it specifically led to the situation where Handley ended up analyzing the plans of the private groups presented to the Board on 6 May 2011 without the correct data. This led Handley to tell these groups on 17 May 2011 that their plans were non-retrogressive when they actually were retrogressive. While the court can see how misleading and confusing this could be for the private groups, the court finds it was not intentional and it was based on a factor outside the Board's control. Another issue was that too much information was relayed by staff and counsel from Handley to the Board. The court notes that this is normal when working on such short time frames.

The court ultimately concludes that while problems and small mistakes were made, they do not rise to the level of a Due Process violation. Hindsight is 20/20 and we learn how we can do things better every redistricting cycle. *Pathei mathos.*

C. Proportionality Issues.

The plaintiffs have made arguments about the proportional representation of the FNSB and the City of Fairbanks. These arguments affect Proclamation House Districts 1-6 and 38 and Senate Districts A-C and S.

Proportionality is under the penumbra of equal protection. Equal protection is two-fold. One component is the one person, one vote concept. This concept is reflected in the requirements on deviations. The federal threshold is 10% and the state standard is "as nearly as practicable to the quotient." The quotient is obtained by dividing the population of the state by forty. The ideal district based upon the 2010 census consists of 17,755 residents. As stated previously, the Board had the lowest deviations in statewide history, with a 8.47% maximum deviation in the House and 7.54% maximum deviation in the Senate. The court notes that there are no claims made with respect to deviations, and in fact Fairbanks has some of the lowest deviations in the state with 0.68% deviation in the House and 0.54% deviation in the Senate.

The plaintiffs' claims reside in the fair and effective representation component. The court first addresses the standard: A voter's right to an equally geographically effective or powerful vote is a significant constitutional interest, although not a constitutional right.[147] The voter, as an individual member of a geographic group or community, has a significant interest in having his/her vote protected from disproportionate dilution by the votes of another geographic group or community.[148]

As a significant constitutional interest, a voter's right to an equally geographically effective vote is protected by the Equal Protection Clause.[149] The Alaska Equal Protection Clause is more stringent than its federal counterpart, but the analysis in determining whether a

[147] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).

[148] *In re 2001 Redistricting Cases*, 44 P.3d 141, 149-50 (Carpeneti, J., dissenting).

[149] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1372 (Alaska 1987).

violation has occurred is similar.[150] When a voter claims the Redistricting Board *intentionally* discriminated against a particular geographic area, Alaska courts apply a neutral factor test.[151] The courts look at both the process followed by the Board in formulating its decision and to the substance of the Board's decision.[152] If the evidence shows, based on a totality of the circumstances, that the Board acted intentionally to discriminate against the voters of a particular geographic area, then the Board has the burden of proving any intentional discrimination will lead to more proportional representation.[153]

The right to geographic equal protection does not, however, entitle members of a political subdivision to control a particular number of seats based upon their population, or proportional representation.[154] There is simply no requirement of "strict" proportionality.[155] It only means that a redistricting board "cannot intentionally discriminate against a borough or any other 'politically salient class' of voters by invidiously minimizing that class's right to an equally effective vote."[156] Intentional discrimination can be inferred where a redistricting plan "unnecessarily divides a municipality in a way that dilutes the effective strength of municipal

[150] *Id.* at 1372.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *In re 2001 Redistricting Cases*, 44 P.3d 141, 144-145, n.7, 146-147 (Alaska 2002).

[155] *Id.* at 144.

[156] *Id.* at 144 & n.8 (groups of voters are not entitled to proportionality absent invidious discrimination).

voters."[157] Thus, "failure to keep all of a borough's excess population in the same house district" provides "some evidence of discriminatory intent."[158]

An inference of intentional discrimination, however, can be rebutted by valid non-discriminatory justifications.[159] Such justifications may include the necessity of complying with federal and/or state law, such as one-person, one-vote, the VRA, the Article VI, Section 6 requirements of compactness, contiguity, and socio-economic integration, or "the need to accommodate excess population."[160] Simply put, the right to geographic equal protection does not trump the constitutional mandates of one-person, one-vote, compactness, contiguity, socio-economic integration, or the VRA. Moreover, as our Supreme Court made clear in its last guidance on redistricting, the "need to accommodate excess population would be sufficient justification to depart from the anti-dilution rule."[161]

1. Splitting the Excess Population of the Fairbanks North Star Borough and its Effect on the Representation of the FNSB Regarding House Districts.

The FNSB has a population of 97,581. The population of the FNSB is sufficient to comprise approximately 5.49 house districts. While there are five districts wholly within FNSB boundaries in the Proclamation Plan, the remaining half district is split between two districts, Proclamation House District 38 and Proclamation House District 6.

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[157] *Id.*

[158] *Id.* at 146-47.

[159] As stated by the Supreme Court in *In re 2001*: "But an inference of discriminatory intent may be negated by a demonstration that the challenged aspects of a plan resulted from legitimate nondiscriminatory policies such as the Article VI, section 6 requirements of compactness, contiguity, and socio-economic integration." *Id.* at 144.

[160] *Id.* at 144, n 7.

[161] *Id.* at 144, n.7.

The plaintiffs argue that this violates geographic proportionality, also known as the anti-dilution rule, by splitting the FNSB's excess population between two house districts. The court notes that this creates an inference of intentional discrimination.[162] The Board argues it had a legitimate, non-discriminatory reason for doing so, and therefore it did not violate the Equal Protection Clause of the Alaska Constitution.

The FNSB had excess population of 8,700 people. The Board added 5,500 people into Proclamation House District 38 in order to comply with the federal Voting Rights Act. However, House District 38 could not absorb all of the FNSB's excess population because it would have reduced the Native VAP below the 42% standard necessary for an effective Native district. Thus, the Board took the maximum amount possible to meet the one person/one vote standard while still maintaining the effectiveness of Proclamation House District 38. That left the Board with two choices for the remaining FNSB excess population of approximately 3,200 people: (1) incorporate and evenly distribute the approximately 3,200 people into the remaining five house districts within the FNSB, thereby increasing the deviations within the FNSB by 3.5% per House district;[163] or (2) combine the remaining excess population in the FNSB into a single district outside the FNSB.

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[162] *In re 2001 Redistricting Cases*, 44 P.3d 141, 146-147 (Alaska 2002).

[163] Board members and staff testified that increasing the average deviation within the FNSB districts by approximately 3.5% was not a viable option, especially given the relatively high growth rate in the FNSB area. Spreading the population amongst the five districts within the FNSB would have created deviations ranging between +4 and +5%, risking a violation of the "as near as practicable" population requirement of Article VI, Section 6 of the Alaska Constitution. The court finds that the Board's interpretation of "as nearly as practicable" to be somewhat strict. As discussed in the analysis of Proclamation House District 1, the Board should keep deviations low, but that does not mean deviations cannot be raised if there are justifications. However, since both deviations and proportional representation are under the Equal Protection Clause, the court finds the Board's choice to be reasonable.

Board members and Board staff testified at trial that the Board chose a compromise position, placing most of the excess population balance into the Richardson Highway District, Proclamation House District 6, which closely resembles its current configuration. Thus, the residents of the FNSB would still be voting with substantially the same group of people as they did over the past ten years. The remaining excess population was spread out among the five districts wholly within the FNSB within deviations considered acceptable by the Board ranging between 1.40% and 2.08%.

In order to ameliorate the effect of splitting the remaining excess population, the population from the FNSB placed into Proclamation House District 6 was paired with Proclamation House District 5, a district wholly within the FNSB, in order to form Proclamation Senate District C. Accordingly, except for the population from the FNSB that was required to be placed in Proclamation House District 38 in order to comply with the federal VRA, all residents of the FNSB were contained in three senate districts.

The court finds that there is no evidence that the Board had any intent to discriminate against the residents of the FNSB. The evidence establishes that the Board had valid, non-discriminatory reasons for splitting the excess population between two districts including compliance with the federal VRA and the population equality requirements for urban areas of Article VI, Section 6 of the Alaska Constitution, as well as the need to accommodate excess population. The Board therefore did not violate the geographic proportionality rights of the voters of the FNSB by splitting its excess population. The plaintiffs' anti-dilution rule challenge based on the split of excess population is denied.

2. FNSB Senate Seats.

The FNSB has a population of 97,581, or approximately 2.75 Senate districts. Proclamation Senate Districts A and B discussed above are comprised entirely of residents of the FNSB. Proclamation Senate District C contains a population comprised of approximately 55% of residents of the FNSB. Accordingly, the residents of the FNSB make up a majority of the population in three senate districts. The only residents of the FNSB who are not included in Proclamation Senate Districts A, B, and C are those residents from the Ester and Goldstream areas of the FNSB who had to be included in Proclamation House District 38 for purposes of complying with the federal VRA, as explained above.

There is no evidence that the Board intended to discriminate against the residents of the FNSB by virtue of its senate pairings. Again, the fact that approximately 5,500 residents of the FNSB are placed into Proclamation House District 38, which is paired with Proclamation House District 37 to form Proclamation Senate District S, is neither evidence of discrimination nor a violation of the anti-dilution rule. The residents from the Ester and Goldstream areas of the FNSB had to be included in Proclamation House District 38 for purposes of complying with the federal VRA, as explained above.[164] There is no evidence that the Board intended to discriminate against the residents of the FNSB by virtue of its senate pairings. In fact, the undisputed evidence establishes that the residents of the FNSB control three senate seats in the Proclamation Plan. Accordingly, the plaintiffs' anti-dilution rule challenges to Proclamation Senate Districts C and S are hereby denied.

[164] The court clarifies that even though it finds that Proclamation House District 38 is not necessary under the VRA, it still finds that the choice of using excess population from Fairbanks was reasonable and could be used in a Native district that actually is necessary.

3. City of Fairbanks Senate Seats.

The City of Fairbanks has a population of approximately 31,535,[165] and comprises 88.8% of an ideal senate district. Under the Benchmark Plan, Senate District E is mostly within the City of Fairbanks and includes Fort Wainwright. The City of Fairbanks is the second largest city in Alaska,[166] and the only city of its size within an organized borough.

Under the Proclamation Plan, the area within the City of Fairbanks is located in two House Districts, Proclamation House District 1 compromising East Fairbanks City, and Proclamation House District 4 compromising West Fairbanks City.[167] Under the Proclamation Plan, the two house districts within the City of Fairbanks are located in separate senate districts: Proclamation House District 1 is in Proclamation Senate District A and Proclamation House District 4 is in Proclamation Senate District B. Under the Proclamation Plan, residents of the City of Fairbanks do not comprise a majority of residents within any senate district.[168]

The plaintiffs argue that under the Equal Protection Clause the City of Fairbanks is required to receive proportional geographic representation. The plaintiffs contend that the City of Fairbanks is a politically salient class of voters that are distinct from the other residents of the FNSB.[169] The plaintiffs elaborate about the differences in services,[170] funding,[171] and other

[165] Exhibit J38 (2010 Census Data).

[166] Exhibit J46, p 18 (ARB Admissions).

[167] Trial Testimony of Senator Paskvan; Exhibit J-41; ARB 6035-6036.

[168] Exhibit J46, p 18 (ARB Admissions).

[169] The City of Fairbanks is a First Class Home Rule City inside the Fairbanks North Star Borough, which is a Second Class Borough. Trial Testimony of Paskvan.

[170] Services provided to the residents of the City include local police, professional fire service, curbside garbage pick-up, building code enforcement, and paved streets. Services provided to the residents of the FNSB outside the City are far more limited; they include Alaska State Trooper coverage but no local police service, a volunteer fire service area, road-service area that generally maintain unpaved streets, no local building codes, and trash services

issues.[172] The plaintiffs argued that the Board discriminated against the City of by failing to place it in a single senate district. The plaintiffs also noted that the Fairbanks senate pairings resulted in pairing two Democratic incumbent senators in Proclamation Senate District B.

The Board argued that the City does not have enough population[173] to support a single senate district and therefore there can be no violation of the anti-dilution rule. The Board argued that it did not discriminate against the City of in its senate pairings. The Board argued that the City effectively controls Proclamation Senate District B at 48.36%[174] and constitutes the plurality of Proclamation Senate District A.[175]

The court agrees with the Board. Not only is there no right to strict proportionality, the anti-dilution rule cannot be violated if the City cannot support a senate district based on its population. No further analysis is necessary.

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through a system of dumpster transfer stations. Trial Testimony of Senator Paskvan, Senator Thomas, and Joe Hardenbrook.

[171] The City has independent taxing authority and receives state assistance such as revenue sharing, operational and capital funding directly from the State while FNSB residents receive state assistance though a complex system of borough pass-thru and non-profit corporations in cooperation with the FNSB. Trial Testimony of Senator Thomas and Hardenbrook.

[172] The City and Borough have experienced conflict over annexation issues that appear before the legislature, as well as differing approaches to such issues as air quality regulation. Trial Testimony of Paskvan.

[173] The City does not contain enough population to support a senate district based on its population alone, being approximately 11% short of the population for an ideal district, and over 6% short of having enough population to constitute a senate seat that met the population equality requirements of the federal and state constitutions.

[174] This means approximately 49% (48.36%) of the total population in Proclamation Senate District B are City residents. The total voting age population of City residents in Proclamation Senate District B is even higher at 49.29%. The remaining 51% of the population is spread out among a number of small, unorganized areas such as Fox, Two Rivers, and Pleasant Valley. The community with the second largest number of voters in Proclamation Senate District B is Steele Creek, with 14.12% of the total population and 14.06% VAP.

[175] City voters in Proclamation Senate District A are made up of Proclamation House Districts 1 and 2. Although they comprise less of a plurality than the voters in Proclamation Senate District B, they do make up the largest politically salient class of voters in Proclamation Senate District A with 9,770 VAP, or 38.66% of the Native VAP. Just as in Proclamation Senate District B, the remaining Native VAP in Proclamation Senate District A is spread out among small, unorganized political subdivisions.

D. Proclamation House District 1.

Proclamation House District 1 includes East Fairbanks City, a portion of Fort Wainwright north of the Tanana River, and portions of Badger, Steele Creek, and South Van Horn census designated population. Proclamation House District 1 was subject to a compactness challenge by the plaintiffs in a pre-trial motion for summary judgment. The court ruled that Proclamation House District 1 was not compact due to an appendage on its west side,[176] but that the Board could assert a VRA justification at trial.

At trial the Board argued that Proclamation House District 1 was part of the ripple effect of the VRA. The Board also argued that the appendage was based on the Board's need to get the lowest possible deviations in urban areas. The plaintiffs argued that the appendage in Proclamation House District 1 existed for a partisan purpose and could easily be made more compact.

1. VRA.

The Board argues that Proclamation House District 1 was affected by the Board's decision to take excess population from Fairbanks and place it into Proclamation House District 38. The court notes that all of Fairbanks was affected by the decision to put excess population from Fairbanks into Proclamation House District 38. However, the Board never argued that the appendage in Proclamation House District 1 was specifically influenced by the VRA, but argued instead that the appendage was necessary in order to achieve low deviations in Fairbanks.

[176] Appendix A, No. 4.

2. Deviations.

Under the Alaska Constitution, the Board is charged with drawing districts that "contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty." As stated earlier, the Board achieved the lowest deviations in statewide history.

In the 2001 Redistricting Case, the Board had a 9.5% deviation in Anchorage.[177] While still under the federal 10% threshold, Article VI, Section 6 was amended in 1998 to add the standard "as nearly as practicable."[178] The 2001 court noted that newly available technological advances will often make it practicable to achieve deviations substantially below the ten percent federal threshold, particularly in urban areas.[179] The Board in the 2001 case believed deviations within ten percent in Anchorage automatically satisfied constitutional requirements and conceded that they did not make any attempt to further minimize the Anchorage deviations.[180] Ultimately the Alaska Supreme Court concluded that the deviations were unconstitutional because the Board failed to offer an acceptable justification and required the Board on remand to make a good faith effort to further reduce the deviations.[181] On remand the Board reduced the maximum deviation in the Anchorage Bowl area from 9.5% to 1.35%.[182]

There was testimony and argument at trial that the Board was under the impression that it needed to achieve the lowest possible deviations in urban areas because of the above discussion

[177] *In re 2001 Redistricting Cases*, 44 P.3d 141, 145 (Alaska 2002).

[178] *In re 2001 Redistricting Cases*, 44 P.3d 141, 146 (Alaska 2002).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1091 (Alaska 2002).

in the 2001 case. Holm drew the districts in Fairbanks and testified that the protrusion was a result of his effort to follow this instruction and achieve the lowest deviations.

While the court finds the Board's intent to achieve low deviations to be commendable, it concludes that it must also live in harmony with the other constitutional requirements. The Alaska Supreme Court's instruction did not imply that justification for deviating from the lowest possible deviation would not be accepted. It simply stated that the Board must to try to achieve low deviations.

The court received considerable testimony about how census blocks[183] could be shifted in the software in order to move population around and create tighter deviations. The court also received a presentation by Lawson specific to Proclamation House District 1 that showed similar deviations to the Board's plan could be achieved while removing the appendage.[184]

3. Partisan Allegations.

The appendage also has been the subject of a partisan allegation. The court finds that this allegation has no merit.[185] Holm testified that the appendage was done for deviation purposes and did not exist in the Board Option Plans because the Board made changes to the Native districts. The court accepts his testimony.

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[183] The court notes that census blocks cannot be broken down and each block contains a vastly different situation, for instance one block could be one lake or hundreds of people.

[184] Lawson swapped population between Proclamation House District 1 and Proclamation House District 4 to achieve a 1.45% deviation in Proclamation House District 1 and a 1.84% deviation in Proclamation House District 4. This is roughly the same as in the Proclamation Plan which had a 1.40% deviation in Proclamation House District 1 and a 1.96% deviation in Proclamation House District 4. (ExhibitJ41, ARB 6034). The court is not suggesting that the Board must do what Lawson demonstrated, but his demonstration shows that a more compact district is possible. Trial Testimony and demonstration of Lawson.

[185] Appendix A, No. 4.

The court concludes that Proclamation House District 1 is not compact and is not justified by the VRA. The court finds the non-compactness of Proclamation House District 1 is the result of the Board's effort to achieve the lowest deviations possible. It is remanded to the Board to draw a more compact district that removes the appendage.

E. Proclamation House District 2.

The court previously found that Proclamation House District 2 was not compact. The Board did not argue that the Proclamation House District 2 was necessary under the VRA. No evidence was presented on Proclamation House District 2 at trial. The court remands Proclamation House District 2 to the Board to redraw.

F. Proclamation House District 5.

The plaintiffs contended that Proclamation House District 5 was not compact.[186] Proclamation House District 5 contains areas of South Van Horn, College, and the Chena Ridge and Chena Pump areas west of the City of Fairbanks. This is the western edge of Fairbanks, between Proclamation House District 38 and Proclamation House District 3. It also contains the Tanana Flats which includes what Fairbanks residents refer to as a "bombing range" which is an unpopulated area the military uses for testing and training. The vast majority of the population of Proclamation House District 5 is located in the Chena Pump and Chena Ridge areas.[187]

1. Partisan Allegations.

The plaintiffs' main argument was that the Tanana Flats were used to create contiguity between Proclamation House Districts 5 and 6 in order to create Proclamation Senate District C

[186] Proclamation House District 5 was not subject to any pre-trial motions for summary judgment.

[187] Trial Testimony of Senator Paskvan, Senator Thomas, and Holm.

which pairs two Democratic Senators. The plaintiffs contended that if the Tanana Flats were not part of Proclamation House District 5 or 6, Proclamation House District 5 would only be contiguous with Proclamation House District 3 or 4, with the necessary implication that Proclamation House Districts 3 and 4 could not be paired, and Senators Thomas and Paskvan could not be included in the same senate district.

The Board contended that it chose to combine Proclamation House Districts 5 and 6 to create Proclamation Senate District C[188] in order to reconnect the excess population of the FNSB in Proclamation House District 6 with fellow FNSB voters in Proclamation House District 5.

Holm, who drew the Fairbanks Districts, including Proclamation House District 5, testified that Proclamation Senate District C was desirable in order to unite the farmers in the Rosie Creek area (southwest of the Chena Pump/Chena Ridge areas) and the Salcha area. The plaintiffs argued that Holm's testimony about his desire to reunite farmers was not credible because there was no evidence of a substantial number of farmers in Proclamation Senate District C. The plaintiffs concluded that there was ample circumstantial evidence that a more likely reason for the inclusion of the Tanana Flats into Proclamation House District 5 was for partisan political purposes.

As discussed earlier, the court does not find that this choice was influenced by partisan affiliation. While Holm was unsure of the numbers of farmers in Proclamation House Districts 5 and 6, the court finds that the ultimate policy goal of uniting the voters of the FNSB in the same senate district was legitimate.

[188] Senate District C contains more than 55% of FNSB voters.

2. Shape.

The compactness inquiry looks to the shape of a district: "Odd-shaped districts may well be the natural result of Alaska's irregular geometry."[189] While the court would not necessarily classify this shape as odd, any oddity comes from the shape of the Tanana Flats. The Tanana Flats are unpopulated and are separated from populated areas by water. Since it is an unpopulated area, it cannot stand on its own and needs to go somewhere. The court notes that the parties did not argue about any appendages.

Plaintiffs argued that the Tanana Flats forms a vacant corridor connecting the populated areas of Proclamation House District 5 and House District 6. The court finds that the use of the Tanana Flats does not constitute the type of corridor Alaska courts have questioned. "[C]orridors" of land that extend to include a populated area, but not the less-populated land around it, may run afoul of the compactness requirement.[190] Here the plaintiffs are actually arguing that the Board should do the opposite and not include the less populated area around the FNSB. The court notes this is also unlike a situation where a long, slim corridor chugs through an unpopulated area, but does not incorporate the area around it. Here the Board is incorporating an unpopulated area of land with the populated area immediately next to it, as it has to go somewhere.

[189] *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska, 1983) (Matthews, J., concurring).

[190] *Hickel v. Southeast Conference*, 846 P.2d 38, 45-46 (Alaska 1992).

3. Compared to Other Tests.

The Board contended that Proclamation House District 5 was compact and similar to the Modified RIGHTS Plan in shape and in regard to the mathematical tests for compactness.[191] The Board pointed out that adding the Tanana Flats to the Chena Ridge area actually increased its mathematical compactness score under the Reock Test. They also argued that the unpopulated area of the Tanana Flats had to go somewhere.

The other proposed and possible plans also struggle in dealing with the shape of the Tanana Flats. The plaintiffs' plans, the Modified RIGHTS Plan and the Demonstration Plan,[192] had similar shapes and also combine the Tanana Flats with the Chena Ridge area. Some plans combined the Tanana Flats with areas to the east of it, but the court does not find this configuration is any more compact than Proclamation House District 5 in the Proclamation Plan. The court finds that Proclamation House District 5 is as visually compact as the other plans. The court reminds the parties that the standard is "relative compactness."

The court concludes that Proclamation House District 5 is compact. However, it notes that because of the court's rulings with respect to Proclamation House Districts 1, 2, and 38, Proclamation House District 5 may effectively change.

G. Proclamation House District 6.

In the plaintiffs' trial brief they argued that Proclamation House District 6 was not

[191] The court notes that there are various mathematical tests to determine compactness. The court is aware of the following: Reock, Schwartzberg, Perimeter, Ehrenberg, Population Polygon, and Population Circle. Plaintiffs argued that the Reock Test was the best test for Alaska because it compares districts to circles and – quoting the Alaska Supreme Court - "The most compact shape is a circle." The Board argues that the appropriate test in Alaska is a visual one and points out that there are problems in using the eight compactness tests. This court ruled that it would consider the tests to the extent they were helpful. Appendix A, No. 3, No. 4.

[192] Modified RIGHTS Plan House District 8 is the most comparative district in the plaintiffs' plans.

compact, contiguous, or socio-economically integrated. While the court ultimately deemed these to be new claims not properly raised in the complaint, the court allowed the plaintiffs to present evidence on these issues at trial. However, the plaintiffs ultimately did not do so. The court therefore finds the plaintiffs fail to meet their burden on those issues.

H. Proclamation House Districts 37 and 38.

The Board argued that the next two districts at issue were required by the VRA.

1. Difficulty in Complying with the VRA.

The Board has cited the following reasons that made the VRA difficult to comply with: the underpopulation of benchmark Native districts (out-migration); lack of Native population concentrations adjacent to the Benchmark Native districts; and inability to create minority districts in urban areas.[193]

2. House District 37.

The court turns to Proclamation House District 37 for analysis. Proclamation House District 37 includes Bethel, the Kuskokwim Delta, Nunivak Island, Saint Matthew Island, the Pribilof Islands, and all the western Aleutian Islands.

The court has previously ruled that Proclamation House District 37 is not compact[194] or contiguous.[195]

[193] Out-migration of Alaska Natives from rural to urban areas, as well as the relatively slower growth rate in rural Alaska, had a profound effect on the 2011 redistricting process. This dramatic population shift left a vast majority of the Alaska Native Benchmark districts drastically underpopulated. ARB 6024-6025; ARB 13351; ARB 13358 at n.22. In order to meet the one-person, one-vote requirement, thousands of people needed to be added to the rural Alaska Native districts. ARB 6544; ARB 6639-ARB 6665; ARB 13351. This fact, coupled with the fact there were no groups of urban Alaska Native populations adjacent to these rural districts, forced the Board to think outside the box. ARB 6024.

[194] Appendix A, No. 4.

a. Split of the Chain.

These orders were based in part on the split of the Aleutian Chain.[196] The Alaska Supreme Court in *Hickel v. Southeast Conference* held *sua sponte* that a split of the Aleutian Islands was a *per se* violation of the Alaska Constitution's contiguity requirement.[197] The Alaska Supreme Court did, however, include the caveat "unless the severance of the Western Aleutians from the Eastern Aleutians is mandated by federal law...."[198] The court also based this decision on the fact that Proclamation House District 37 is not contiguous because of hundreds of miles of open water. The burden, then, is on the Board to show that these violations to the Alaska Constitution were necessary under the VRA.

b. More Native VAP than Necessary.

Proclamation House District 37 is an effective district. It contains 46.63% Native VAP. Proclamation House District 37 is also part of Proclamation Senate District S. Proclamation Senate District S is an effective senate district and also includes Proclamation House District 38, an effective house district with a Native VAP of 46.36%.

There has been testimony that these numbers are higher than required to create effective districts in this area. The average Native VAP required in order to make a house district

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[195] Appendix A, No. 5.

[196] The brief of the Aleutians East Borough is helpful in explaining the problems that occur when the chain is split, "The Aleutians Islands and the Borough have always been together in the same House District and Senate District. The territory is comprised of the same people with similar history, interests and concerns." "The Borough is primarily concerned with the Board's decision to fracture the Borough's municipal boundaries by splitting the City of Akutan from the rest of the Borough..." "The result of the Board's action further divides the Borough into two separate Senate Districts, with the majority of the Borough in Senate District 36-R, while Akutan is in Senate District 37-S. Brief p 1-2.

[197] *Hickel v. Southeast Conference*, 846 P.2d 38, 54 (Alaska1992).

[198] *Id.* at 59.

effective is about 42%. Proclamation House District 37 is over the average percentage required by 4%. To compare, the *Hickel* court found that an extra 2% Native VAP meant that the configuration of a district was not necessary under the VRA and could not overcome the violations of the Alaska Constitution in the areas of socio-economic integration and compactness.[199]

The VRA experts also found that voting was not polarized in the Aleutian Chain. This means that a connected Aleutian Chain District can actually be effective at a much lower Native VAP percentage. While experts are not sure how low the numbers can go to still be effective, experts estimated that it was possible to go as low as 35%. Proclamation House District 36, which includes the remaining Aleutian Islands and is next to Proclamation House District 37, contains 71.45% Native VAP. Proclamation House District 37 is paired with Proclamation House District 35 in order to create an effective senate district.

It is possible to have a non-retrogressive plan that does not split the Aleutian Chain. The Board came up with two plans that met the benchmark and kept the chain together, the PAME and the TB Plan. The Board was not the first to split the Aleutian Chain but rather got the idea from other private groups.

c. Pairing of Minority Incumbents.

While the Board was trying to create effective districts, it was also concerned about minority comment and the pairing of minority incumbents. While the pairing of minority incumbents is not specifically listed as a factor that DOJ considers, the Board insisted that it falls

[199] *Hickel v. Southeast Conference*, 846 P.2d 38, 51-52 (Alaska 1992).

under the umbrella of "other factors." This court and other courts in Alaska have ruled that minority incumbent pairing is a factor that DOJ considers.[200] The Board also noted that the only question they were asked by the DOJ at the preclearance meeting was how the Native incumbents were treated.[201]

Not only did the Board have problems in creating effective districts, they also had problems doing this in a manner that did not pair minority incumbents. The Board noted that they had to pair Native Senator Kookesh with Senator Stedman due to the significant population loss in Southeast Alaska.[202] Nor was it possible to create an Alaska Native "effective" or "influence" senate district in Southeast Alaska. As a result of these various demographic changes and legal requirements, pairing Senator Kookesh with the incumbent Senator Stedman from Sitka was unfortunately unavoidable. The Board's conclusion was borne out by the fact that no viable third party plan presented to the Board was able to avoid pairing Senator Kookesh.

Not pairing Native Representative Thomas was also an issue for the Board. The Board chose to draw Native Influence Proclamation House District 34 in Southeast in a way that would not pair Representative Thomas. While this affected all of Southeast and there was a

[200] "In evaluating a reapportionment plan for preclearance, the Justice Department might view the treatment of minority incumbents as part of the totality of the circumstances. For example, the Department of Justice might view as suspect a pattern of pairing minority incumbents in districts with other incumbents." Hickel v. Southeast Conference, 846 P.2d 38, 67 (Alaska 1992) (Appendix E, Judge Weeks' 18 June 1992 Order nt.16). "...[T]he Department of Justice considers other factors that are relevant to whether the plan will have a retrogressive effect on minority voting strength, including whether minority incumbents were paired against each other or paired against non-Native incumbents, whether the percentage of minority voters in an effective Native District has declined significantly, whether minorities favor or disapprove of the plan, and whether minorities had inadequate opportunity to participate in development and comment on the plan." Judge Rindner's 1 February 2002 Order. Also see Appendix A, No. 3.

[201] Affidavit of Torgerson; Affidavit of Greene; and Affidavit of Bickford.

[202] Southeast population loss was roughly equal to one house district and half a senate district, making it impossible to recreate Benchmark Senate District C, which is currently represented by Alaska Native Senator Kookesh.

compactness challenge to Proclamation House District 32 in Southeast, this court ultimately concluded that it was "compact enough."[203]

Yet, it was the decision to not pair Native Senator Lyman Hoffman that had the largest impact on the redistricting process. The Board described Senator Hoffman, the co-chair of Senate Finance, as the most influential and powerful Native incumbent. There was considerable testimony and argument that while the Native districts could be drawn differently, many of these options would pair Senator Hoffman with another senator. The two Board plans that kept the Aleutians together, the TB plan[204] and the PAME plan,[205] paired Senator Hoffman.

The fundamental issue is this: faced with the necessity of complying with Section 5 preclearance of the Proclamation Plan, did the choice made by the Board harmonize with the Alaska Constitution? The Board, like our ancient Melian friends, was faced with choices within

[203] Appendix A, No. 4.

[204] The Board describes the TB Plan: The TB plan took the unique approach of changing the historical make up of District 40 (even though it was only -1.35% from the ideal district size) by dividing the North Slope Borough and the Arctic Northwest Borough into separate districts and picking up population from more urban areas in and around Fairbanks and along the southeast border of the state. Although Handley advised the TB Plan may not be retrogressive by the numbers, this plan had a number of other potential problems including the pairing of Alaska Native incumbents. The proposed plan also received overwhelming criticism from Alaska Native groups who felt that due to low voter registration and turn out on the North Slope, the new proposed North Slope District would very likely not provide Alaska Natives with the ability to elect their preferred candidate of choice. Board members and staff testified that if the Board had adopted the TB Plan, Alaska Native groups and leaders would have objected to the DOJ, thereby seriously jeopardizing Alaska's chances for preclearance.

[205] The Board describes the PAME Plan as follows: A second Alaska Native district plan known as the PAME Bethel/Kodiak plan was created by Board members McConnochie and Greene with input from staff and other Board members, and was adopted unanimously in concept by the Board. Handley reviewed this plan and advised that it met the numbers and therefore was likely not retrogressive. This plan, however, included a senate district which combined Kodiak with Bethel, thereby pairing one of the most powerful Alaska Native incumbent members of the Senate, Lyman Hoffman, with the current Senate president, Gary Stephens. Alaska Native groups in both the Bethel and Kodiak areas, severely criticized this pairing. The Calista Corporation in particular notified the Board of its serious objections to this pairing and even suggested the Board split the Aleutians if necessary to prevent it. Board member Greene was also very uncomfortable with this pairing. As with the TB Plan, the Board was concerned that such objections by Alaska Native groups would have seriously jeopardized its ability to obtain preclearance from the DOJ.

necessity. This court does not impute its own choice of plans, but rather determines whether the choice within necessity is in harmony with the Alaska Constitution. In this case the court concludes the choice was not in harmony with the Alaska Constitution.

The fact that DOJ looks at or considers a factor does not mean it is reasonable to let this factor alone control the outcome. Torgerson, Holm, and Bickford all testified that they received comments from the Native community, specifically the Calista Corporation, objecting to the pairing of Senator Hoffman. There was testimony that they were concerned these groups would object to DOJ and the plan would not pass scrutiny. While the court finds their beliefs to be credible, it also finds them too speculative to meet the standard of necessary. The finding is supported by the following factors:

First, Handley discussed at a Board meeting that a *pattern* of drawing Native incumbents out of their seats would not look good.[206] The court does not believe that DOJ would consider the pairing of two out of the seven Native incumbents to be a pattern, especially if the Board explained that it was necessary in order to meet the benchmark and comply with the Alaska Constitution.

Second, Native Senator Kookesh was paired and the plan still passed DOJ preclearance.

Third, the court notes that DOJ did receive objection from a Native group to the Proclamation Plan and the plan still passed preclearance.[207] Handley also testified about another plan in the lower 48 that had objection from Native groups and still passed preclearance.

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[206] ARB 6545.

[207] Exhibit 15 is the Aleut Corporation's letter objecting to preclearance of the Proclamation Plan.

Ultimately the Board is asking the court to approve the split of the Aleutian Chain so that Native Senator Hoffman will not be paired because DOJ *might* not pre-clear the plan. The court does not find that this option was necessary under the VRA but rather is speculative. There will always be groups that are unhappy and they all have the option of objecting to DOJ. The Board cannot base the plan on fear of speculative consequences.

More importantly, if the Board were to interpret the definition of "necessary" to include this type of speculation, a future Board could use the VRA justification for invalid purposes such as gerrymandering or promoting partisan interests. While the court concludes those invalid purposes were not at play here, it is also important to strictly interpret the word "necessary" in order not to needlessly minimize the Alaska Constitution which is also meant to prevent gerrymandering.

The court also finds that it cannot rule the configuration of Proclamation House District 37 is necessary under the VRA and in harmony with the Alaska Constitution when all five of the effective house districts have more Native VAP than necessary. Clearly there are other options in creating Native Districts. Proclamation House Districts 40, 39, 38, 37, and 36 have more Native VAP than needed to be effective. Proclamation House District 40 has 62.09% Native VAP and only needs 42% to be effective.[208] Proclamation House District 39 has 67.09% Native VAP but only needs between 42-50% Native VAP to be effective.[209] Proclamation House

[208] Trial Testimony of Arrington. Handley agreed that it might be possible that the North Slope district may be effective at less than 42% because of the low voter registration of non-Native North Slope workers at Prudhoe Bay.

[209] Trial Testimony of Arrington.

District 38 has 46.36% Native VAP but only needs 42% to be effective.[210] Proclamation House District 37 has 46.63% Native VAP but only needs 42% to be effective.[211] Proclamation House District 36 has 71.45% Native VAP but only needs 35% to be effective.[212]

For all of the reasons stated above the court finds Proclamation House District 37 is not in harmony with the Alaska Constitution and must be remanded back to the Board to reunite the Aleutian Chain.

3. Proclamation House District 38.

Proclamation House District 38 includes the Ester/Goldstream suburban area of the FNSB, the Denali Borough, the Iditarod Area REAA and the Wade Hampton Census Area.[213]

Ester/Goldstream is composed of predominately English speaking non-Native population, who historically vote Democratic.[214]

The Denali Borough contains a number of communities along the Parks Highway composed of predominately English speaking non-Native population, who have historically voted Republican.[215] It has a population of 1,826.[216] The Iditarod Area REAA contains a number of communities composed of predominately Alaska Native people that were in

[210] Trial Testimony of Arrington.

[211] Trial testimony of Arrington.

[212] Trial Testimony of Arrington.

[213] Exhibit J41; ARB 6046. The court is aware that the Native VAP in Proclamation House District 36 is higher than required in order to create effective Proclamation Senate District R.

[214] Trial Testimony of Senator Thomas and Hardenbrook.

[215] Trial Testimony of Senator Thomas and Hardenbrook.

[216] Exhibit J47.

Benchmark House District 6.[217] The Wade Hampton area contains a number of communities composed of predominately Alaska Native people that were in Benchmark House District 39.[218] While Alaska Natives generally vote Democratic, there are a couple of precincts in the Native areas of Proclamation House District 38 that historically have more substantial Republican vote.[219]

The Board does not dispute Proclamation House District 38 is not relatively socio-economically integrated, and this court granted partial summary judgment on that issue based on the Board's admission.[220] The Board asserts these violations of the Alaska Constitution were necessary in order to comply with the VRA and thus had the burden of proof on that point.

a. Combining Urban Population with Rural Population.

Board members, staff, and plaintiffs all agreed the Board had to add urban population to a rural Alaska Native district in order to meet the one person/one vote standard and avoid retrogression. It was not a matter of whether excess population needed to be added to rural Native districts but only a matter of where to access this excess urban population. This is the first time in Alaska redistricting history that a Board combined non-Alaska Native populations with at least one rural Alaska Native district.[221] Every private party plan submitted to the Board contained at least one district that combined urban population with rural population in an Alaska

[217] Trial Testimony of Bickford and Lawson.

[218] ARB 13486; Trial Testimony of Taylor Bickford and Leonard Lawson.

[219] Exhibit J58 (Arrington Depo), at 92.

[220] Appendix A, No. 2.

[221] ARB 6024-25; ARB 13358 at n.22.

Native district.[222] Even the two Demonstration Plans, Modified RIGHTS Plans I and II, drawn by the plaintiffs three and over six months after the Board adopted its Proclamation Plan, combined urban and rural populations. Those plans simply took urban populations from other areas of the state rather than Fairbanks.

b. The Choice of Fairbanks.

The Board ultimately chose to take excess population from the Fairbanks area. The Board articulated that they chose to take population from the Ester/Goldstream area for the following reasons: the FNSB had excess population in the amount of 8,700 people;[223] there are historical, economic, cultural, and social ties between Fairbanks and rural Native Alaska;[224] Fairbanks' geographic location, and historical Democratic voting patterns.[225]

The plaintiffs pointed out that it was possible to choose another urban area from which to take population. The court finds that the Board's choice was reasonable for the reasons cited by the Board. Every proposed redistricting plan submitted to the Board by private parties recognized this fact, as all of them had at least one house district that combined urban and rural population. Many plans, like the Board's, took this population from the Fairbanks area. A

[222] ARB 745-64; ARB 3990-4185; ARB 4186-4321; ARB 4410-4543; ARB 5186-5274; ARB 5324-5363. Examples of such plans were identified as Defendant's Exhibit E. Several of these plans took population from the FNSB and added it rural Alaska Native populations.

[223] ARB 4156-57.

[224] Senators Paskvan and Thomas, as well as Hardenbrook, all testified that Fairbanks serves as a hub for rural Alaska and has strong historical ties with rural Native Alaska. The court notes on its own that Balto and Leonhard Seppala did not start from Anchorage in 1925 to deliver serum to Nome. They started from Nenana. Nenana is also approved by the Alaska Supreme Court as trial venue for a large part of rural Alaska here in question. Nenana is only fifty miles by road from Fairbanks. Further, Fairbanks is the seat of the Fourth Judicial District which takes in all this area and more. Anyone would be hard pressed to assert Fairbanks is not a hub for rural Alaska.

[225] ARB 4337; ARB 13358 at n.22.

couple of plans chose other areas of the state. The fact that other areas of the state could be used, however, does not make the Board's decision improper or unreasonable. The plaintiffs' arguments ultimately amounted to a "not in my backyard" protest.

The plaintiffs also argued that the Board did not look hard enough at other options for places to take urban population. The court finds that the Board looked at other options. The hardness of the look is compromised by the time-frame, but the court ultimately concludes that the Board looked "hard enough."[226]

The plaintiffs contended that Handley's advice to the Board that Alaska Natives generally vote Democratic, and an effective Native district could be constructed by adding urban/suburban non-Native population that vote Democratic is not on the record. Members of the Board, Bickford, and Handley's testimony supported the concept that this was something Handley told White and Bickford and they relayed it to the Board. Since the plaintiffs did not assert that there were any Open Meetings Act violations,[227] this point is moot.

The Board cited the following reasons to support the rationale that they should add Democrats to a rural Native district: the Alaska Natives' political party of choice is the Democratic Party and Alaska Natives vote overwhelmingly for Democrats; Democrats are more likely to support an Alaska Native-preferred candidate; and Alaska Native-preferred candidates are more likely to be Democrats. Handley also testified at trial that, based on her analysis of Alaska Natives' voting patterns undertaken as part of her RBV analysis, Alaska Natives tend to vote overwhelmingly Democratic. The plaintiffs' own VRA expert, Arrington, testified that he

[226] The FNSB argued that the Board should have considered Anchorage because it also had excess population and should have also considered unavoidable retrogression. FNSB Brief 6-7.

[227] The plaintiffs' arguments regarding executive session abuse and inappropriate use of Board staff have been rejected.

completely agreed with Handley's analysis and reasoning that when adding urban population to a rural minority district, "you would want to add Democrats" because adding Democrats potentially increases the effectiveness of the district.[228] The evidence was undisputed that the communities of Ester and Goldstream historically vote Democratic. The plaintiffs admitted that fact in their responses to the Board's Requests for Admissions.[229] Bickford and plaintiffs' witness Hardenbrook also provided un-rebutted testimony to that effect at trial.

The plaintiffs also argued that if the Board chose Fairbanks to take excess population, they should have taken it from the military areas. The VRA experts agreed that military voter turnout was low and therefore adding it to a Native effective district would also be acceptable, because it would not dilute the Native effective vote. The plaintiffs contended that combining the military areas with known Republican areas, such as North Pole, actually increased the Republican civilian vote.

The court finds this is a variation of the "not in my backyard argument" and is a "not in my political party argument." Since Eielson and Ester/Goldstream were both reasonable choices to add to an effective Native district, this was ultimately a discretionary decision for the Board. The court does not take issue with that decision.

The court finds that the Board acted reasonably when it selected Fairbanks, and specifically Ester/Goldstream, as an area from which to take excess population. However, the court finds that the configuration of Proclamation House District 38 is not necessary under the VRA for the same reasons the configuration of Proclamation House District 37 is not necessary under the VRA. As stated earlier, the court cannot conclude this configuration of Native districts

[228] Exhibit J58 (Arrington Depo. at 103:12-104:5; 90:2-5, 19-22; 92:15-16; 99:7-12).

[229] Exhibit J48, p 25-26.

is in harmony with the Alaska Constitution when all of them have more Native VAP than necessary. The court also finds that Proclamation House District 38 is not necessary because it was obviously influenced by the decision to not pair Senator Hoffman, which the court already has discussed is too speculative. For all of the reasons stated above the court finds Proclamation House District 38 is not in harmony with the Alaska Constitution and must be remanded back to the Board.

VIII. Conclusion.

Based on the foregoing facts and authorities, the court rules as follows:

1. The Board did not violate the plaintiffs' constitutional guarantees of equal protection under either the state or federal constitutions nor did it violate the equal protection rights of the citizens of the FNSB or the City of Fairbanks.

2. The Proclamation Plan does not unreasonably take excess population from the Fairbanks area if required by the necessity of compliance with the VRA and the choice is in harmony with the Alaska Constitution.

3. The Proclamation Plan is not based upon impermissible partisan intent.

4. Proclamation House District 5 does not violate the Alaska Constitutional requirement of compactness.

5. Proclamation House District 2 is not compact under the Alaska Constitution and no VRA justification has been offered in support of deviating from that constitutional requirement. Therefore the matter is REMANDED to the Board to draw Proclamation House District 2 consistent with the Alaska Constitution.[230]

6. Proclamation House District 1 violates the Alaska Constitutional requirement of compactness, and the contention that the subject finger was necessary in order to minimize urban deviation is not in harmony with either the Alaska Constitution or the prevailing case law.

[230] The court does not direct the actual numbering protocol the Board may choose to use for districts in any new plan.

Therefore the matter is REMANDED to the Board to draw Proclamation House District 1 in harmony with the Alaska Constitution.

7. Proclamation House District 37 violates the Alaska Constitutional requirements of compactness and contiguity. The contention that it was necessary to split the Aleutian Chain in order to create an effective Native district and not pair Senator Hoffman is not in harmony with the Alaska Constitution, in light of the excess Native population in other effective districts and the speculative assertion that such pairing would have caused DOJ not to give preclearance to the plan. Therefore the matter is REMANDED to the Board to draw Proclamation House District 37 in harmony with the Alaska Constitution.

8. Proclamation House District 38 violates the Alaska Constitutional requirement of socio-economic integration. The Board's contention that this district needed to reach from the Bering Sea to Fairbanks in order to take excess Democratic population from Fairbanks is not in harmony with the Alaska Constitution, in light of excess Native population in other effective districts and the speculative nature of pairing concerns for Senator Hoffman. Therefore the matter is REMANDED to the Board to draw Proclamation House District 38 in harmony with the Alaska Constitution.

9. The court's prior decision on Proclamation House District 32 is not disturbed by this order. However the Board should be cognizant in preparing any new plan or plans pending a final decision from the Alaska Supreme Court that this court's view that Proclamation House District 34 is an influence district is based upon Handley's testimony that the 2006 amendments to the VRA and the February 2011 regulations do not preclude an influence district. The

procedural posture in review of this district is awkward because the City of Petersburg did not appeal the court's ruling. The Alaska Supreme Court may *sua sponte* consider this district for review of the entire Proclamation Plan and may well reach a different conclusion. In that case, the Board may have to revisit the difficult challenges presented by a geographic area that has lost 30,000 to 35,000 people, as well as whether one of the required effective districts could be drawn in Southeast.

10. The order remanding the matter to the Board is STAYED pending further direction from the Alaska Supreme Court.

11. All motions for attorney fees and costs are STAYED pending a final decision from the Alaska Supreme Court. The parties will have 15 days from the date of the distribution of the final decision of the Alaska Supreme Court to submit such motions.

DATED at Fairbanks, Alaska, this 3rd of February 2012.

Michael P. McConahy

Superior Court Judge

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Appendix A

1. 22 September 2011 Order on Motion to Dismiss for Lack of Standing (Denied)

2. 10 October 2011 Order Granting the Riley Plaintiff's Motion for Summary Judgment in Part

3. 12 December 2011 Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness

4. 23 December 2011 Order on the Compactness of District 1, 2, and 37 (Granted)

5. 23 December 2011 Order on the Contiguity of House District 37 (Granted)

6. 23 December 2011 Order on the Plaintiffs' Motion for Partial Summary Judgment/Law of the Case: Benchmark Standard (Denied)

7. 23 December 2011 Order on the Plaintiffs' Motion for Summary Judgment: Invalidity of House District 38 (Denied)

8. 23 December 2011 Order on the Plaintiffs' Motion for Summary Judgment: Invalid Process (Denied)

9. 23 December 2011 Order Regarding the Law of the Case and the Splitting of the Excess Population of the Fairbanks North Star Borough (Granted)

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

IN RE: 2011 REDISTRICTING CASES:)
)
)
Case No. 4FA-11-2209CI

Order on Motion to Dismiss for Lack of Standing

The Board moves to dismiss the Fairbanks North Star Borough [FNSB] and the City of Petersburg [Petersburg] Plaintiffs on the grounds that they are not qualified voters and therefore lack standing. The Plaintiffs oppose the motion.

I. The Precedence Afforded Voting in Our Society

The evolution of the governance of human affairs has proceeded apace from the ancient Greeks to modern times. The advent of a stable agricultural system allowed a taxation base that sustained an ordered society under the Romans, particularly during the time of the Antonine Dynasty from 138 A.D. to 193 A.D. as documented by Gibbon.[1] This evolution reached its apotheosis in America in 1776 whereby citizens created a new nation, as aptly described several score years later, as "a government of the people, by the people, for the people. . ."[2]

The defining principles of this democracy were ultimately incorporated into the U. S. Constitution.[3] It addressed fundamental issues regarding the relationship of a citizen to his government. The most fundamental elements of citizen participation in government are the right to vote and the right to serve on a jury. John Adams, a founding father and second president of the United States, viewed these twin rights as the

[1] Edward Gibbon, *Decline and Fall of the Roman Empire*, published in six volumes between 1776 and 1788.
[2] Gettysburg Address, 1863.
[3] Adopted 1787.

animating source of the body politic. In his third "Clarendon" letter, which appeared in the Boston Gazette in the midst of the Stamp Act crisis,[4] Adams wrote,

> "thus, it seems to appear, that two branches of popular power, voting for members of the house of commons, and trials by juries, the one in the legislative and the other in the executive part of the constitution, are as essential and fundamental to the great end of it, the preservation of the subject's liberty, to preserve the balance and mixture of the government, and to prevent its running into an oligarchy or aristocracy, as the lords and commons are to prevent its becoming an absolute monarchy. These two popular powers, therefore, are the heart and lungs, the mainspring and the center wheel, and without them the body must die, the watch must run down, the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution. **In these two powers consist wholly the liberty and security of the people**." [Emphasis added].

Alaska benefited from the bright minds of practical citizens in creating its own constitution,[5] a constitution that was chaired by a grocer from Valdez[6] and produced one of the touchstone documents of governance found in any constitution. Alaska stands at the forefront of individual rights by placing its Declaration of Rights[7] first in the document.

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[4] http://www.commonwealthbooks.org/John-Adams.html
[5] Ratified in 1956; effective upon statehood on 1.03.59.
[6] The names of Egan, Bartlett, Doogan, and Coghill may not come as well to the tongue of non-Alaskans as Washington, Franklin, Jefferson, and Adams, but their work is the basis for the scrutiny that brings us together in this action.
[7] Article 1.

The instant action brings together the executive, legislative, and judicial branches of government in an earnest endeavor to determine whether the redistricting plan proposed by the Board meets the vital, organic needs of citizens to vote under terms and conditions of the U.S Constitution, complies with the Alaska Constitutional requirements under Article 6, and otherwise is consistent with the Federal Voting Rights Act. The mechanism for review of a proposed redistricting plan requires an expedited procedure, consistent with due process, designed to resolve any differences within a time frame that preserves voting rights but does not delay elections. A trial on the merits is scheduled to commence the week of 9 January 2011.

The instant motion is not focused on the merits of the redistricting plan, but rather on the issue of whether the two municipal plaintiffs have standing under either Article 6 of the Alaska Constitution or otherwise have standing under generally accepted principles of Alaska case law. Judge Rindner found at the trial level in the 2001 case that municipalities could prosecute redistricting claims. The Board contends Judge Rindner's finding is neither binding nor correct.

Form will not displace substance on such a fundamental issue as voting rights. Both FNSB and Petersburg have made cogent arguments why they have standing to prosecute this action. For the reasons noted below, the court finds Judge Rindner's conclusion is correct and therefore the Board's motion to dismiss the municipalities for lack of standing is DENIED.

II. Procedural Redistricting Litigation Context

This matter originated as three separate cases: the case filed by the *Riley* plaintiffs in Fairbanks [4FA-11-2209 CI], the case filed by the *Petersburg* Plaintiffs in Juneau

[1JU-11-00782CI], and the case filed by the Fairbanks North Star Borough in Fairbanks [4FA-11-2213]. The *Riley* and *Petersburg* cases were consolidated on 22 July 2011. A scheduling conference was held on 22 July 2011. On 26 July 2011 all three cases were consolidated as 4FA-11-2209CI. The electronic filing of pleadings was established to accommodate the expedited nature of the case. Status hearings were also held on 5 August 2011, 26 August 2011, and 20 September 2011. The Board filed their answer on 10 August 2011 which listed the Plaintiffs' lack of standing as an affirmative defense. The Board filed the current Motion to Dismiss for Lack of Standing on 9 September 2011.

III. Standing

"Standing questions are limited to whether the litigant is a 'proper party to request an adjudication of a particular issue....' "[8] Standing in our state courts is not a constitutional doctrine; rather, it is a rule of judicial self-restraint based on the principle that courts should not resolve abstract questions or issue advisory opinions.[9] The basic requirement for standing in Alaska is adversity.[10]

The concept of standing has been interpreted broadly in Alaska. We have "departed from a restrictive interpretation of the standing requirement,"[11] adopting instead an approach "favoring increased accessibility to judicial forums."[12] (and cases cited therein), *cert. denied.*[13]

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[8] Moore v. State, 553 P.2d 8, 24 n. 25 (Alaska ,1976) (quoting Flast v. Cohen, 392 U.S. 83, 100–01(1968)).
[9] *Id.*
[10] *Id.*
[11] Coghill v. Boucher, 511 P.2d 1297, 1303 (Alaska, 1973).
[12] Moore v. State, 553 P.2d 8, 23 (Alaska 1976); see also State v. Lewis, 559 P.2d 630, 634 n. 7 (Alaska, 1977).
[13] 432 U.S. 901 (1977).

Under the Alaska Constitution **any qualified voter** may apply to the superior court to compel the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting.[14] Herein, as noted by the Board, lays the rub.

There are also traditional tests to qualify for standing. Under the interest-injury approach, a plaintiff must have an interest adversely affected by the conduct complained of. Such an interest may be economic,[15] or it may be intangible, such as an aesthetic or environmental interest.[16] The degree of injury to the interest need not be great: " '[t]he basic idea ... is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' "[17]

Under the citizen-taxpayer approach the party must be a citizen or a taxpayer and raise an issue of public significance.[18]

Under the association standing approach, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[19]

The Board argues that a qualified voter must be a citizen, not a government entity. The Board cites minutes from the Alaska Constitutional Convention and House Judiciary

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[14] Alaska Const. Art 6 Sec. 11.
[15] Moore v. State, 553 P.2d 8, 24 (Alaska, 1976); Wagstaff v. Superior Court, Family Court Division, 535 P.2d 1220, 1225 (Alaska, 1975).
[16] State v. Lewis, 559 P.2d 630, 635 (Alaska, 1977).
[17] Wagstaff v. Superior Court, Family Court Division, 535 P.2d 1220, 1225 & n. 7 (Alaska, 1975). (quoting Davis, *Standing: Taxpayers and Others*, 35 U.Chi.L.Rev. 601, 613 (1968)).
[18] Trustees for Alaska v. State, 736 P.2d 324, 329-330 (Alaska, 1987).
[19] Alaskans for a Common Language, Inc. v. Kritz, 3 P.3d 906, 915 (Alaska, 2000).

Committee which refer to a qualified voter as a citizen. The Board also cites Pennsylvania case law, as Pennsylvania only allows individual voters to bring reapportionment challenges: "It is the right to vote and the right to have one's vote counted which is the subject of reapportionment challenges"[20], citing the U.S. Supreme Court, "the right to vote is personal and the rights sought to be vindicated in a suit challenging an apportionment scheme are personal and individual."[21] The Board additionally argues that the government entities do not meet traditional standing tests, as they do not have a "sufficient personal stake in the outcome of the controversy."

Petersburg argues that they meet the traditional criteria for standing and nothing under the Alaska Constitution excludes parties with traditional standing from challenging the Board's redistricting decision. Petersburg argues that they have "interest-injury" standing as Petersburg has an economic and intangible interest in sufficient legislative representation, which is injured by district boundaries adopted in the redistricting plan. Petersburg argues in the alternative that if the court finds that they do not have "interest-injury" standing, they then have "associative standing" as (1) their residents have the ability to sue in their own right; (2) Petersburg's ability to represent its municipal interests and its ability to obtain funding and legislative support is germane to the city's purpose; and (3) the participation individual voters is wholly unnecessary to the claims asserted or the relief sought. Petersburg additionally argues (1) *Carpenter* supports their position; (2) redistricting challenges in Alaska have categorically included municipal parties, citing the *In re 2001 Redistricting Cases*[22], *Hickel v. Southeast Conference*[23],

[20] Albert v. 2001 Legislative Reapportionment Com'n, 567 Pa. 670, 679 (Pa., 2002).
[21] Reynolds v. Sims, 377 U.S. 533, (1964).
[22] 47 P.3d 1089 (Alaska, 2002).
[23] 868 P.2d 919 (Alaska, 1994).

Kenai Peninsula Borough v. State[24], Petersburg specifically points to Judge Rindner's denial of the Board's Motion to Dismiss for Lack of Standing[25]; and (3) the Board's citation to the Alaska Constitution and Legislative History merely discusses the qualifications for voters and do not refer to redistricting.

The Fairbanks North Star Borough makes many of the same arguments and additionally argues (1) it has standing under traditional criteria for standing under the case law (they claim they meet the interest-injury and citizen-taxpayer test); (2) standing has been given to municipal entities before; (3) the Pennsylvania cases cited by the Board are distinguishable because the Pennsylvania Constitution uses the words "any person aggrieved"; (4) even if municipalities are not granted standing, the FNSB has a representative party that is a qualified voter (Timothy Beck). The FNSB also has attached exhibits which demonstrate the support of its citizens to protest the reapportionment either by comments at an assembly meeting or by e-mail.

The Board replies (1) the Plaintiffs are ignoring the issue whether they are qualified voters under the Alaska Constitution and reiterates that they are not; (2) the plaintiffs are misconstruing *Carpenter* and reiterates that Carpenter was a qualified voter; (3) the fact that municipalities have been allowed to bring suits before has no precedential value because the Supreme Court has not decided the issue, argues that past practice does not trump the law and this issue needs to be decided; (4) the Alaska Constitution is plain and unambiguous and it does not matter that it does not specifically bar municipalities;

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[24] 743 P.2d 1352 (Alaska, 1987).

[25] Citing a footnote in Rindner's decision, "The Alaska Supreme Court has broadly interpreted the concept of standing, favoring the increased accessibility to judicial forums. Accordingly, "any qualified voter" is authorized to institute and maintain a reapportionment suit seeking to correct any errors in redistricting. Carpenter, 667 P.2d at 1209-10. In a pretrial decision, this court held that the right to bring such a suit was not limited to individuals but included governmental entities and certain organizations as well."

(5) the Plaintiffs do not have standing under traditional standing principals; (6) the Plaintiffs do not qualify under an interest-injury analysis because the true purpose behind redistricting is to protect an individual's personal constitutional right to vote and not for a municipality to effectively advocate for more funding; (7) the Plaintiffs do not have associative standing because the Plaintiffs are not associations, but are entities and the purpose of redistricting is voting, not securing funding; and standing does require participation of individual members in the lawsuit; and (8) the Plaintiffs do not qualify as tax-payer citizens because they are not citizens or taxpayers and they are not appropriate parties in this case.

The Board's Motion to Dismiss for lack of Standing is denied for the following reasons. First, the concept of standing is interpreted broadly in Alaska. The basic requirement is adversity and it is clear the Plaintiffs and the Board have adverse interests in this case. Second, while the Plaintiffs do not qualify as voters in their respective entities as a city and borough, they consist of assembly and council members who are qualified voters and represent qualified voters. Third, in Alaska's redistricting history municipalities have been allowed to participate as Plaintiffs. While the Board is correct that this issue has not been decided by a court with precedential authority, it does a raise a due process issue of which the Plaintiffs were not put on notice that they could not file suits themselves and needed to do so under the name of a qualified voter. This point alone demonstrates this is really a form over substance issue.[26] Fourth, the court finds that the Plaintiffs otherwise have traditional interest-injury standing to prosecute their claims. And fifth, the court agrees with the Plaintiffs that *Carpenter* supports a broad

[26] An individual voter [Beck] is joined in the FNSB action. City has not joined an individual voter; that decision is left to City.

view of standing in redistricting cases. The Board is correct that in *Carpenter* the plaintiff was a qualified voter, but determinative for our purposes is the fact she was given very broad standing to raise issues that extended beyond her own district; she was allowed to seek to correct any error, including addressing military exclusions and the Cordova inclusion issues.

IV. Conclusion.

The liberty and security of the people is best served by vigorous scrutiny of any redistricting plan. The Plaintiffs in this case do have standing to advance this scrutiny consistent with Alaska case law. Therefore, based on the foregoing facts and authorities, the Board's Motion to Dismiss the Plaintiffs for Lack of Standing is DENIED.[27]

DATED at Fairbanks, Alaska, this 22nd of September 2011.

Michael P. McConahy
Superior Court Judge

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[27] Consistent with the expedited nature of this action, any motion for reconsideration must be served and filed no later than 9.27.11. Oppositions to any such motion for reconsideration are allowed and must be served and filed no later than 9.29.11. Any such pleadings are limited to 5 pages. Additionally this court will not issue a stay in the event a party wants to seek extraordinary review. Any stay must issue from the Alaska Supreme Court.

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

IN RE: 2011 REDISTRICTING CASES:)
)
)

Case No. 4FA-11-2209CI

Order Granting the Riley Plaintiff's Motion for Summary Judgment in Part

Based upon the admission of the Board, the court grants the Riley Plaintiffs' Motion for Summary Judgment in Part, specifically that House District 38 does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution. The Riley Plaintiffs do not need to adduce evidence as to whether House District 38 is socio-economically integrated. The issue of whether the Board was required to deviate from the Alaska Constitution in order to comply with the Voting Rights Act is reserved for trial or further pre-trial briefing.[1]

DATED at Fairbanks, Alaska, this 25th of October 2011.

Michael P. McConahy
Superior Court Judge

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[1] The parties shall brief the applicable legal burdens and standards in their pre-trial memo.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

)

Case No. 4FA-11-2209CI

Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness

A. Motion Practice Background

Petersburg filed a motion for partial summary judgment on 18 October 2011 that House District 32 is not compact. The Board opposed the motion and filed a cross motion for summary judgment on 4 November 2011 that House District 32 is compact.

Petersburg filed their combined opposition to the Board's cross-motion for summary judgment and reply to the Board's opposition to Petersburg's motion for summary judgment on 18 November 2011. The Board filed their reply to Petersburg's opposition to the Board's cross-motion for summary judgment on 30 November 2011. Neither party requested oral argument.

B. Preliminary Comments on the Case

The court commends the Board for its hard work. All of the previous courts have referred to the task of redistricting as "Herculean." This court refers to it as leviathanic. This description is consistent not only with the vastness of the task of proclaiming Alaskan districts consistent with state and federal mandates, but also recognizes the geographic uniqueness of Southeast Alaska.[1] Southeast is home to a large population of whales that plunge in its vasty deeps throughout the warmer months of the year. The whales are in Southeast for the very reason that makes drawing compact and contiguous house districts problematic: it is an archipelago rich in waterways by, between, and around a wealth of islands of widely varying size.[2] The unprincipled harvesting of resources from Southeast was a motive force for statehood. Indeed, the abolition of fish traps was one of the three ordinances submitted to the territorial voters along with the ratification of the constitution and ratification of the Alaska-Tennessee Plan.

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[1] What we know as Southeast Alaska is the result of the Anglo-Russian Convention of 1825 between Russia and Britain to define the borders of their respective colonial possessions. For our purposes it said: "the said line shall ascend to the north along the channel called Portland Channel as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude." The vagueness of the reference to coastal mountains was qualified as follows" "Whenever the summit of the mountains . . . shall prove to be at the distance of more than ten marine leagues from the ocean, the limit . . . shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom". *Political Geography*, Norman Pounds, 1972, p. 82. The United States purchased Alaska from Russia in 1867. Disputes about the vague border, and port access for Canada, remained unresolved until the current boundaries were finalized in 1903 by arbitration pursuant to the Hay-Herbert Treaty.

[2] A common term for the area is the Alexander Archipelago.

Referring to the task before the Board as leviathanic is also consistent with the court's *leitmotif* expressed at the very first hearing in this case. At that time the court noted it learned more than it ever wanted to know about whales after reading *Moby Dick* and it expected it would learn more than it ever wanted to know about redistricting as the case progressed. That has turned out to be more true that could have been foreseen at the time.

The issue before the court in this motion focuses on whether Proclamation House District 32 complies with the compactness requirements of the Alaska Constitution. The legal issues will be discussed below. For introductory purposes, it bears note that there are at least *eight* tests that can be applied to determine compactness. As Judge Weeks previously noted in a motion for reconsideration, "Obviously the court did not know enough." [3] The parties have done yeoman work to assist this court on these various tests, but the poignancy of Judge Weeks' remark is sobering.

Melville devotes an entire chapter of *Moby Dick* to discussing the classification of whales because it never had been properly addressed.[4] This literary construct does not bear much more labor, other than to note Melville divided the whales in three primary books subdivisible in chapters. Yet Melville himself admits of the difficulty of that approach:

> Next: how shall we define the whale, by his obvious externals, so as conspicuously to label him for all time to come. To be short, then, a whale is a

[3] Correction Order by Judge Weeks Granting a Motion for Reconsideration (part of the Appendix of Hickel 1).

[4] *Moby Dick*, Chapter 32, Cetology.

> spouting fish with a horizontal tail. There you have him. However contracted, that definition is the result of expanded meditation. A walrus spouts much like a whale, but the walrus is not a fish, because he is amphibious. But the last term of the definition is still more cogent, as coupled with the first. Almost any one must have noticed that all the fish familiar to landsmen have not a flat, but a vertical, or up-and-down tail. Whereas, among spouting fish that tail, though it may be similarly shaped, invariably assumes a horizontal position.

The archipelago of Southeast is unique and demands scrutiny of compactness with the candid acknowledgement that although it may possess some characteristics shared with other parts of Alaska, it, like Hawaii, is unique because of the concentration of islands separated by water.[5] The task is further complicated by the uneven distribution of population; quotidian requirements militate that the Board consider boundaries that are not otherwise grossly obvious. Finally the Voting Rights Act requirements add yet another level of complexity to this already difficult task, including the consideration of preserving the seat of an incumbent Native legislator.

The Board and Petersburg[6] have each done extraordinary work in navigating these shoals. Neither has fetched up hard a reef like Captain Hazelwood. Yet one argument is more persuasive as explained below.

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[5] When confronted with conditions so different from those of any other single state in the continental United States, it is readily apparent that it is well nigh impossible to achieve the mathematical precision of equal proportions which is feasible in those other states. The situation is more analogous to that of the State of Hawaii, whose unusual difficulties were recognized as potentially requiring special remedies by the United State Supreme Court in *Burns v. Richardson*. Egan v. Hammond, 502 P.2d 856, 866 (Alaska 1972).

[6] The court is sensitive to include the citizens of Petersburg as completely as possible in this litigation, including having testimony taken in Petersburg if needed. In the instant motion the court offered to sit in Petersburg for oral argument on this motion but was advised it was not necessary. No oral argument was requested by any party. The court also acknowledges the historical richness of Petersburg and its significant contributions to the state. Tlingit peoples have used the area around present day Petersburg for thousand of years and constitute a significant part of the population today. The arrival of Peter Buschman at the close of the 19th Century was the beginning of a Norwegian population that grew the city and was

Leaving statehood and whaling issues completely aside now, the Court recognizes that this redistricting process was particularly difficult because of the requirements of the Voting Rights Act and the following factors cited by the Board: (1) under-population of Benchmark Alaska Native Districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native Districts; and (3) the inability to create minority districts in urban Alaska.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[7] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[8] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a

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instrumental in all aspects of Alaska's fishing industry. Petersburg is properly and vigorously asserting what it contends to be in its best interests regarding its political alignment. Its citizens need to know their concerns are being carefully considered and, despite the distance from Petersburg to Fairbanks, are always afforded every opportunity to participate in the litigation process.

[7] Alaska R. Civ. P. 56.

[8] Kiester v. Humana Hosp. Alaska, Inc., 843 P.2d 1219, 1222 (Alaska 1992) (quoting Sea Lion Corp. v. Air Logistics of Alaska, 787 P.2d 109, 116 (Alaska 1990)).

material issue of fact exists."[9] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[10]

The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[11]

C. General Arguments

Petersburg contends that House District 32 in Southeast Alaska is not compact under the Alaska Constitution.[12] Petersburg argues that greater compactness can be achieved under the Modified RIGHTS plan.[13] Petersburg also argues that no deviations from the compactness standard were required under the Federal Voting Rights Act.

The Board contends that House District 32 is compact under the Alaska Constitution. The Board argues that to the extent there is any question whether House District 32 is relatively compact, the Board's departure from strict adherence to that

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[9] Philbin v. Matanuska-Susitna Borough, 991 P.2d 1263, 1265–66 (Alaska 1999) (quotations omitted).

[10] Lord v. Wilcox, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing State, Dep't of Highways v. Green, 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See* Jennings v. State, 566 P.2d 1304, 1309-10 (Alaska 1977).

[11] CR 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

[12] Petersburg's First Amended Complaint filed on 22 August 2011 contained claims that House District 32 was not socio-economically integrated and that Senate District P was improperly paired. Petersburg abandoned those claims on 19 October 2011.

[13] The Modified RIGHTS Plan is one of many private plans submitted to the Board during the redistricting process. The court notes that many of these plans went through several drafts. The court is aware that the Modified Rights Plan was altered for the purposes of this motion by retracting Yakutak to better compare it to the Board's Plan and that the modified version is entitled the Demonstrative Plan. The court refers to both versions of the plan as the Modified RIGHTS plan.

requirement is justified by its need to draw a redistricting plan that avoids retrogression and complies with the Voting Rights Act.

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> "The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible."

Compactness in terms of redistricting has been defined by the Alaska Supreme Court as follows: "'Compact' in the sense used here means having a small perimeter in relation to the area encompassed."[14] "'Compact districting should not yield 'bizarre designs'."[15] The compactness inquiry looks to the shape of a district, "Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridor" 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 redistricting."[16] The

[14] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[15] Davenport v. Apportionment Comm'n of New Jersey, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div.1973), quoted in Carpenter v. Hammond, 667 P.2d 1204, 1218-19 (Alaska, 1983). (Matthews, J., concurring).

[16] Hickel v. Southeast Conference, 846 P.2d 38, 45-46 (Alaska, 1992).

court looks to the "relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[17]

D. Issues of Greater Compactness

Petersburg argues that at least one other private plan, the Modified RIGHTS Plan, has achieved greater compactness in Southeast Alaska. Mr. Lawson, a witness for Petersburg, performed eight mathematical tests for determining compactness on Maptitude Redistricting software. Petersburg specifically points to the Reock Test where the Modified Rights Plan scored higher then the Board's Plan in the Southeast House Districts. The Reock Test quantifies the compactness of a district by determining the ratio of the area of the district to the area of the smallest circle that contains the district. Petersburg argues that of the eight tests, the Reock test is the best test for Alaska because it compares districts to circles and – quoting the Alaska Supreme Court - "The most compact shape is a circle."[18]

The Board contends that the eight mathematical tests for compactness are inappropriate for determining compactness in Alaska and in fact point out that House District 32 scored higher than the RIGHTS Plan in three of the eight tests, specifically the Perimeter Test, the Population Polygon test and the Population Circle Test. The Board argues a visual test is more appropriate to use in Alaska.[19]

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[17] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[18] Kenai Peninsula Borough v. State, 743 P.2d 1352, 1361 n. 13 (Alaska, 1987), quoting Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[19] The court does not rule on whether a visual test or mathematical test is best for Alaska, as it is not necessary to decide under this plan. The court found Judge Rindner's discussion on the two methods

The Board also argues that the correct standard for compactness is relative compactness. The Court agrees. "Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness."[20] 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.

E. Voting Rights Act Considerations

The Voting Rights Act justifies a deviation from the Alaska Constitution's compactness requirement only to the extent that the deviation is necessary for Voting Rights Act compliance.[21]

Petersburg agues that the Voting Rights Act has no bearing on the redistricting of Southeast Alaska, as none of the "effective districts" that provide Alaska Natives with the opportunity to elect Alaska Native preferred candidates are located in Southeast Alaska.

However, Petersburg acknowledges that the Board's Voting Rights Act Expert, Dr. Handley, also discussed the fact that in the benchmark plan, there was a district in Southeast Alaska (House District 5) that is approximately 1/3 Alaska Native.

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informative and notes that historically Alaska has relied on the visual test, but this is not to say that mathematical compactness tests could not be helpful in the future.

[20] Carpenter v. Hammond, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[21] Hickel v. Southeast Conference, 846 P.2d 38, 52 n. 22 (Alaska, 1992).

In order not to be retrogressive,[22] the Board was advised by Dr. Handley to create an "influence district"[23] in Southeast Alaska. The Board therefore created House District 34 in Southeast Alaska which has 35.14% Alaska Native VAP.[24] While Petersburg's contentions are about House District 32, the court notes that the structure of House District 34 has an impact on the other districts in Southeast Alaska.

Petersburg argues that House District 34 is not the only way to create an "influence district" in Southeast Alaska. Petersburg points out that the Modified RIGHTS Plan also has an influence district in Southeast that is 32.45% Alaska Native VAP, varying by only a de minimis (00.45%) from the Board's 32.85%.[25]

F. Pairing of Minority Incumbents

The Board acknowledges that the influence district could be located in another area in Southeast Alaska and that other private plans had even slightly higher percentages

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[22] The Department of Justice measures retrogression by comparing minority voting strength under the new plan in comparison to their position under the existing plan. Beer v. United States, 425 U.S. 130, 141, 145 (1976).

[23] "Influence Districts" are districts that have enough Native Alaskan population that they would likely be able, with the combination of enough non-Native cross-over vote, to elect candidates of their choice. This number is less than what is required for "effective districts." "Effective Districts" are districts that provide minority voters with the ability to elect candidates of their choice to office. Dr. Handley advised the Board that an "influence district" in Southeast needed at least 30% Alaska Native Voting Age Population in the plan. [ARB00003896-ARB00003899].

[24] VAP stands for voting age population.

[25] In Petersburg's combined opposition and reply brief, they suggest for the first time that it was not necessary to establish an influence district in Southeast Alaska. The court finds this argument to be conclusory because it is not supported by any facts, or an affidavit by a Voting Rights Act expert. To the contrary, there is overwhelming support that an "influence district" was required in Southeast, including the fact that House District 5 in the benchmark plan 10 years ago was approximately 1/3 Native, the Board's Voting Rights Act Expert said it was necessary, every private plan also created an influence district in Southeast Alaska, and even the Modified Rights Plan created an "influence district" in Southeast Alaska."

of Alaska Native VAP in the Southeast Alaska Native District in question. However, the Board determined that it was more important to keep the incumbent Alaska Native Legislator (Bill Thomas) from the Benchmark Alaska Native District in the Proclamation Alaska Native District and avoid pairing him with a non-Alaska Native incumbent. The Board argues that it did this for several of reasons, including the public testimony received from the Alaska Native Community; because it was impossible to create benchmark Senate District C; because it was impossible to create an Alaska Native effective or influence senate district in Southeast Alaska; and because it was forced to pair Alaska Native Senator Kookesh with another incumbent. The Board also notes that the only question they were asked by the Department of Justice at the preclearance meeting was how the Alaska Native Incumbents were treated.[26]

Petersburg argues the Voting Rights Act does not protect minority incumbents, it protects minority *voters*, and there is no requirement that minority incumbents be protected.

While the court agrees the Voting Rights Act does not protect minority incumbents, Alaska case law acknowledges that the Department of Justice looks at whether the plan has a pattern of pairing minority incumbents and whether the Board sought and applied the input from the Alaska Native Community.

"In evaluating a reapportionment plan for preclearance, the Justice Department might view the treatment of minority incumbents as part of the totality of the

[26] Affidavit of Chairman of the Board, John Torgerson; Affidavit of Board Member Marie Greene; and Affidavit of Executive Director Taylor Bickford.

circumstances. For example, the Department of Justice might view as suspect a pattern of pairing minority incumbents in districts with other incumbents."[27]

"...the Department of Justice considers other factors that are relevant to whether the plan will have a retrogressive effect on minority voting strength, including whether minority incumbents were paired against each other or paired against non-Native incumbents, whether the percentage of minority voters in an effective Native District has declined significantly, whether minorities favor or disapprove of the plan, and whether minorities had inadequate opportunity to participate in development and comment on the plan."[28]

The court therefore finds that the Board's choice to not pair Representative Thomas with a non-Alaskan Native Incumbent was justified.

G. Odd Appendages

Petersburg also argues House District 32 contains odd appendages that reach across bodies of water to incorporate the communities of Gustavas and Tenakee Springs.

The Board states that they included Tenakee Springs and Gustavus in House District 32 for equal population purposes. The Board claims that without these two communities House District 32 had a total population only of 17,309, which would have resulted in a deviation of -2.98% below the ideal district. The addition of the two communities brought the total population of House District 32 to 17,801, which is a deviation of .26% from the ideal district which has a population of 17,755.

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[27] Hickel v. Southeast Conference, 846 P.2d 38, 67 (Alaska,1992)(Appendix E, Judge Weeks' 18 June 1992 Order nt. 16).

[28] Board's Exhibit I, Judge Rindner's 1 February 2002 Order.

The compactness inquiry looks to the shape of a district. Odd shaped districts may well be the natural result of Alaska's irregular geometry. Also, if the shape is necessitated by the need to create districts of equal population, then the district may be constitutional.[29] "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.[30]

The court notes that the inclusion of Gustavus and Tenakee Springs in District 32 is not offensive. Much of the look is caused by water and the shape of the island. The court also notes that it does not have a "long slim suspicious corridor" of land going through a district to grab population. The court accepts the Board's justification that the inclusion of the communities is for equal population purposes and notes that it is a valid justification.[31]

The court concludes that there are no genuine issues of material fact and DENIES Petersburg's Motion for Summary Judgment that House District 32 is not compact as a matter of law.

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[29] Board's Exhibit B, Judge Rindner's 31 December 2001 Order Granting Ruedrich Plaintiff's Motion for Summary Judgment Re: Lack of Compactness of House District 16, citing Hickel v. Southeast Conference, 846 P.2d 38, 44-46 (Alaska,1992)

[30] The court is cognizant that similar arguments are pending by the Riley Plaintiffs. The instant decision is specifically limited to the facts of Petersburg's claims.

[31] The court also notes that the Medenhall Valley District [31] is one of the most consistent districts from plan to plan and the fact that District 32 embays it does not destroy compactness. Petersburg does not even so contend.

H. District 32 is Compact

District 32 consists of Petersburg, areas of Juneau, Skagway, Gustavus and Tenakee Springs.[32] As discussed above, much of the shape of the district is caused by Alaska's unique geography, particularly the shape and placement of the islands. At some point a district must be deemed "compact enough" to satisfy the requirements of the Alaska Constitution.[33]

"Compact enough" superficially rings hollow. Our belief in the empiricism of science suggests that certain subjects *are* capable of description and definition with precision. "Compact", on its face, would seem to lend itself to such preciseness. However, for the reasons noted above, such is not the case. The existence of eight tests for compactness in the context of redistricting litigation illustrates the lack of mathematical precision in defining districts that meet state and federal requirements. Courts historically and regularly apply standards that are consistent but not scientifically precise. In civil cases decisions are made based on a "more probably than not" basis; guilt or innocence is based on the government proving its case not with absolute certainty, for few things are capable of being proved with absolute certainty, but rather "beyond a reasonable doubt". Therefore, in this legal context of determining "compactness" for redistricting purposes, the finding that the subject House district is

[32] The metes and bounds description is available on the Alaska Redistricting Board's website: http://www.akredistricting.org/

[33] Rindner's 13 December 2011 Order Granting Ruedrich Plaintiff's Motion for Summary Judgment Re: Lack of Compactness of House District 16

"compact enough" is consistent with our history of jurisprudence and legally sufficient for determining the instant motion.

The court therefore concludes that House District 32 is "compact enough" to satisfy the requirements of the Alaska Constitution.

G. Conclusion

Based on the foregoing facts and authorities, the court DENIES Petersburg's motion for summary judgment and GRANTS the Board's cross motion for summary judgment.

DATED at Fairbanks, Alaska, this 12th of December 2011.

Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration and CR 54(b)

Given the litigation ending consequence of this order, and the impending trial on the merits, expedited timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 16 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 19 December 2011. If no order is issued by this court by the close of business on 22 December 2011 then any motion for reconsideration shall be deemed denied.

In the event there is no motion for reconsideration by the date and time specified, or if the motion is explicitly denied or denied by lack of order by the date noted above, then this court certifies without further motion practice that there is no just reason for delay for the entry of judgment. Given the exigencies of this litigation the court will not require formal judgment to be entered at this time. Presumably this finding will be sufficient for any aggrieved party to seek appellate review. The court is sensible that expedited appellate review of this litigation ending order is necessary if the supreme court believes the issues disposed of in this motion should be decided by the trier of fact after a trial.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

_____)

Case No. 4FA-11-2209CI

Order on the Compactness of Districts 1, 2, and 37

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for partial summary judgment on 5 December 2011 that House Districts 1, 2 and 37 are not compact under the Alaska Constitution. The Board opposed the motion on 13 December 2011. The Plaintiffs replied on 15 December 2011. Oral argument was held on 22 December 2011.

B. Preliminary Comments on the Case

The scope of this litigation has dwindled. The Fairbanks North Star Borough and Tim Beck voluntarily dismissed their claims. Petersburg moved for summary judgment focusing solely on compactness; summary judgment was granted adverse to Petersburg.[1] That leaves only the Riley/Dearborn plaintiffs. Since they are Fairbanks residents, the

[1] The time for reconsideration expired 12.16.11. By the terms of the order, it is effectively a final judgment under Alaska R. Civ. P. 54(b).

focus of their claims is Interior Districts.[2] This motion addresses compactness contentions regarding Districts 1, 2, and 37.[3] Districts 1 and 2 do not necessarily deal with the scope of land mass presented by Districts 32 and 37, but the analysis is the same.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[4] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[5] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a

[2] As a condition of dismissal of the FNSB claims the court allowed the Riley/Dearborn Plaintiffs to raise any claims asserted by FNSB, specifically any concerns regarding House District 37. That district is subject to a separate contiguity motion.

[3] The plaintiffs focus on several "appendages" or "corridors". Unrelated to our litigation it does bear note that 67 years ago this month the German army made a large incursion into the Ardenne forest, surrounding the U.S 101st Airborne troops at Bastogne. General McAulliffe's reply to the surrender demand was simple: "Nuts." General Patton breached the Nazi line on 12.26.44 and opened a corridor to Bastogne. Now that is a corridor. Thanks to such service we can litigate in relatively comfort issues that represent the fundamentals of our democracy, an opportunity for one vote per one person.

[4] Alaska R. Civ. P. 56.

[5] *Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1222 (Alaska 1992) (quoting *Sea Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 116 (Alaska 1990)).

material issue of fact exists."[6] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[7]

The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[8]

C. General Arguments

The Riley/Dearborn Plaintiffs contend that House Districts 1, 2, and 37 are not compact under the Alaska Constitution.[9] The Board argues that House Districts 1, 2, and 37 are compact and that the configuration of the districts was required by equal population requirements and the Voting Rights Act.

House District 1

House District 1 includes East Fairbanks City, a portion of Fort Wainwright north of the Tanana River, and portions of Badger, Steele Creek, and South Van Horn CDP.

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[6] *Philbin v. Matanuska–Susitna Borough*, 991 P.2d 1263, 1265–66 (Alaska 1999) (quotations omitted).

[7] *Lord v. Wilcox*, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See Jennings v. State*, 566 P.2d 1304, 1309-10 (Alaska 1977).

[8] Alaska R. Civ. P. 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

[9] The Plaintiffs argue that the Board cannot use the Voting Rights Act as a justification because they did not file a cross motion seeking a ruling that the Voting Rights Act provides justification of any violation of Alaska's Constitutional compactness requirement. The court notes that the deadline for dispositive motions ended on 12.05.11 when the present motion for summary judgment was filed. The court later issued an order stating that cross motions would not be accepted. The Board was free to file a motion for summary judgment before the dispositive motion deadline, but did not. However, that does not preclude the Board from arguing the Voting Rights Act justified deviation from constitutional requirements. That issue will ultimately be for the trier of fact and the appellate court.

The Plaintiffs concede that House District 1 is relatively compact under the Reock test.[10] However, the Plaintiffs argue that House District 1 contains a classical appendage on its western side, which protrudes west from the New Steese Highway along the Slough.[11] The far western tip of the appendage contains a small portion of Aurora area south of College Road and north of Noyes Slough.

The Plaintiffs also argue that a more compact district can be drawn and that this is demonstrated by the versions of the Board's previous plans, entitled Board's Options 1 and 2. The Plaintiffs point out that Board Options 1 and 2 contain no such appendage and that South Cushman serves as a common boundary between the East and West Fairbanks City districts south of the Mitchell Expressway. The Plaintiffs argue that the appendage in House District 1 is made possible by swapping out the area south of the Chena River, north of the Mitchell expressway, east of Cushman Street and west of the New Steese Highway. Under Board Options 1 and 2, this area was in the East Fairbanks City District, while the area within the western appendage in House District 1 was in the West Fairbanks City District. The Plaintiffs argue that there is no question that the Board's change in the final plan exchanged these populations to make possible the offensive appendage contained in House District 1.

[10] The Reock Test is one of eight mathematical tests to determine compactness. The Reock Test quantifies the compactness of a district by determining the ratio of the area of the district to the area of the smallest circle that contains the district. With the best score being 1.0, House District 1 scored a .45, which is more compact than the entire Proclamation Plan mean, which is .37.

[11] The Plaintiffs coined the appendage the "Kawasaki finger." They argue it is reminiscent of the "Oosik District" the *Hickel Court* found so offensive.

The Plaintiffs argue that there is no valid justification for this non-compactness and argue that circumstantial evidence exists to suggest a possible political motivation for the appendage. The Fairbanks Districts were drawn by Board member Jim Holm. Jim Holm is the former Republican State Representative from West Fairbanks City. In 2004 and 2006, Mr. Holm ran for re-election against Democrat Scott Kawasaki, with Mr. Holm winning in 2004 and Mr. Kawasaki winning in 2006. Mr. Kawasaki is the current representative of West Fairbanks. The Plaintiffs argue that the 2006 race was close and hotly contested.

The Plaintiffs allege that Mr. Holm drew the appendage in House District 1 in an effort to move Mr. Kawasaki from his current West Fairbanks District to East Fairbanks, where he would be forced to run for re-election in a district that was substantially different from his current district, and against a popular former City Mayor and Republican House Incumbent who would be running in a district that was substantially similar to his current district. The Plaintiffs argue that Mr. Holm believed that Mr. Kawasaki lived in what is in actuality his sister's home. The Plaintiffs base this argument on the following: Ms. Kawasaki (Mr. Kawasaki's sister) indicated her address as 224 Spruce when she signed in to attend a Board Hearing; Ms. Kawasaki is often mistaken as Mr. Kawasaki's wife; Ms. Kawasaki's home was located in the West Fairbanks City District under the Board Option Plans; and Ms. Kawasaki's home is now in the East Fairbanks City District under the Proclamation Plan when the district's western appendage was created.

The Plaintiffs also argue that after the Board's Proclamation Plan, Mr. Pruhs, the Republican Party District 10 Chair, filed a letter of intent to run for the legislature. Under the Board Option Plans Mr. Pruhs' home was in East Fairbanks City and under the Proclamation Plan, Mr. Pruhs' home is located in West Fairbanks. Under the Board Option Plans, Mr. Pruhs would have had to face the current incumbent for East Fairbanks City, Mr. Thompson, who is also Republican. Under the Proclamation Plan Mr. Pruhs will be running against Mr. Kawasaki. Also if Mr. Kawasaki lived where his sister's home is, Mr. Pruhs would be running in a district without an incumbent.

The Board agues that the configuration of House District 1 was largely driven by equal population and compactness concerns. The Board argues that after it had adopted Board Options 1 and 2, the Voting Rights Expert, Dr. Handley, advised that the effectiveness standard had changed for Alaska Native Districts.[12] The Board argues this forced it to redraw all of its Native Districts, which in turn affected many urban district boundaries. The Board points out that House District 1 was also affected by the Board's decision to add population from the Goldstream and Ester areas of the FNSB to House District 38 in order to comply with the Voting Rights Act.[13] The Board argues that they looked at other private party plans for alternative solutions, but they were all retrogressive.

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[12] Dr. Handley advised that the standard had changed due to racially polarized voting.

[13] The Board cites the following factors that made it particularly difficult to comply with the Voting Rights Act: (1) under-population of Benchmark Alaska Native Districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native Districts; and (3) the inability to create minority districts in urban Alaska.

The Board argues that the Ester/Goldstream areas of the FNSB was the best areas from which to draw population from to add to the rural Alaska Native Districts for the following reasons: (1) the FNSB had excess population to give, (just under half an ideal house district or approximately 8,700 people); (2) Fairbanks had some historical economic, cultural and social ties to rural Alaska; (3) its geographic location made it relatively proximate to the rural districts and; (4) the FNSB had areas which historically tended to vote for Democrats.[14]

Since the Board exported some of the excess population out of the FNSB into House District 38,[15] there was less population in the Fairbanks area, so the Board decided to move the Eielson population up to Fairbanks instead of combining it with population from the Mat-su which allowed the Board to create five districts wholly within the FNSB.

The Board argues that there is evidence in the Board record to explain the addition of the area. The Board argues that Board Member Holm used natural boundaries to create districts that were as near as practicable to the ideal district size. The Board argues that a census block view of the boundary between House District 1 and House

[14] Dr. Handley advised the Board that if urban, non-Alaska Native population had to be added to rural Alaska Native districts, that urban non-Alaska Native population should be from areas that tend to vote Democratic. Dr. Handley explained this was important because the Alaska Natives' preferred political party is the Democratic party and therefore adding Democratic-voting, non-Alaska Native population would enhance the effectiveness of their district not only because Alaska Natives tend to vote Democratic, but also due to an expected increase in white cross-over vote.

[15] House District 38 must necessarily be adjusted if the Board has to redraw House Districts 1, 2, and 37.

District 3 shows that House District 1 comes slightly over to the right[16] to grab the population from the only adjacent area within the boundaries of the City of Fairbanks.[17]

The Board also argues that the Plaintiffs' conspiracy theory[18] that Board Member Hold mistakenly thought that Representative Kawasaki lived in the "appendage" is false. The Board contends that Mr. Holm did in fact know where Representative Kawasaki lived when he drew the Fairbanks Districts.[19]

The Board additionally argues the Plaintiffs admit that House District 1 is mathematically relatively compact and is more compact than the alternative corresponding district in the Modified RIGHTS Demonstrative Plan.

House District 2

House District 2 is an elongated district that follows the Richardson Highway corridor from the Fairbanks City limits southeasterly to Badger Road, North Pole, Moose Creek, and Eielson AFB areas.

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[16] The Board corrected itself at oral argument and confirmed that it meant to say move to the left to grab population.

[17] Mr. Holm stated the following in discussions with the Board, "I mean it's makes sense to me to have like 9 [Proclamation House District 1], it makes sense to have it between the slough and all of downtown Fairbanks. And then it goes to the Tanana River. So it's the slough and - - to the Tanana River and it's all the way to the airport, it ties in with the airport there. And 10 [Proclamation House District 3 didn't have enough people on the right so we had to go past Wainwright and go over and take some people out of 11 because we had excess people in 11.

[18] The Board objects to the Plaintiffs' arguments of gerrymandering and ask that they be stricken form the record as they were not raised in the complaint. The Plaintiffs argue that their arguments do not allege partisan gerrymandering per se. There is not evidence in the record to find that partisan gerrymandering has occurred. The Plaintiffs arguments are merely that: argument.

[19] The Board argues Board Member Holm identified Proclamation House District 4 (which was House District 9) as "Kawasaki's District", which proves Board Member Holm knew at the time that Representative Kawasaki did not live in the alleged "appendage."

The Plaintiffs argue House District 2 is not compact under the Reock Test.[20] The Plaintiffs also argue that House District 2 is one large corridor that connects three major population areas: Badger, North Pole, and Eielson/Salcha and at the same time divides these population areas among four districts (1, 2, 3 and 6).[21] The Plaintiffs argue that this is an odd shape, which the *Hickel Court* held to be indicative of gerrymandering. The Plaintiffs additionally argue that narrow highway corridor districts are indicative of gerrymandering and that the Richardson Highway Corridor District runs for 40 miles and is about 1/35th the population.[22] The Plaintiffs contend that there is no justification for this non-compactness.

The Board contends that House District 2 was designed to accomplish the legitimate goals of redistricting- that of equal population distribution and socio-economic integration. The Board argues that the type of corridor districts Alaska courts are concerned with are corridors of land that extend to include a populated area but not the less populated area around it.[23] The Board also argues that there is not a single shred of

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[20] House District 2 scored .19, which is less than the Proclamation Plan mean of .37. The Plaintiffs also argue that the Modified RIGHTS plan is more compact. The Modified RIGHTS Plan divides the area in question into two districts: House District 5 Eielson (scoring .32) and House District 6 North Pole Badger (scoring .53). The court notes the Modified RIGHTS Plan is one of many private plans submitted to the Board during the redistricting process. The court also notes that many of these plans went through several drafts. The court is aware that the Modified Rights Plan was altered to better compare it to the Board's Plan and that the modified version is entitled the Demonstrative Plan. The court refers to both versions of the plan as the Modified RIGHTS plan.

[21] The Board argued at oral argument that the population of the FNSB was socio-economically integrated by law and therefore, it did not have to worry about splitting communities with in it- such as Badger, North Pole, Eielson and Salcha.

[22] The Plaintiffs compare this to the North Carolina 12th Congressional District which followed the I-85 Highway corridor for 160 miles in *Shaw v. Reno*, 509 U.S. 630 (1993).

[23] *Hickel v. Southeast Conference*, 846 P.2d 38, 45-46 (Alaska, 1992).

evidence supporting the argument that the configuration of House District 2 is partisan in nature.

The Board argues that House District 2 largely consists of North Pole and Eielson Air Force Base because "many of the people that live in North Pole are retired military" and "there's a real close tie between Eielson Air Force Base and North Pole, that's where the people that don't live on Base live."[24] Mr. Holm did not include land that is farmland because he believed the farmers had more in common with the extensive population in House District 6[25] and it was not possible to stretch the boundary of House District 2 towards House District 4 because he needed the population for House District 4.[26]

The Plaintiffs argue that the shifting of farmers argument does not explain why the district slices through residential areas in the Persinger Drive, Nordale Road, Repp Road Maule Lane, and Nelson Road areas, which apportioned population between House Districts 1, 2 and 3 and had nothing to with House District 6.

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[24] ARB00003039-ARB00003040

[25] ARB00003040-ARB00003043.

[26] ARB00003045; ARB00003050; Bickford Aff at Para 6.

House District 37

House District 37 includes Bethel, the Kuskokwim delta, Nunivak Island, Saint Matthew Island, the Pribilof Islands, and all the western Aleutian Islands.

The Plaintiffs argue House District 37 fails under the Reock Test, scoring a .00, meaning that House District 37 lacks any compactness whatsoever.[27]

The Plaintiffs argue that House District 37 is non-compact because it divides the geographic and cultural unity of the Aleutians by combing the western Aleutians with Bethel-area communities hundreds of miles north on the other side of House District 36. The Plaintiffs point out that House District 37 expanses nearly 800 miles over the Bering Sea between Nunivak Island and Attu and expanses 500 miles between the Kuskokwim delta and Unalaska.[28] The Plaintiffs also point out that this is not the first time the redistricting plan has looked to do strange things with the Aleutians to solve districting problems, as this approach was used in the 1990 redistricting process and found to have violated the Alaska Constitution due to lack of contiguity in *Hickel*.[29]

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[27] The Board points out that the Modified RIGHTS Plan House District 37 also scored a zero on the Reock Test. The Board also argues that of the eight mathematical tests, Proclamation House District 37 scored higher than the Modified RIGHTS Plan House District 37 in three of the tests- the Schwartzberg, Perimeter and Ehrenberg Tests. The districts also scored the exact same score in three of the tests- the Reock, the Population Polygon and Population Circle Tests.

[28] Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain some amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration. *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska,1992).

[29] The Plaintiffs also filed a separate motion for partial summary judgment that House District 37 violates the contiguity requirement of the Alaska Constitution on 5 December 2011.

The Plaintiffs also argue that more compact alternatives are available as Board Options 1 and 2 of House District 37 are more compact. Plaintiffs argue Board Options 1 and 2 drew a district that was contiguous by land which includes all the Aleutians, the Alaska Peninsula and most of the Bristol Bay Region. The Plaintiffs also note that the Modified RIGHTS Plan followed a similar structure. The Plaintiffs argue that there is no justification for this non-compactness, including the Voting Rights Act.[30]

The Board argues that House District 37 is the extreme example of Alaska's unique and irregular geography. The Board contends this is exactly why the standard is "relative compactness" due to the Board's responsibility to comply with the often conflicting federal and state law. The Board argues that House District 37 contains the world's longest archipelago that stretches more than 1,000 miles so it is simply impossible to create a perfect circle due to this geographical anomaly.

The Board argues *Hickel* did not address the issue of compactness when discussing the split of the Aleutian Chain. The Board also argues that the word "corridors" refer to land and not "open sea" and the Alaska Supreme Court has only addressed "open sea" with respect to contiguity and not compactness. The Board argues that they were required to split the Aleutian Chain in order to comply with the Voting Rights Act. The Board argues the goal was to increase the Alaska Native VAP in House

[30] Plaintiffs argue that there is no Voting Rights Act necessity that would require the splitting of the Aleutians. According to Dr. Handley, Benchmark House District 37, which encompasses the Aleutian Islands and portion of the Bristol Bay Region presents a specific analysis. Benchmark House District 37 has consistently elected minority-preferred candidates despite being less than 41% Alaska Native VAP because most of the election contests were not racially polarized. The Modified RIGHTS Plan House District 37 has a Native VAP of 46%.

District 36 so the Alaska Peninsula could be paired with Kodiak to form an effective Senate district. The Board also notes that other private plans also split the Aleutians.[31]

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Compactness in terms of redistricting has been defined by the Alaska Supreme Court as follows: "'Compact' in the sense used here means having a small perimeter in relation to the area encompassed."[32] "'Compact districting should not yield 'bizarre designs'."[33] The compactness inquiry looks to the shape of a district, "Odd-shaped districts may well be the natural result of Alaska's irregular geometry. However, "corridor" 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 redistricting."[34] The

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[31] Including the Modified RIGHTS Plan and the Fairbanks North Star Borough.

[32] *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[33] *Davenport v. Apportionment Comm'n of New Jersey*, 304 A.2d 736, 743 (N.J.Super.Ct.App.Div.1973), quoted in *Carpenter v. Hammond*, 667 P.2d 1204, 1218-19 (Alaska, 1983). (Matthews, J., concurring).

[34] *Hickel v. Southeast Conference*, 846 P.2d 38, 45-46 (Alaska, 1992). The Board argues the holding in the 2001 Redistricting Case minimizes the concern for an appendage in an urban area while maximizing the

court looks to the "relative compactness of proposed and possible districts in determining whether a district is sufficiently compact."[35]

The court previously addressed a compactness issue in this case and again reviews some of the general arguments by the parties that had previously been addressed by the court.

D. Mathematical Tests

The court notes that there are eight possible tests to determine compactness. The Plaintiffs argue that the Reock Test is the best test for Alaska because it compares districts to circles and – quoting the Alaska Supreme Court - "The most compact shape is a circle."[36] The Board argues that the appropriate test in Alaska is a visual one and points out that there are problems in using the eight compactness tests. The court noted in its previous order, "The court does not rule on whether a visual test or mathematical test is best for Alaska, as it is not necessary to decide under this plan. The court found Judge Rindner's discussion on the two methods informative and notes that historically Alaska has relied on the visual test, but this is not to say that mathematical compactness tests could not be helpful in the future."

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emphasis on minimal population deviation. The *2001 Redistricting Case* neither lessens the constitutional requirement of compactness, nor automatically justifies an appendage punitively based on population needs. The court thus closely scrutinizes the appendage.

[35] *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

[36] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1361 n. 13 (Alaska, 1987), quoting *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

The court notes that there are problems in using the mathematical tests to determine compactness in the current districts in question. The Plaintiffs argue that House District 1 is compact under the Reock Test. With the best score being 1.0, House District 1 scored a .45, which is more compact than the entire Proclamation Plan mean, which is .37. House District 1 is also more mathematically compact than the corresponding district in the Modified RIGHTS Demonstrative Plan. Yet, the Plaintiffs still argue that House District 1 is still not compact due to an appendage.

The Plaintiffs argue House District 2 is not compact under the Reock Test, scoring .19, which is less than the Proclamation Plan mean of .37. The Plaintiffs also argue that the Modified RIGHTS plan[37] is more compact. The Modified RIGHTS Plan divides the area in question into two districts: House District 5 Eielson (scoring .32) and House District 6 North Pole Badger (scoring .53). The Board points out that the Proclamation Plan House District 2 scored higher in seven of the eight mathematical tests than Modified RIGHTS Plan House District 5. The Proclamation Plan House District 2 scored higher than the Modified RIGHTS Plan House District 6 in one test and scored within the standard deviation of the Proclamation Plan in 4 others.

The Riley/Dearborn Plaintiffs argue House District 37 fails under the Reock Test, scoring a .00, meaning that House District 37 lacks any compactness whatsoever. The Board points out that the Modified RIGHTS Plan House District 37 also scored a zero on

[37] The Modified RIGHTS Plan is one of many private plans submitted to the Board during the redistricting process. The court notes that many of these plans went through several drafts. The court is aware that the Modified Rights Plan was altered to better compare it to the Board's Plan and that the modified version is entitled the Demonstrative Plan. The court refers to both versions of the plan as the Modified RIGHTS plan.

the Reock Test. The Board also argues that of the eight mathematical tests, Proclamation House District 37 scored higher than the Modified House District 37 in three of the tests, the Schwartzberg, Perimeter and Ehrenberg Test. The districts also scored the exact same score in three of the tests, the Reock, the Population Polygon and Population Circle Tests.

The court notes that it will consider the mathematical tests to the extent they are helpful to the court, but the above summary shows they are largely unhelpful. House District 1 scored relatively well under the Reock Test and better than the Modified RIGHTS Plan, yet the Plaintiffs argue that it is still not compact. House District 2 is being compared to two separate districts under the Modified RIGHTS Plan which creates comparative problems in the first place, with the Proclamation Plan scoring higher in 7 tests when compared to 1 district and better than 1 test and equal to four when compared to the other district. House District 37 scored a zero under the Reock Test, but so did the Modified RIGHTS Plan.

E. Relative Compactness & Other Tests

The parties have also made arguments about the standard of compactness. The court notes that the correct standard is relative compactness. "Since it is not possible to divide Alaska into circles, it is obvious that the constitution calls only for relative compactness."[38] While it is appropriate to compare the Board's districts to proposed and possible districts when determining compactness, the most compact district does not

[38] *Carpenter v. Hammond*, 667 P.2d 1204, 1218 (Alaska, 1983). (Matthews, J., concurring).

automatically trump another relatively compact district. There are other concerns to take into account, particularly the Voting Rights Act.

F. Voting Rights Act

The Board uses the Voting Rights Act as a justification for the configuration of House District 1 and House District 37. The Plaintiffs argue this is absurd with regard to House District 1, as it is not an "effective" or "influence" district and the closest "effective district" is House District 38 which is separated by at least one other district. The Board argues that population from the Ester and Goldstream areas had to be added to House District 38 in order to increase the Alaska Native VAP, affecting House District 1.

The Plaintiffs argue that House District 37 can be drawn in a more compact manner, which will also increase the Native Voting Strength. They also point to the fact that Dr. Handley is unable to say what the minimum level of Alaska Native VAP that would be effective in that area. The Board argues the goal was to increase the Alaska Native VAP in House District 36 so the Alaska Peninsula could be paired with Kodiak to form an effective Senate district.[39]

House District 1

As the court noted earlier, it finds the allegations regarding Mr. Holm's political motivation speculative and unpersuasive. That, however, does not end the matter. The debate over compactness, particularly compactness in an urban area, is difficult because sufficient population generally exists to meet quotidian requirements. In the *Hickel* era

[39] Since the court ultimately holds that House Districts 1 and 37 are not compact, the burden is on the Board to show that they are justified by the Voting Rights Act.

the Alaska Supreme Court found the "Oosik appendage" offensive; that district was in the Wasilla area. More recently, in the 2001 redistricting case, the Alaska Supreme Court did focus on population deviation in the Anchorage bowl. However, as noted above, the 2001 redistricting case does not eliminate scrutiny of such appendages, much less minimize scrutiny. It is obvious that compact districts are more easily achieved in urban areas precisely because of the available population. So focus on an appendage, rather than an esoteric exercise of the relative values of homoousian versus homoiousian doctrines, is a real and practical analysis impacting voting districts.

The court finds that House District 1 is not compact. House District 1 does have an appendage on the far western tip. This appendage goes so far as to extend beyond the Fairbanks City limits. While the Board argues that it was drawn this way in order to achieve equal population, the court does not find this argument persuasive. Rather the court finds this finger is more akin to the dread "Oosik district." The court notes that while it is acceptable that the district is different from Board Options 1 and 2, the court still concludes that western appendage makes House District 1 non-compact.

House District 2

The court finds that Board member Holm's effort to combine the Eielson Base with the North Pole resulted in an odd, non-compact shape. Although the "corridor" aspect of the district along the Richardson Highway may not have the same concerns of highway districts in the contiguous states, it is troubling. But perhaps most troubling is the large incursion into Proclamation House District 1 that the Board found necessary in order to join Eielson Air Force Base with North Pole, not for Voting Rights Act

requirements, but for socio-economic reasons. This is even more troublesome given the fact that areas traditionally part of urban Fairbanks are separated from Fairbanks and areas, such as around Badger Road, are separated from the rest of the North Pole community. Separating the Eielson farm projects from House District 2 magnifies the lack of compactness by creating a large U shape in House District 6 that engulfs the southern half of House District 2.

The court finds that House District 2 is not compact.

House District 37

The court notes that House District 37 is not compact for many of the same reasons why it is not contiguous. House District 37 divides the geographic and cultural unity of the Aleutians by combing the western Aleutians with Bethel-area communities hundreds of miles north. House District 37 expanses nearly 800 miles over the Bering Sea between Nunivak Island and Attu and expanses 500 miles between the Kuskokwim delta and Unalaska.

The court finds that House District 37 is not compact.

G. Conclusion

Based on the foregoing facts and authorities the court finds as follows:

1. Proclamation House Districts 1, 2, and 37 are not compact under the Alaska Constitution.

2. No Voting Right Act justification for deviation from the compactness requirement has been asserted for House District 2.

3. The burden is on the Board to adduce evidence at trial to justify deviation from the constitutional requirement of compactness for House Districts 1 and 37.

4. A global order will issue next week summarizing the impact for trial of the orders on contiguity and compactness.

DATED at Fairbanks, Alaska, this 23rd of December 2011.

Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.

I certify that a copy of the foregoing was distributed via:
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Clerk

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

_____)

Case No. 4FA-11-2209CI

Order on the Contiguity of House District 37

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for partial summary judgment on 5 December 2011 that House District 37 is not contiguous under the Alaska Constitution. The Board opposed the motion on 13 December 2011. The Plaintiffs replied on 15 December 2011. Oral argument, requested by the Plaintiffs, was held on 22 December 2011.

B. Preliminary Comments on the Case

Interestingly the Aleutians were "settled"[1] from east to west,[2] specifically from the Siberian coast. From a North American perspective, the Aleutian Islands stretch westward from the Alaska Peninsula towards the Kamchatka Peninsula, demarking the

[1] "Settle" is used in this context solely to describe western contact with the Aleutian Islands. It in no wise suggests the people who inhabited this land for thousands of years were "discovered" by the Russians.

[2] "East" and "west" become confused where the 180th degree of longitude intersects the subject area.

Bering Sea and the Gulf of Alaska. The uniqueness of the area is reflected in the observations of early Russians:

> As you sail eastward from the shallow, often ice-locked, reef-enclosed Sea of Okhotsk on the Siberian coast and first sight the Aleutian Islands you are struck at once by the fantastic desolation of the seascape. The westernmost Aleutians rise from the restless, repellant, slate-gray seas like crags in Doré etchings, twisted and tortured beyond belief in testimony of their violent volcanic origin, and warning the mariner to keep his distance from their concealed sawlike teeth, white with the droppings of the millions of seabirds that forever wheel and cry in the surrounding mists like lost children. You realized then, that this is of a pattern with the Asiatic coast; Japan has its earthquakes and Kamchatka its smoking peaks, but here the process of formation seems to go on still.
>
> Then, in spite of the fact that the drift ice from the Arctic lies but a few miles to the north, you notice the warmth. On one side of the Aleutians lies the Bering Sea, on the other the Pacific – or- rather *Kuro Siwa*, the Japan Current. The Aleutians are a gigantic boom that keeps them apart. The Current sweeps up from near the Equator on a slow, cosmic swirl past the Japanese Empire, turns along these Aleutians and warms them, turns again along the mainland to California, where it makes it last turn to gather warmth to carry north.
>
> . . .
>
> As you continue to sail eastward, the impression of terrible newness passes somewhat as larger and larger islands appear with green and russet lichens covering the highlands, which soon assume the aspect of mountains. Then, the forefront of Alaska Peninsula, the beginning of the mainland, comes slowly into view. Here are some of the most awesome heights of the world, mountains and glaciers fronting the sea and giving way to gigantic bays and inlets, fringed by incredible forests and filled with the thunder of cataracts that forever drain the snows fields in the distance. However, the familiar fogs and mists remain, and the rain continues to fall.[3]

The above quote certainly is the most beautiful piece of prose to grace the several orders in this case. It is quoted not only for its beauty, but also to establish a point of

[3] *Lord of Alaska*, Hector Chevigny, Foreward (Viking Press, 1943).

reference for the analysis that follows. The point of the motion is whether House District 37 passes or fails constitutional muster under the single issue of contiguity.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[4] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[5] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists."[6] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[7]

Proclamation House District 37 separates the Western Aleutians from the Eastern Aleutians. It also severs the Western Aleutians from its ancient and intimate connection with a northern rain forest that continues past a barren glacier region on the mainland, from the Bay of Yakutat south to the Columbia River. Yet the Western Aleutians are included in a House District with Bethel on the Kuskokwim delta. The Aleutian Islands

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[4] Alaska R. Civ. P. 56.

[5] *Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1222 (Alaska 1992) (quoting *Sea Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 116 (Alaska 1990)).

[6] *Philbin v. Matanuska–Susitna Borough*, 991 P.2d 1263, 1265–66 (Alaska 1999) (quotations omitted).

[7] *Lord v. Wilcox*, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See Jennings v. State*, 566 P.2d 1304, 1309-10 (Alaska 1977).

are a rare geographic instance where the Alaska Supreme Court took *sua sponte* notice of contiguity.[8] For reasons noted below, Proclamation House District 37 does not pass Alaska constitutional muster regarding contiguity. The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[9]

C. General Arguments

The Plaintiffs contend House District 37 is not contiguous under the Alaska Constitution.[10] The Board argues that House District 37 is contiguous under the Alaska Constitution. The Board also argues the Voting Rights Act required it to split the Aleutian Chain.

D. Standard of Review

Groh v. Egan[11] established, and *Carpenter*[12] reaffirmed, the standard of review that we apply in exercising our jurisdiction to review reapportionment decisions under Alaska Constitution article VI, section 11:[13]

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[8] *Hickel v. Southeast Conference*, 846 P.2d 38, 54, 61 (Alaska, 1992).

[9] Alaska R. Civ. P. 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

[10] The court notes that Plaintiffs also filed a motion for partial summary judgment that House District 37 is not compact on 5 December 2011.

[11] *Groh v. Egan*, 526 P.2d 863 (Alaska, 1974).

[12] *Carpenter v. Hammond*, 667 P.2d 1204 (Alaska, 1983).

[13] Alaska Const. art. VI, § 11, provides in pertinent part: Application to compel correction of any error in redistricting must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

> It cannot be said that what we may deem to be an unwise choice of any particular provision of a reapportionment plan from among several reasonable and constitutional alternatives constitutes 'error' which would invoke the jurisdiction of the courts.
>
> We view a plan promulgated under the constitutional authorization of the governor to reapportion the legislature in the same light as we would a regulation adopted under a delegation of authority from the legislature to an administrative agency to formulate policy and promulgate regulations. We have stated that we shall review such regulation first to insure that the agency has not exceeded the power delegated to it, and second to determine whether the regulation is reasonable and not arbitrary. Of course, additionally, we always have authority to review the constitutionality of the action taken, but we have stated that a court may not substitute its judgment as to the sagacity of a regulation for that of the administrative agency, and that the wisdom of a given regulation is not a subject for review.
>
> In short, our review is meant to ensure that the reapportionment plan is not unreasonable and is constitutional under article VI, section 6 of Alaska's constitution.[14]

E. Contiguity

The mandate for redistricting of election districts is set forth in Article VI, Section 6 of the Alaska Constitution, which states:

> The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article. Each house district shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as

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[14] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1358 (Alaska, 1987). The Plaintiffs argue that because this is a constitutional issue, the court should exercise its independent judgment rather than deferring to the Board. The court finds that this is a misreading of the standard. The court determines the constitutionality of the districts, but does not get to substitute its independent judgment for that of the Board. As a practical matter this means the court does *not* redraw the offending district. Rather, if the Supreme Court agrees or finds some proclamation districts to be unconstitutional, then the matter is remanded to the Board to draw districts consistent with the court's findings. *See* Judge Rindner's 1 February 2002 Order.

practicable of two contiguous house districts. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

Contiguity has been defined by the Alaska Supreme Court as follows:

> Contiguous territory is territory which is bordering or touching. As one commentator has noted, "[a] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (i.e., the district is not divided into two or more discrete pieces)."[15] Absolute contiguity of land masses is impossible in Alaska, considering her numerous archipelagos. Accordingly, a contiguous district may contain *some* [emphasis added] amount of open sea. However, the potential to include open sea in an election district is not without limits. If it were, then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim. To avoid this result, the constitution provides the additional requirements of compactness and socio-economic integration.[16]

The Alaska Supreme Court previously addressed a plan that split the Aleutian Islands in the 1990 redistricting process. The 1990 plan separated Adak, Shemya and Attu from the rest of the Aleutian Islands and paired it with the Wade Hampton Census area.[17] The Alaska Supreme Court held,

> The Board's plan divides the Aleutian Islands between two districts. The eastern Aleutians are in District 39, and the western Aleutians in District 37. On its face this severance violates the contiguous territory requirement of article VI, section six of the Alaska Constitution.[18] Although the parties did not raise this issue, the separation of the Aleutian Islands is so plainly erroneous that we address the issue *sua sponte*. Thus, in exercise of our authority under article IV, section two of the Alaska

[15] Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L.Rev. 77, 84 (1985).

[16] *Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska,1992).

[17] *Id.* at 70.

[18] The Alaska Supreme Court in their order of remand, noted that the Aleutians must be joined together in one district unless their separation is mandated by federal law. Since the federal law did not mandate their separation, the contiguous territory requirement of the Alaska Constitution controlled.

Constitution, we hold that the separation of the Aleutian Islands into two districts violates article VI, section six of the Alaska Constitution.[19]

The Alaska Supreme Court ordered: "Thus unless the severance of the Western Aleutians from the Eastern Aleutians is mandated by federal law, the areas must be joined in one district."[20]

The plan was remanded back to the trial court, who appointed three masters to redraw the plan based on the Supreme Court's mandates and guidelines.[21] The masters rejoined Adak with Attu, since it was possible to keep the Aleutians together and still comply with the Voting Rights Act.[22]

F. House District 37

House District 37 includes Bethel, the Kuskokwim delta, Nunivak Island, Saint Matthew Island, the Pribilof Islands, and all the western Aleutian Islands.

The Plaintiffs argue House District 37 violates the contiguity requirement in two ways. First, the Proclamation Plan separates the Aleutian Islands between two districts. House District 37 includes all islands of the Aleutian Chain west of Unimak Pass and House District 36 includes all islands of the Aleutian Chain east of Unimak Pass. Second, there is no contiguity via land between the western Aleutians and the remainder of the district. Rather, the contiguity between the two parts of the district is hundreds of

[19] *Hickel v. Southeast Conference*, 846 P.2d 38, 54 (Alaska, 1992).

[20] *Id.* at 38, 61.

[21] *Id.* at 38, 62.

[22] *Id.* at 38, 71.

miles of open water across the Bering Sea. The Plaintiffs point out that the *Hickel Court* cautioned, "The potential to include open sea in an election district is not without limits."[23] The court agrees there is a limit to the inclusion of open sea in a district. Here Bethel is the commercial, governmental, and political center of the proposed district. Without gainsaying its vibrant connection to the sea by the Kuskokwim River, the fact is Bethel is over 1,000 miles away from Attu. By any measure, this is more than "some amount of open sea."

The Board argues the split of the Aleutians is necessary to comply with the Voting Rights Act. The Board argues it took a "hard look" at other options that did not split the Aleutian Chain. The Board points to two alternative plans it considered, the "TB Plan"[24] and the "PAME Plan"[25] that would have kept the Aleutian Chain together, but failed for other reasons.[26] The Board states it ultimately split the Aleutian Chain in order

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[23] *Id.* at 54.

[24] The "TB Plan" changed the historical makeup of House District 40 and divided the North Slope Borough and the Northwest Arctic Borough into separate districts. This plan was ultimately abandoned by the Board due to concerns raised by the Alaska Native community that some of the districts, particularly the newly configured North Slope district would not offer the ability to elect Alaska Native-preferred candidates of choice due to the Alaska Native VAP percentage, the lack of registered Alaska Native voters and low voter turnout in the area. The court has already determined that the Board may take into account whether minority incumbents are paired with other incumbents under the Voting Rights Act. *See* the court's 12 December 2011 Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness.

[25] The "PAME" Plan was rejected due to concerns about the inclusion of a Senate District that combined Kodiak with Bethel. The major problem with this configuration is that it paired Alaska Native incumbent Senator Lyman Hoffman with the current Senate president Gary Stevens. The court has already determined that the DOJ looks at whether the Board took into account comments from the Alaska Native community when drawing the plan. *See* the Court's 12 December 2011 Order Denying Petersburg's Motion for Partial Summary Judgment on Compactness and Granting the Board's Cross Motion for Summary Judgment on Compactness.

[26] The court notes that Board Options 1 and 2 do not split the Aleutian Chain.

to avoid a Bethel/Kodiak Senate District while at the same time creating a house district in Southwest with an Alaska Native VAP percentage high enough to exceed the VAP of Senate District C in the Benchmark Plan and maintain an "effective" senate district. The Board argues that it did not come up with the plan of splitting the Aleutians on their own and that a number of private party plans also did so.[27]

The Board finally argues that Alaska's unique geography is at play, as the Aleutian Islands occupy an area of 6,821 square miles and extend westward from the Alaska Peninsula about 1,200 miles. The area also includes the islands of Saint Paul and Saint George, which are essentially "suspended" almost halfway between the tip of the Aleutian Chain and the closest section of the mainland, which the Board states it included in House District 37 for the specific purpose of maintaining contiguity. The Board ultimately argues that House District 37 is contiguous.[28]

The Alaska Supreme Court held without qualification in *Hickel* that the separation of the Aleutian Chain is so "plainly erroneous" that it must be joined unless the split is mandated by federal law. While contiguity by water is accepted in Alaska, the court agrees with the Plaintiffs that this pushes the limits. While the court agrees with the

[27] The Board points out that the FNSB, who raised the issue in their complaint, also submitted a plan that split the Aleutian Chain. The RIGHTS Coalition also submitted a plan with an Aleutian split. There was also a plan entitled the Begich Split Aleutian Plan.

[28] The Board also requested summary judgment, noting, "While the dispositive motion deadline in this case has passed, under Rule 56(c) summary judgment is can be granted against the 'moving party' without the need for a cross-motion 'where appropriate'."

Board that Alaska's unique geography is an issue here, this unique geography is not new and this court cannot ignore Alaska Supreme Court precedent.[29]

However, the court recognizes that it is possible that a split in the Aleutian Chain is required by the Federal Voting Rights Act under the current population statistics. The Board has cited factors that made it particularly hard to comply with the Voting Rights Act.[30] Those factors may not have been at play twenty years ago when *Hickel* was decided. The court also understands that the Board needed to achieve certain Alaska Native population numbers in order to comply with the Voting Rights Act.[31] The Board also is allowed to look at other factors for preclearance under the Voting Rights Act, such as the pairing of Alaska Native incumbents and the extent the Board took into account input from the Alaska Native community. The court also notes that the Board points to other private party plans that also split the Aleutian Islands, further demonstrating that an Aleutian Chain split might be the only solution.

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[29] The Board agued at oral argument that a Kodiak/Southeast Senate Pairing was allowed in *Hickel*, however, there is no requirement that senate districts be contiguous. *Hickel v. Southeast Conference*, 846 P.2d 38, 73 (Alaska, 1992).

[30] The Board cited the following factors that made it particularly difficult to comply with the Voting Rights Act: (1) under-population of Benchmark Alaska Native Districts; (2) lack of Alaska Native population concentrations adjacent to the Benchmark Alaska Native Districts and (3) the inability to create minority districts in urban Alaska.

[31] The court is concerned with the inference by the Plaintiffs that the Board's Voting Rights Act expert cannot determine what minimum percentage Alaska Native VAP is required to maintain District 37 as an "effective district."

The court is cognizant that while it looks at the constitutionality of each district individually, each district impacts the next. House District 37 is an "effective district"[32] under the Proclamation Plan. It is also directly underneath House District 38, which is also an "effective district" under the Proclamation Plan. The court has previously ruled that District 38 is not socio-economically integrated, and the Board will have the burden of proving at trial that its composition was required in order to comply with the Voting Rights Act.[33]

Conclusion

The court concludes that House District 37 is not contiguous under the Alaska Constitution. The burden will be on the Board at trial to show that the geographic configuration of House District 37 is necessary under the Voting Rights Act. The Plaintiff's Motion for Partial Summary Judgment that House District 37 is not contiguous is GRANTED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.

Michael P. McConahy
Superior Court Judge

[32] "Effective Districts" are districts that provide minority voters with the ability to elect candidates of their choice to office.

[33] House District 38 also is relatively close to House Districts 1 and 2 which have also been challenged by the Plaintiffs as being non-compact.

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

_____)

Case No. 4FA-11-2209CI

Order on the Plaintiffs' Motion for Partial Summary Judgment/Law of the Case: Benchmark Standard

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for summary judgment/law of the case: Benchmark Standard. The Board filed its opposition on 16 December 2011. The Plaintiffs replied on 21 December 2011. Oral argument, requested by the Plaintiffs, was held on 22 December 2011.

B. General Arguments

The Plaintiffs seek summary judgment that the benchmark standard was no more than four "effective districts"[1] and that Section 5 under the Voting Rights Act does not require the protection of Native Influence Districts.[2]

The Board argues that the benchmark standard was five "effective districts."

[1] "Effective districts" are districts that give Alaska Natives the ability to elect the candidate of their choice.

[2] Since the court ultimately concludes that the Plaintiffs have not shown that the benchmark for effective house districts is inaccurate, it does not address the issue of influence districts.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[3] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[4] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists."[5] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[6]

C. Benchmark Standard

Dr. Handley, the Board's Voting Rights Act expert, ultimately advised the Board that the benchmark was five effective house districts, one influence house district and three effective senate districts. In a 2010 election, one of the five effective house districts, Benchmark House District 6, did not elect a native preferred candidate.[7] At times during the redistricting process Dr. Handley referred to Benchmark House District 6 as an "equal opportunity district,"

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[3] Alaska R. Civ. P. 56.

[4] *Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1222 (Alaska 1992) (quoting *Sea Lion Corp. v. Air Logistics of Alaska, 787 P.2d 109, 116 (Alaska 1990)).*

[5] *Philbin v. Matanuska–Susitna Borough,* 991 P.2d 1263, 1265–66 (Alaska 1999) (internal quotations omitted).

[6] *Lord v. Wilcox*, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing *State, Dep't of Highways v. Green,* 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See Jennings v. State,* 566 P.2d 1304, 1309-10 (Alaska 1977).

[7] The performance of a district is measured by looking at all of the elections throughout the ten year span. The non-performance of the district in one election does not necessaily make a district ultimately ineffective.

"influence district," and as "not a particularly effective district now." Yet, Dr. Handley ultimately concluded that Benchmark House District 6 was effective.

Both parties agree that referring to a district as "equal opportunity" is Section 2 language and does not apply to Section 5 under the Voting Rights Act. Both parties also agree that Dr. Handley used the wrong language and was ultimately corrected by someone from the Department of Justice.

However, the Plaintiffs argue that Dr. Handley's analysis is flawed and that she should have ultimately concluded that Benchmark House District 6 was not effective. The Board argues that Benchmark House District 6 was effective. Dr. Handley also stated in her deposition that someone from the Department of Justice also told her that the standard in Alaska was five effective house districts.[8] It is important to note that the Plaintiffs' expert, Dr. Arrington, also concluded that Benchmark House District 6 was effective.[9]

The court finds that the Plaintiffs have not shown that Benchmark House District 6 is not effective for Voting Rights Act purposes and further finds the Board utilized the correct number of effective districts. While Dr. Handley may have referred to the district in an incorrect way during her analysis, that does not prove that her conclusion is wrong. In fact her conclusion is

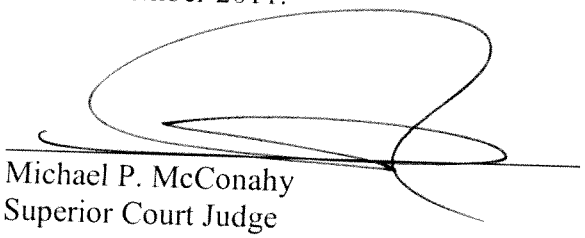
[8] Handley Depo. At 96:11-22. The court need not decide hearsay issues at this point. An expert may rely on hearsay evidence in forming an opinion that is not otherwise admissible. Evidence Rule 703; *Norris v. Gatts*, 738 P.2d 344 (Alaska,1987).

[9] The Plaintiffs ultimately argue that the experts "got it wrong" because their analysis does not take into account language differences and other factors, yet the Plaintiffs admit that this is not something that these experts normally analyze.

supported by another Voting Rights Act expert and there are no experts that support the Plaintiffs' argument.[10]

The Plaintiffs' Motion for Summary Judgment/Law of the Case: Benchmark Standard is DENIED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.



Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.

[10] The Plaintiffs also argued at oral argument that House District 37 is not effective because it is not a majority Native District. Yet, this district continues to perform as an effective district. The court notes this argument is also not supported by a Voting Rights Act expert and must also be rejected.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

_____)

Case No. 4FA-11-2209CI

Order on the Plaintiffs' Motion for Summary Judgment: Invalidity of House District 38

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for summary judgment: Invalidity of House District 38. The Board filed its opposition on 16 December 2011. The Plaintiffs replied on 21 December 2011. Oral argument, requested by the Plaintiffs, was held on 22 December 2011.

B. General Arguments

The Plaintiffs seek summary judgment that House District 38 is not justified by the Voting Rights Act. The Plaintiffs argue that the Board did not make adequate findings to justify House District 38. The Plaintiffs request the court remand the case back to the Board to make findings that would allow meaningful judicial review.

The Board contends that House District 38 is justified by the Voting Rights Act. The Board argues that it did make appropriate and legally sufficient findings in the Board Record and Proclamation Report that the Voting Rights Act required the configuration of House District 38.

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[1] In determining whether there is a genuine issue of material fact, all "reasonable inferences of fact from proffered materials must be drawn against the moving party ... and in favor of the non moving party."[2] "Once the moving party has established a prima facie case, the non-movant is required, in order to prevent the entry of summary judgment, to set forth specific facts showing that he could produce admissible evidence reasonably tending to dispute or contradict the movant's evidence, and thus demonstrate that a material issue of fact exists."[3] Mere assertions of fact in pleadings and memoranda cannot raise genuine issues of fact.[4]

C. Voting Rights Act

The court has already ruled that House District 38 is not socio-economically integrated.[5] The parties have already stipulated and the court has agreed that the Board has the burden of proving that the configuration of House District 38 was required by the Voting Rights Act.[6] Both parties have made conclusory statements that House District 38 either is or is not required by the Voting Rights Act. Neither party has proven their argument by specific facts or admissible evidence. There is clearly a genuine issue of material fact whether House District 38

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[1] Alaska R. Civ. P. 56.

[2] *Kiester v. Humana Hosp. Alaska, Inc.*, 843 P.2d 1219, 1222 (Alaska 1992) (quoting *Sea Lion Corp. v. Air Logistics of Alaska*, 787 P.2d 109, 116 (Alaska 1990)).

[3] *Philbin v. Matanuska–Susitna Borough*, 991 P.2d 1263, 1265–66 (Alaska 1999) (quotations omitted).

[4] *Lord v. Wilcox*, 813 P.2d 656, 658 n. 4 (Alaska 1991) (citing *State, Dep't of Highways v. Green*, 586 P.2d 595, 606 n. 32 (Alaska 1978)). Nor can unverified pleadings be relied on. *See Jennings v. State*, 566 P.2d 1304, 1309-10 (Alaska 1977).

[5] *See* the court's 25 October 2011 Order.

[6] *See* the court's 23 December 2011 Order.

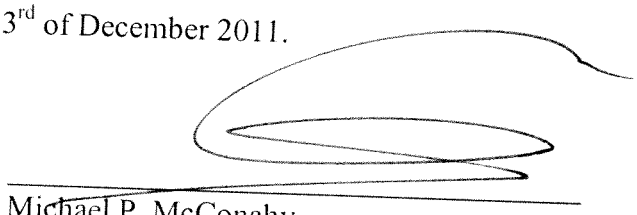
is required by the Voting Rights Act. This issue will proceed to trial. Summary Judgment is DENIED.

D. Findings by the Board

The Plaintiffs argue that the Board did not make adequate findings regarding House District 38. The Board argues that it did. There is clearly a genuine issue of material fact as to whether there are adequate findings to support the configuration of House District 38. If at trial the court finds that the Board did not make adequate findings, the court will have the option of remanding the case back to the Board to make adequate findings. However, as stated earlier, the burden is on the Board to prove that House District 38 is required by the Voting Rights Act. If the Board's findings are inadequate for judicial review, they will not have met their burden.

The Board's Motion for Summary Judgment: Invalidity of House District 38 is DENIED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.



Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

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_____)

Case No. 4FA-11-2209CI

Order on the Plaintiffs' Motion Summary Judgment: Invalid Process

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for summary judgment: invalid process. The Board filed its opposition on 16 December 2011. The Plaintiffs replied on 21 December 2011. Oral argument, requested by the Plaintiffs, was held on 22 December 2011.

The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[1]

B. General Arguments

The Plaintiffs contend that the 2011 Final Plan for the redistricting of Alaska's legislative districts adopted by the Board is invalid because the Board followed an invalid

[1] Alaska R. Civ. P. 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

process in developing the plan. The Plaintiffs ultimately argue that the Board did not attempt to draft a plan that complied with the Alaska Constitution prior to pursuing other alternatives. The Plaintiffs ask the court to remand the matter back to the Board to undertake the correct process that they argue is mandated by a footnote in *Hickel*.[2]

The Board does not deny that it started by drawing the minority districts, on the advice of their Voting Rights Act expert, Dr. Handley. The Board argues that the Plaintiffs take the footnote in *Hickel* out of context and argue that the language does not create a "mandate" that a certain methodology be followed. The Board also argues that it is free to adopt its own procedures. The Board additionally argues that the Board in *Hickel* was under a completely different timeline,[3] so even if the process were mandated, it is no longer good law given the shortened timeline under the 1998 amendments to Article VI, Section 10.[4]

The Plaintiffs rely on the following footnote from *Hickel* that the Board is required to look at the Alaska Constitution first,

> "Our conclusion underscores the error in the Board's methodology in reconciling the requirements of the Voting Rights Act with the requirements of the Alaska Constitution. The Board was advised to expect that any challenges to the reapportionment plan would come under the

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[2] The Plaintiffs also argued at oral argument that the Alaska redistricting cases always go to court because the Board always fails to start with the Alaska Constitution.

[3] As amended in 1998, Article VI, Section 10 of the Alaska Constitution required the Board to adopt a proposed plan or plans within thirty days of receiving the official census report, to then hold hearings on those proposed plans, and to adopt a final plan within ninety days of receiving the census reports. Former Article VI, Section 10 required the Board to adopt a proposed plan and submit it to the governor within ninety days of receiving census data; the governor then had an additional ninety days during which he could notify the Board's proposal and issue the final proclamation of redistricting. No public hearings were required. The Plaintiffs argue that the Board had time to start with the Alaska Constitution because they were able to create two board option plans.

[4] The Board also argued that other private groups drawing plans also started drawing the Alaska Native districts first.

> newly amended section 2 of the Voting Rights Act. Consequently, the Board accorded minority voting strength priority above other factors, including the requirements of article VI, section 6 of the Alaska Constitution. This methodology resulted in proposed district 3, a district which does not comply with the requirements of the Alaska Constitution. However, proposed district 3 is not required by the Voting Rights Act, either.
>
> Article VI, cl. 2 of the United States Constitution provides that "This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land...." This mandates that provisions of state law, including state constitutional law, are void if they conflict with federal law. To the extent that the requirements of article VI, section 6 of the Alaska Constitution are inconsistent with the Voting Rights Act, those requirements must give way. However, to the extent that those requirements are not inconsistent, they must be given effect. The Voting Rights Act need not be elevated in stature so that the requirements of the Alaska Constitution are unnecessarily compromised.
>
> The 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 agrees with the Board. The court does not find that the footnote in *Hickel* created a mandate or a claim for invalid process. The *Hickel Court* discussed the principal that even though the Federal Voting Rights Act ultimately trumps the Alaska Constitution when there is a conflict, the requirements under the Alaska Constitution may not be compromised unless it is actually required. The court has previously ruled that House District 38 violates the Alaska Constitution.[6] The burden is on the Board to show that the configuration of the district is required by the Voting Rights Act. If the Board

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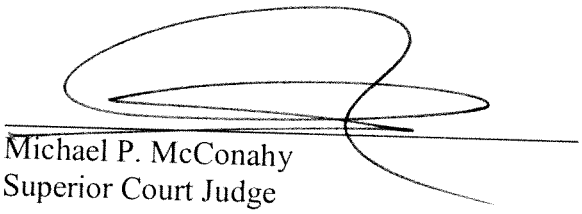
[5] *Hickel v. Southeast Conference*, 846 P.2d 38, 51 nt. 22 (Alaska, 1992).

[6] *See* the court's 25 October 2011 Order.

cannot prove that the Voting Rights Act required the configuration of House District 38, the plan will be remanded back to the Board. This is the exact same approach the *Hickel Court* and the *2001 Redistricting Court* used when they concluded that districts violated the Alaska Constitution. The court finds that the Plaintiffs request to remand the entire plan back to the Board to start over is impractical and unnecessary.

The Plaintiffs' Motion for Summary Judgment: Invalid Process is DENIED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.



Michael P. McConahy
Superior Court Judge

Notice Regarding Reconsideration

Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2011. If no order is issued by this court by the close of business on 6 January 2011 then any motion for reconsideration shall be deemed denied.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT AT FAIRBANKS

IN RE: 2011 REDISTRICTING CASES:)

)

)

Case No. 4FA-11-2209CI

Order Regarding the Law of the Case and the Splitting of the Excess Population of the Fairbanks North Star Borough

A. Motion Practice Background

The Riley/Dearborn Plaintiffs filed a motion for partial summary judgment[1] and the law of the case on 5 December 2011 that the Board split the excess population of the Fairbanks North Star Borough ("FNSB") between two districts, and therefore, the Board has the burden of proof to establish that such decisions are necessary for legitimate, non-discriminatory purposes. The Board filed its limited non-opposition on 16 December 2011. The Plaintiffs replied on 20 December 2011. Oral argument was held on 22 December 2011.

[1] While the Plaintiffs have used the words "summary judgment," the court agrees with the Board that this is a motion regarding the law of the case and has treated it as such.

The decision set forth below is based upon the evidence adduced by the parties in support of their respective positions as well as the extensive Board record required to be filed both with the trial and supreme court.[2]

B. General Arguments

The Plaintiffs contend that the Board split the excess population of the FNSB between two districts and therefore, the Board has the burden of proof to establish that such decisions are necessary for legitimate, non-discriminatory purposes. The Plaintiffs additionally argue that based on the court's previous ruling that House District 38 is not socio-economically integrated, the Board has the burden of proof to show a legitimate non-discriminatory reason for why House District 38 is not socio-economically integrated.[3]

The Board agrees that the burden of proof is on the Board to provide legitimate, non-discriminatory reasons for the splitting of the excess population of the FNSB between two house districts and the deviation from the socio-economic integration standard of the Alaska Constitution for House District 38.

C. Excess Population

The Alaska Supreme Court has addressed the issue of excess population of boroughs as follows:

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[2] *See* Alaska R. Civ. P. 90.8(d). A summary of the extensive Board Transcript will be incorporated into the post-trial findings.

[3] The Plaintiffs filed a motion for partial summary judgment that House District 38 is not socio-economically integrated. The court granted the motion in part on 25 October 2011.

> "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.[4] 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."[5]

Each district created by the Board must contain a population as near as practicable to the quotient obtained by dividing the population of the state by 40. The ideal district based upon the 2010 census consists of 17,555 residents. According to the U.S. Census Data, the FNSB has a population 97,581 residents. The Board's plan created five house districts (Districts 1-5) wholly within FNSB's boundaries and divided the excess population between two other districts (District 38 and 6).

In its report accompanying the proclamation, the Board stated the following with respect to District 38 and FNSB's excess population:

> "Compliance with the federal Voting Rights Act had ripple effects across the state. Population from rural areas had to be combined with population from urban areas to allow for the creation of Alaska Native districts. For example, in order to bring House District 38 to within constitutional one-person one-vote standards, it had to pick up population from the more rural areas of the Fairbanks North Star Borough. As a result, the excess population in the Fairbanks North Star Borough had to be split across two districts rather than placed into a single district, because District 38 could not absorb all of Fairbanks excess population and still maintain the necessary Alaska Native voting age population required by the federal Voting Rights Act. The balance of the Fairbanks North Star Borough's

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

[5] *Kenai Peninsula Borough v. State*, 743 P.2d 1352, 1369, 1372–73 (Alaska 1987) (stating that a primary indication of intentional discrimination against a geographic region was a lack of adherence to established political subdivision boundaries).

remaining excess population was placed into House District 6, which closes resembles the configuration of House District 12."[6]

Since the parties agree and have the cited the correct law of the case regarding excess population, the court grants the Plaintiff's motion with respect to this point.

D. Socio-Economic Integration of House District 38

The parties correctly agree that the Board has the burden to provide legitimate, non-discriminatory reasons for its configuration of House District 38. While there is some minor argument over the language used, the court finds that this is merely semantics and does not affect the Board's burden or the law of the case. The court ruled on 25 October 2011 that "House District 38 does not comprise a relatively integrated socio-economic area within the meaning of Article VI, Section 6 of the Alaska Constitution."

The Plaintiffs' Motion on the Law of the Case is GRANTED.

DATED at Fairbanks, Alaska, this 23rd of December 2011.

Michael P. McConahy
Superior Court Judge

[6] The Plaintiffs note that the Board was instructed that, "In the event the Board determines it is necessary to split a borough's excess population due to other legal requirements, the Board should make a record to support that its decision was the result of legitimate, non-discriminatory process." ARB00005934-5939.

Notice Regarding Reconsideration

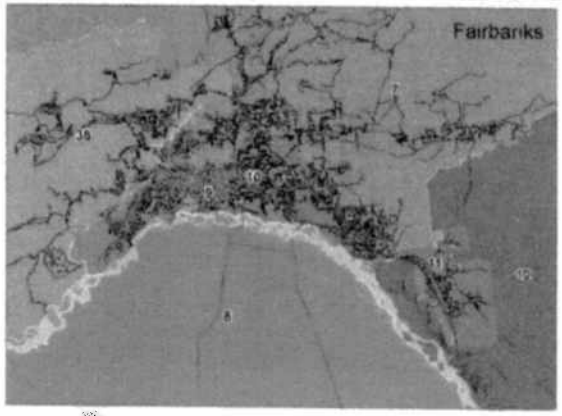
Given the expedited process and the impending trial on the merits, timelines are necessary for reconsideration motions. Therefore any motion for reconsideration of this order must be filed and served no later than noon on 30 December 2011. Responses will be allowed without further order and must be filed and served no later than noon on 3 January 2012. If no order is issued by this court by the close of business on 6 January 2012 then any motion for reconsideration shall be deemed denied.

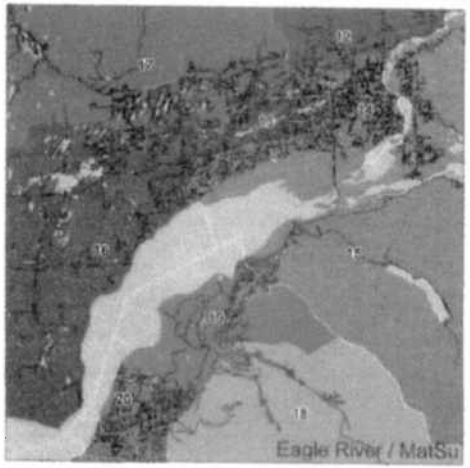
Appendix B

1. Board Adopted Plan (Proclamation Plan) (Exhibit J1)
2. Proclamation Plan (Close up of Fairbanks (Exhibit J2)
3. Board Option 1 with Alternatives (Exhibit J8)
4. Board Option 2 with Alternatives (Exhibit J9)
5. Benchmark Plan (Amended Final Redistricting Plan) (Exhibit J5)
6. AFFER 9 Plan Version 1.3 (Submitted to the Board on 5/24/11) (Exhibit J19)
7. AFFER Version 5.81 (Submitted to the Board on 5/24/11) (Exhibit J20)
8. AFFR Alternative to 3-31-11 Original Plan (Submitted to the Board on 5/24/11) Exhibit J22)
9. AFFR Second Adjusted Redistricting Plan (Submitted to the Board on 5/24/11) (Exhibit J23)
10. Demonstration Plan (Exhibit J3)
11. Fairbanks North Star Borough Plan (Submitted to the on Board 5/6/11) (Exhibit J30)
12. RIGHTS Plan (Submitted to the Board on 3/31/11) (Exhibit J12)
13. RIGHTS Plan (Submitted to the Board on 5/6/11) (Exhibit J13)
14. RIGHTS Plan (Submitted to the Board on 5/6/11) (Exhibit J14)
15. RIGHTS Plan (Submitted to the Board on 5/6/11) (Exhibit J15)
16. RIGHTS Plan (Submitted to the Board on 5/24/11) (Exhibit J16)
17. PAME Plan (Defendant's Exhibit T)
18. TB Plan (Exhibit J31)

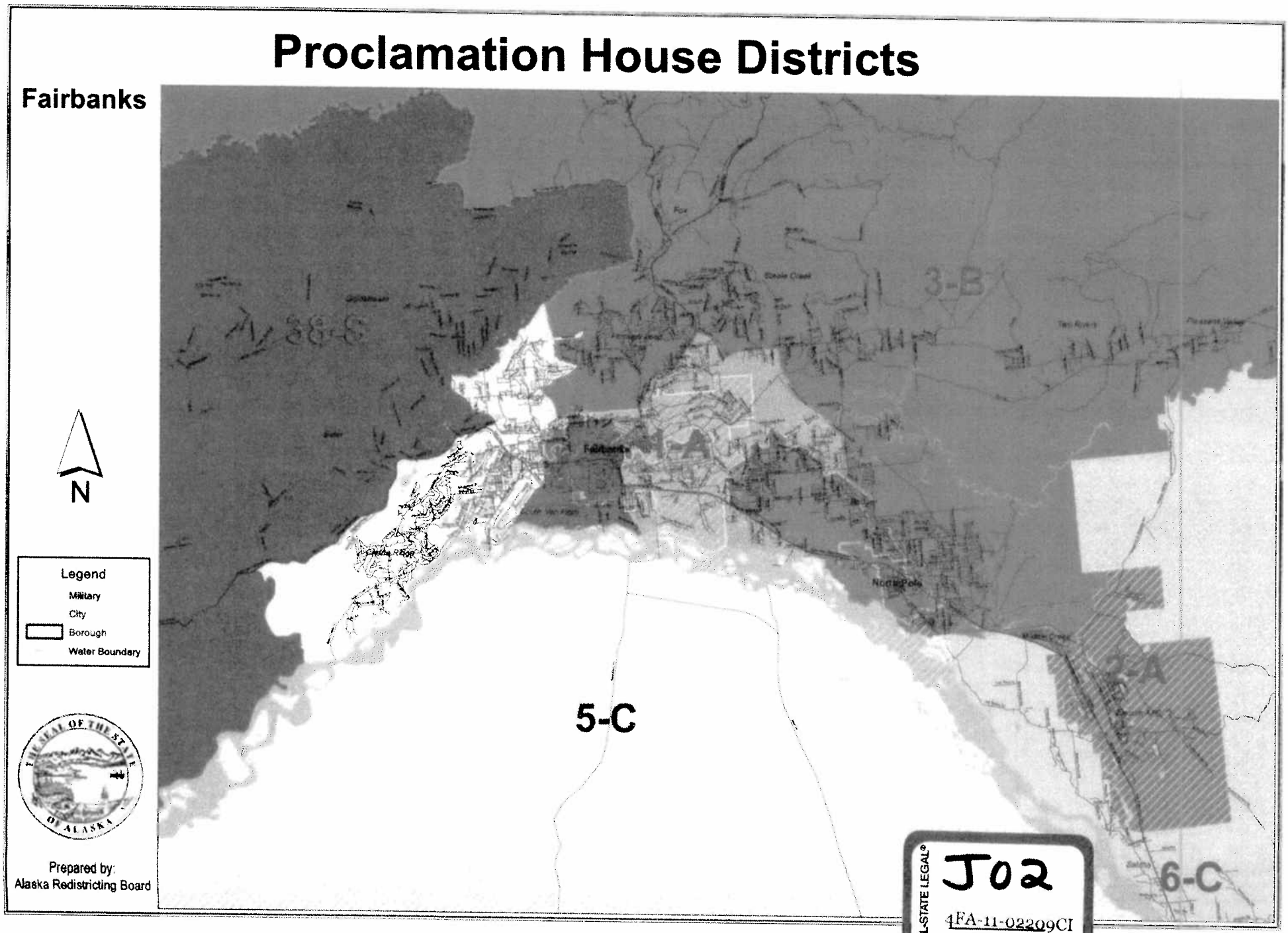
Alaska Redistricting Board

Board Adopted Plan



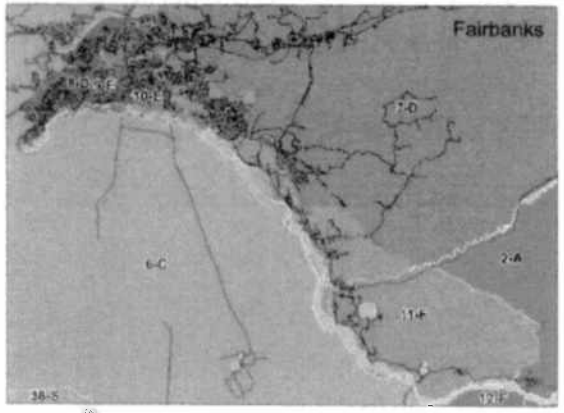


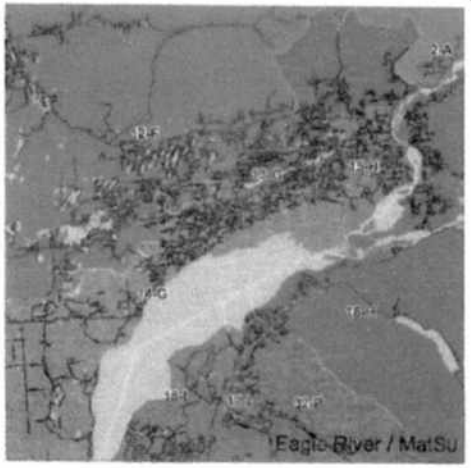
Proclamation House Districts



Alaska Redistricting Board

Board Option 1 with Alternatives





Alaska Redistricting Board

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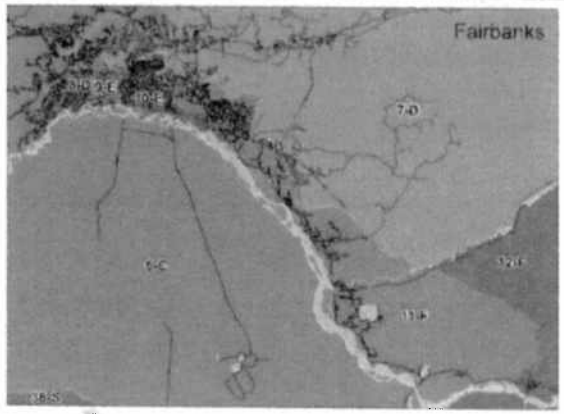
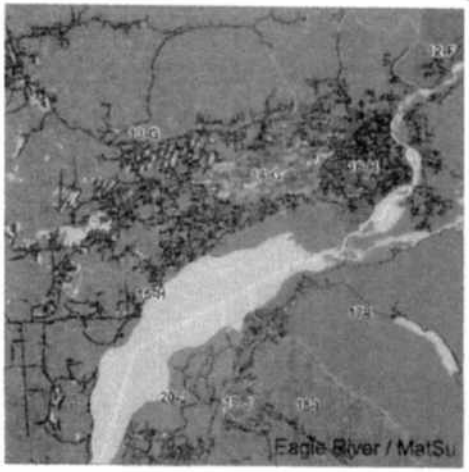
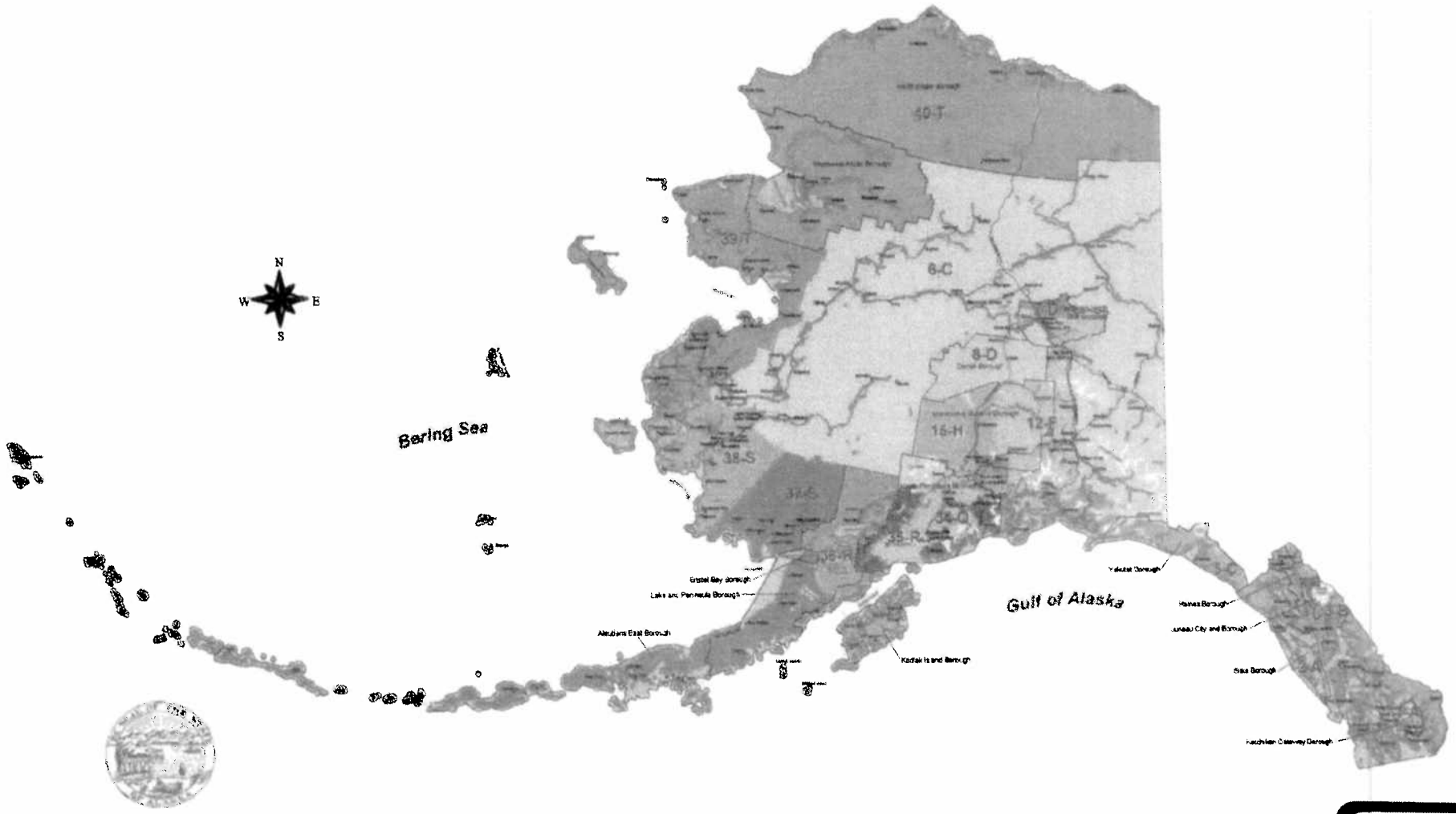


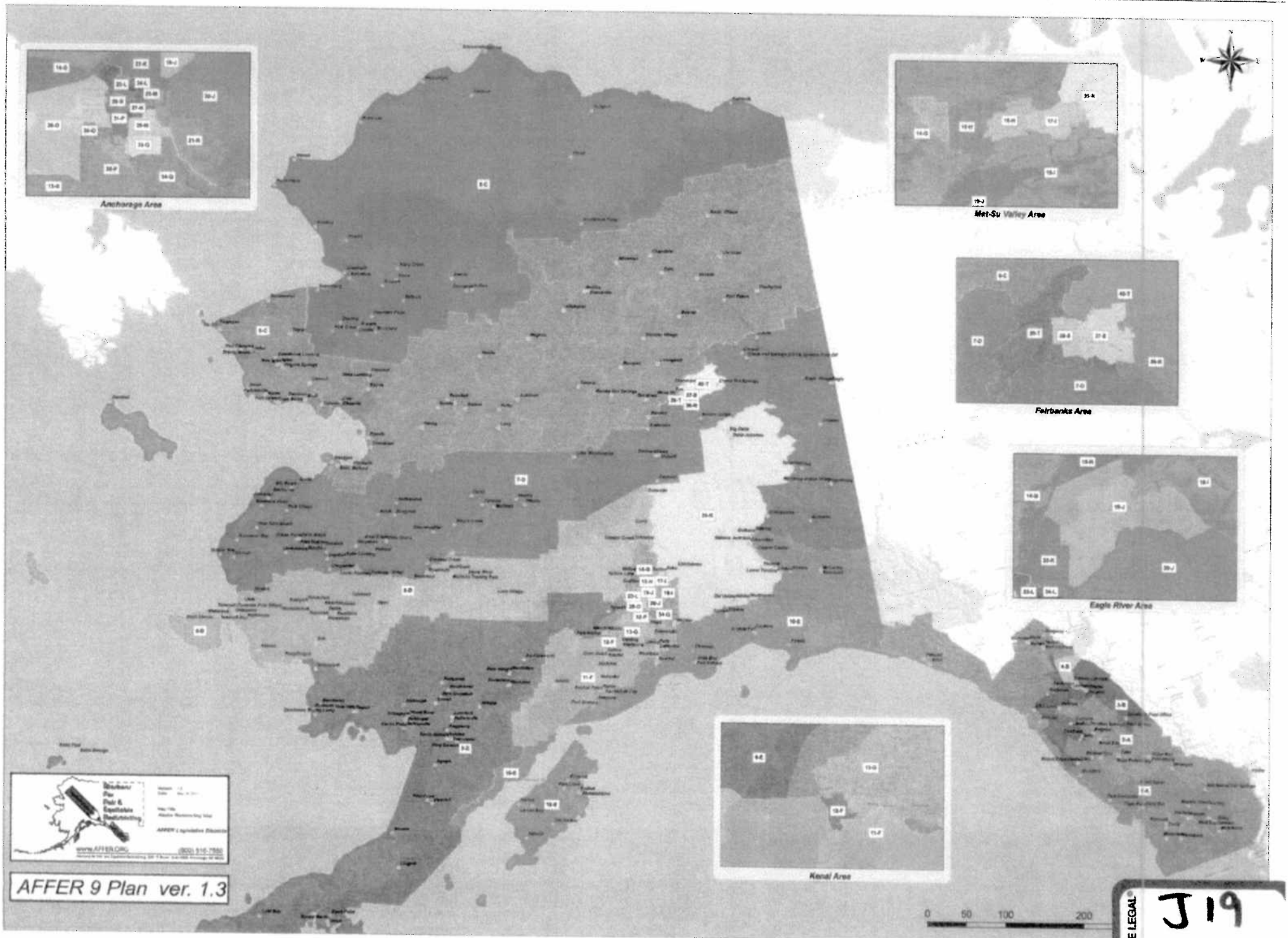


Amended Final Redistricting Plan



Amendments adopted by Alaska Redistricting Board
April 13 as modified on April 18, 2002

Prepared by Alaska Redistricting Board
April 25, 2002



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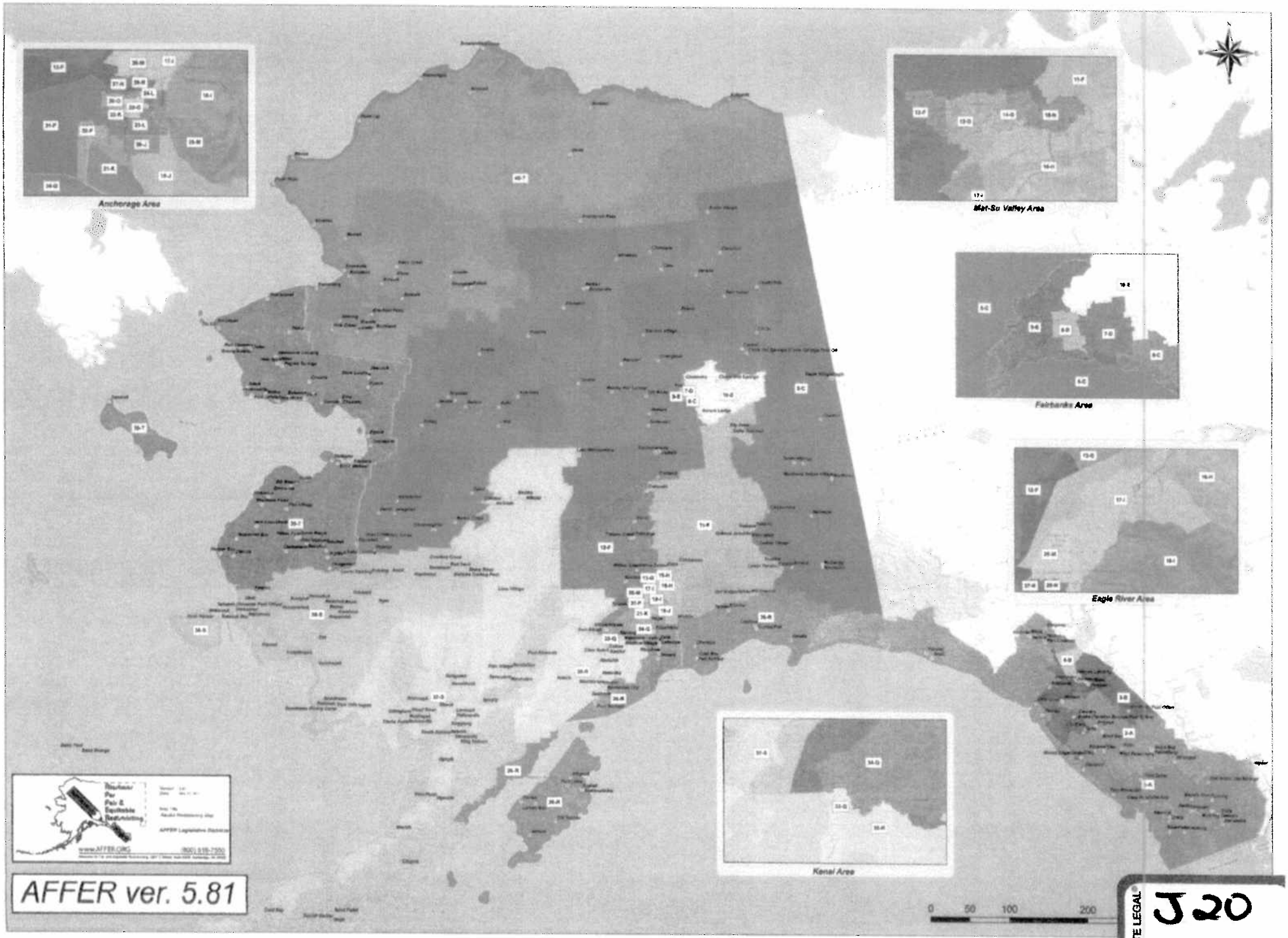
4FA-11-02209CI



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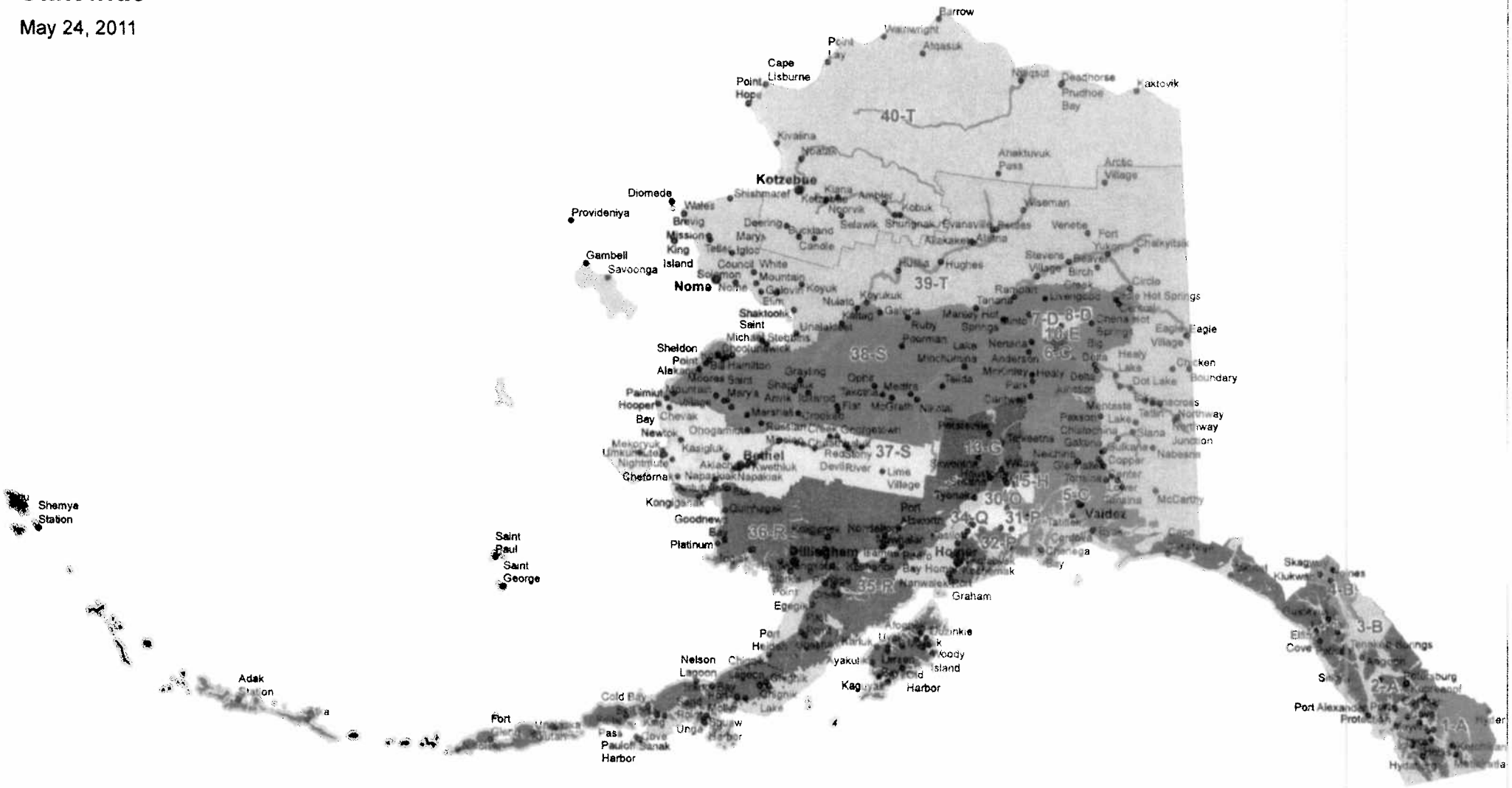
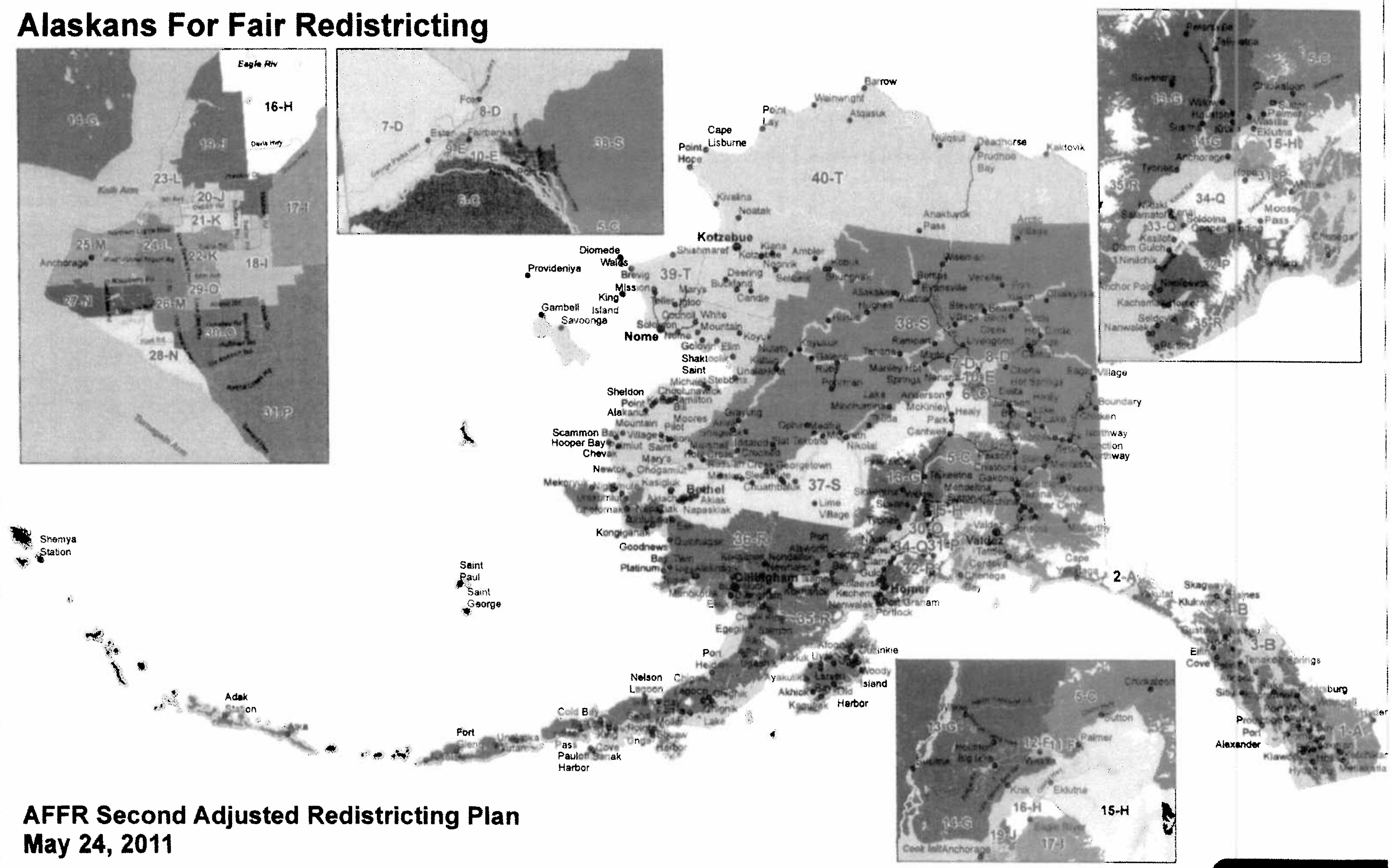
AFFR Alternative to 3-31-11 Original Plan

Statewide

May 24, 2011



Alaskans For Fair Redistricting



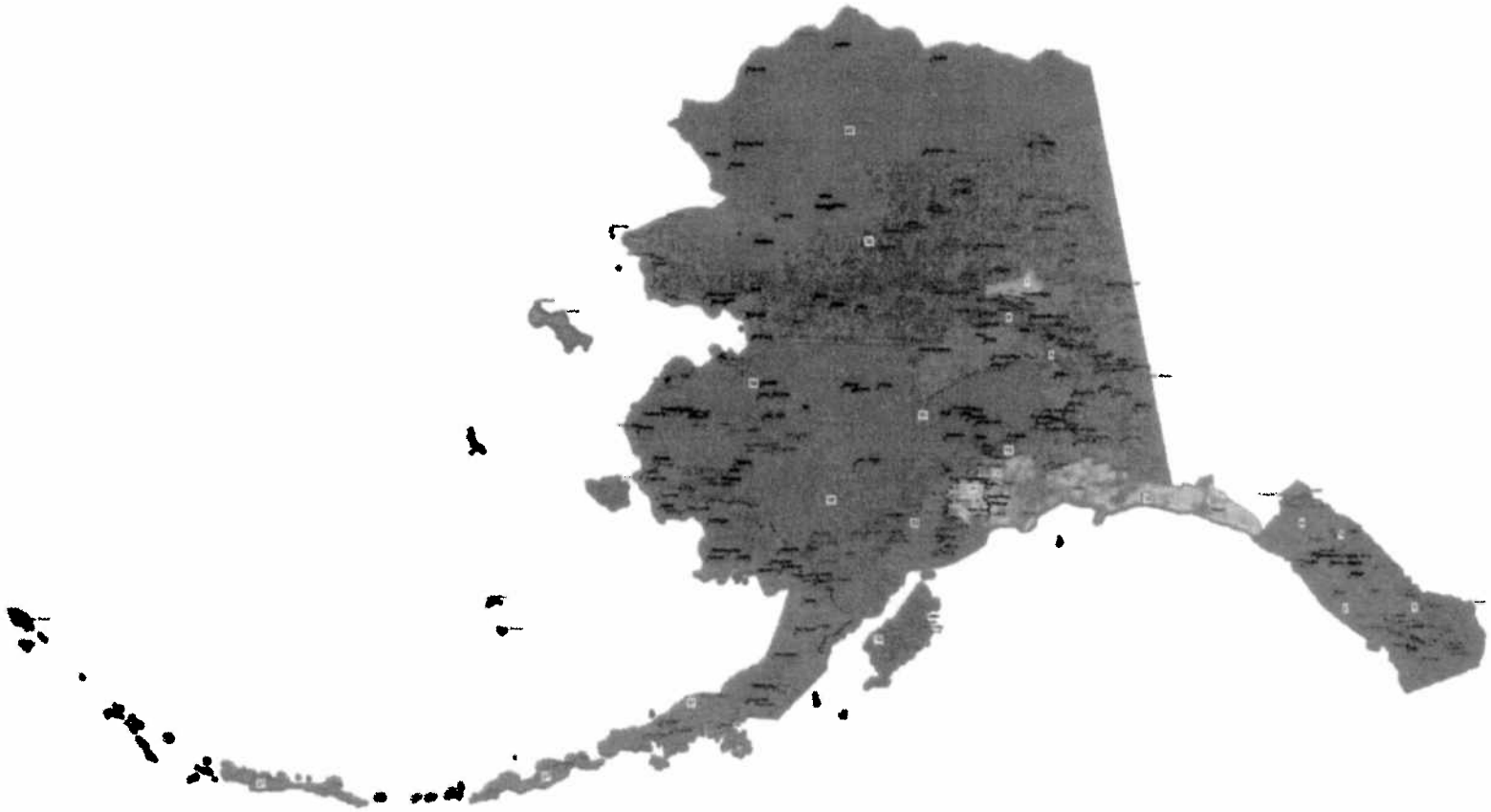
AFFR Second Adjusted Redistricting Plan
May 24, 2011

J23

1-STATE LEGAL

4FA-11-02209CI

Demonstrative Plan



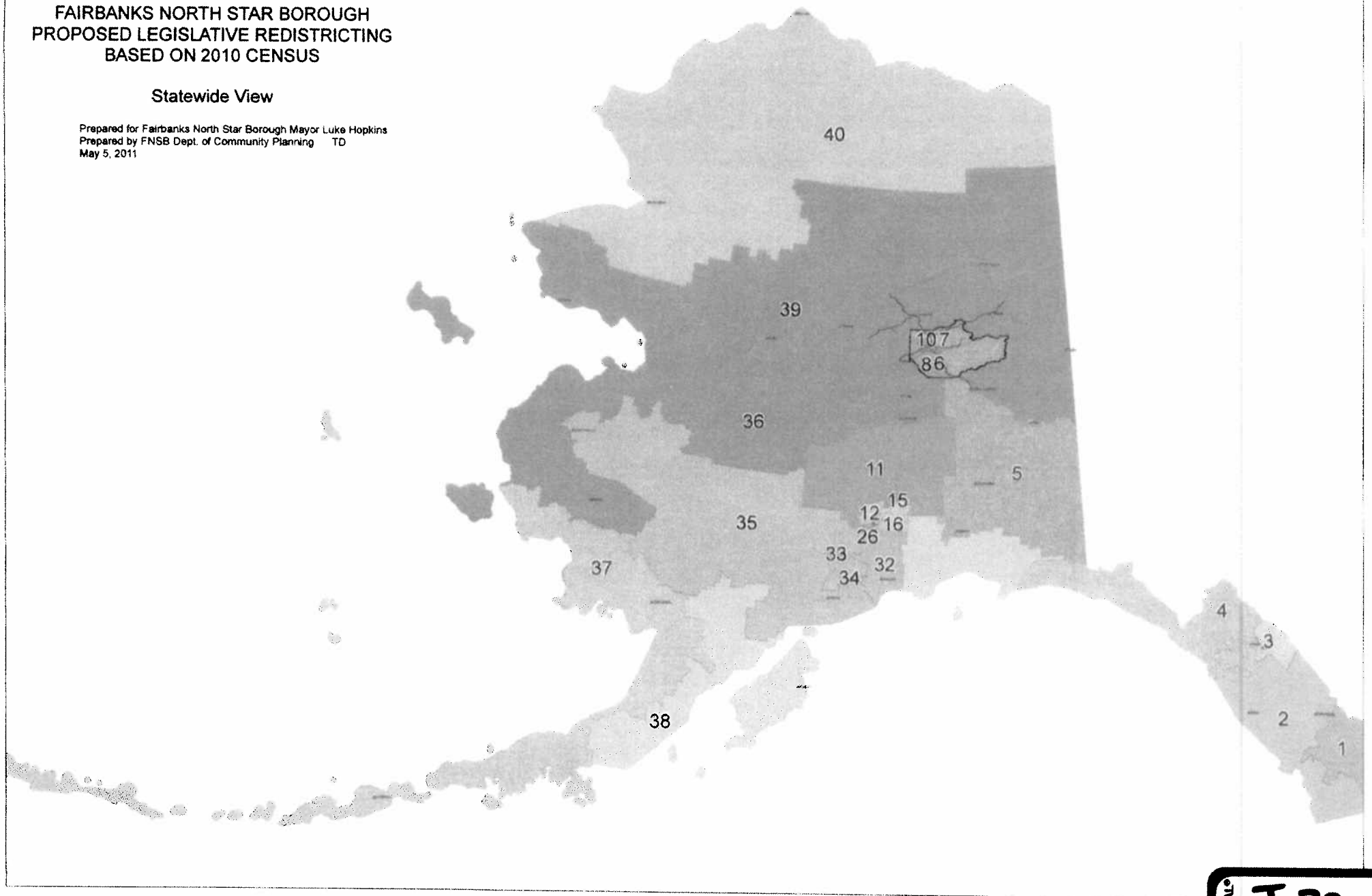
J03

4FA-11-02209CI

FAIRBANKS NORTH STAR BOROUGH
PROPOSED LEGISLATIVE REDISTRICTING
BASED ON 2010 CENSUS

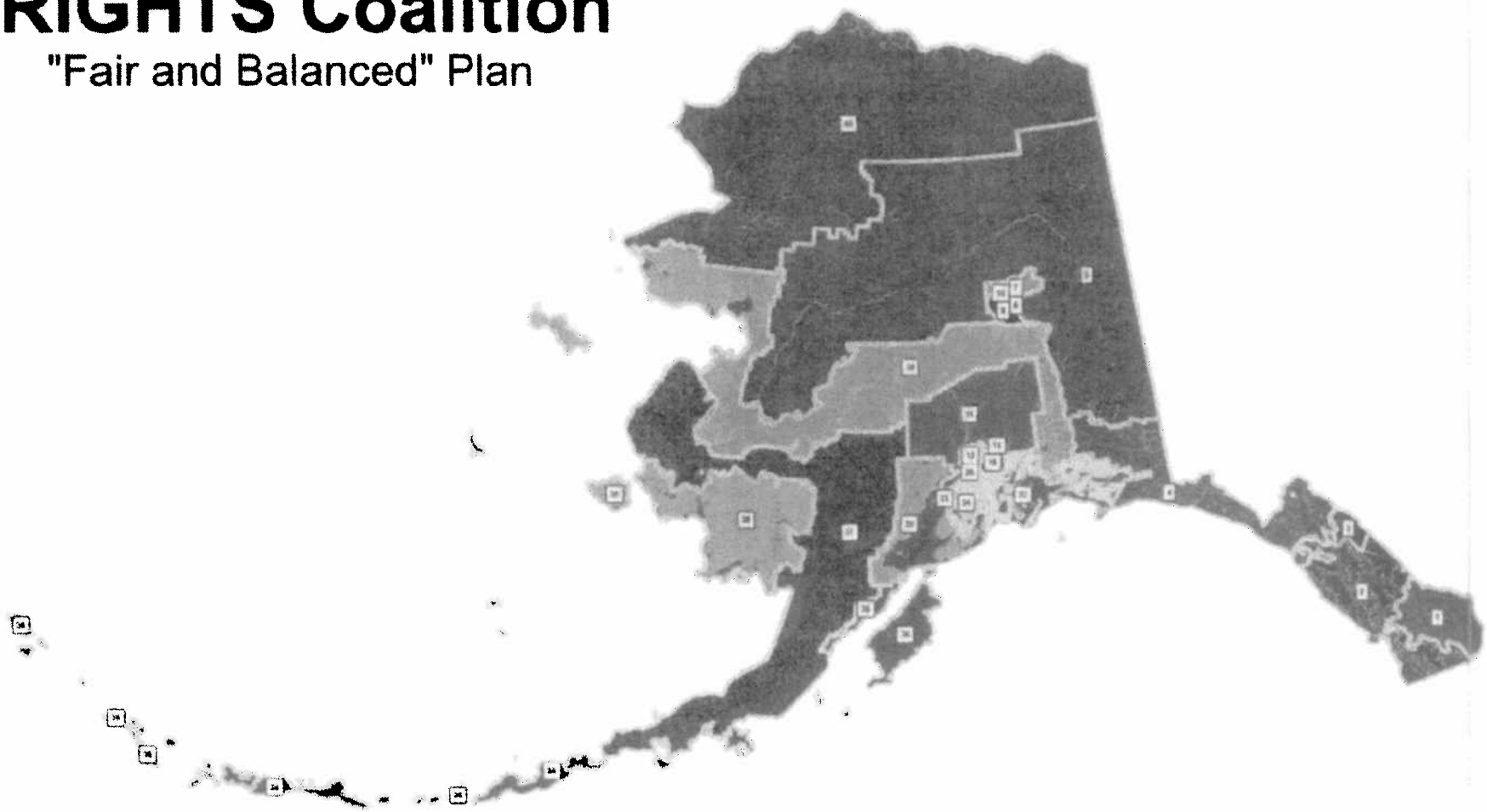
Statewide View

Prepared for Fairbanks North Star Borough Mayor Luke Hopkins
Prepared by FNSB Dept. of Community Planning TD
May 5, 2011



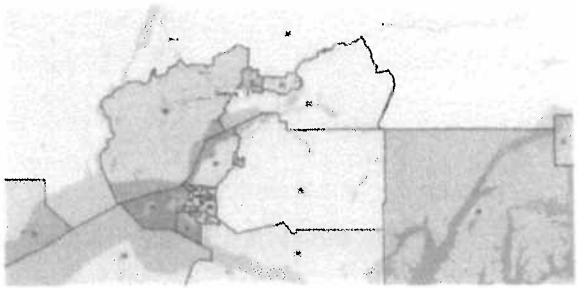
RIGHTS Coalition

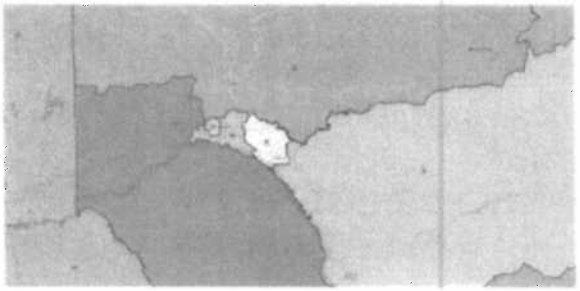
"Fair and Balanced" Plan

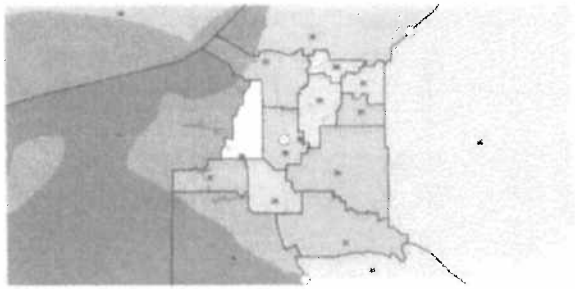


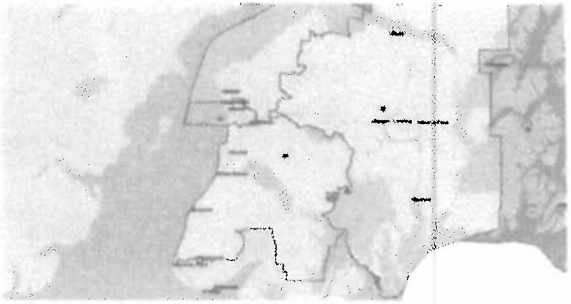
J12

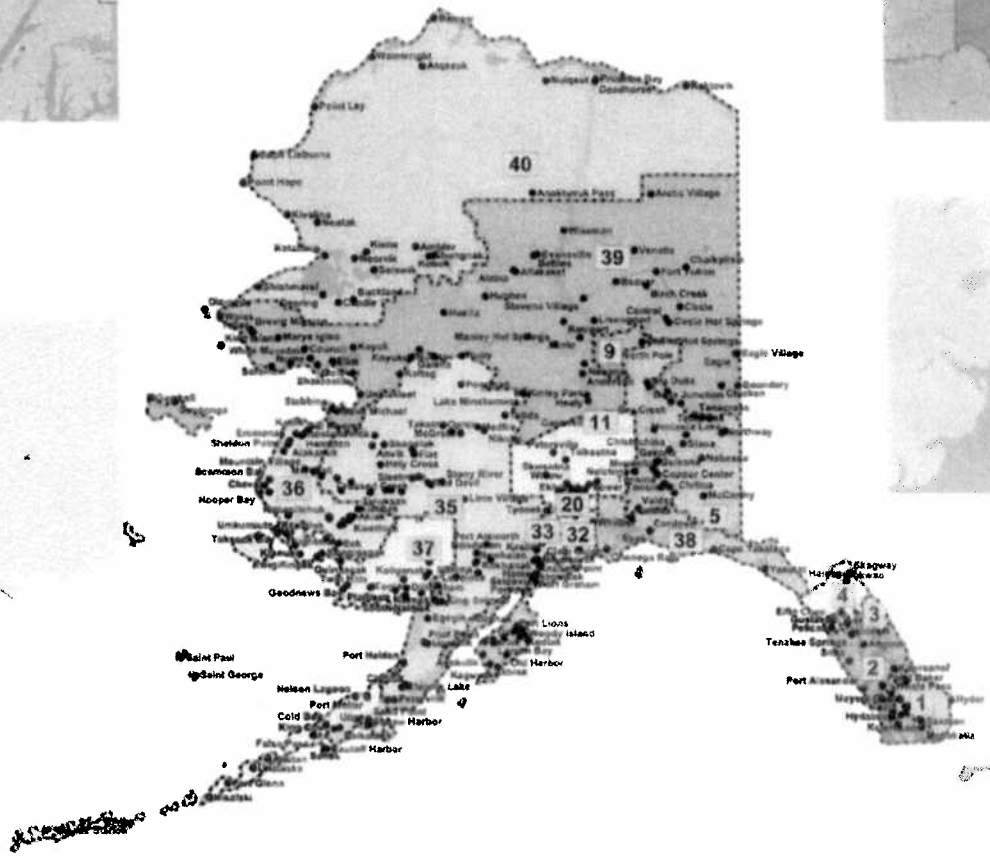
The RIGHTS Coalition
Alternative 1



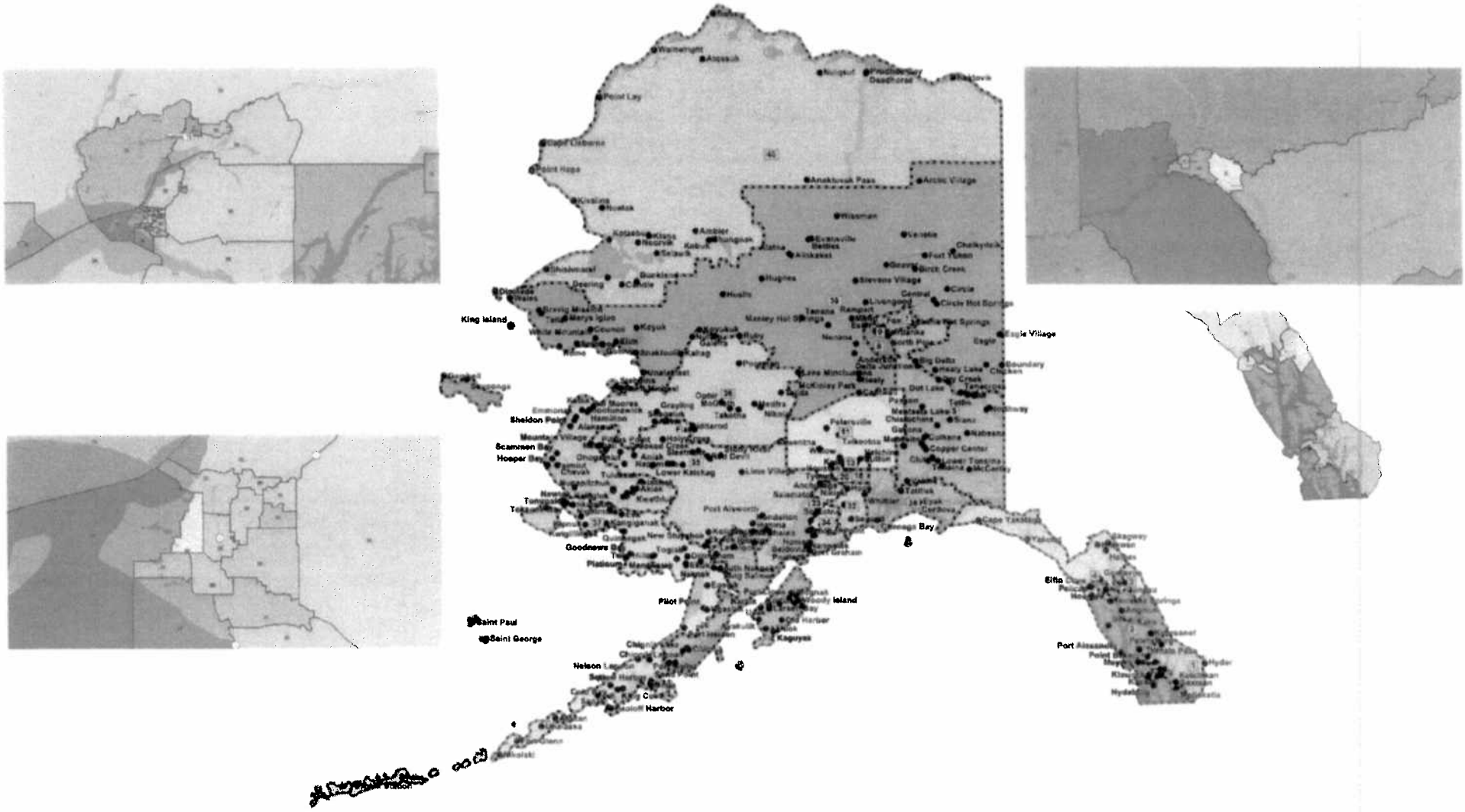




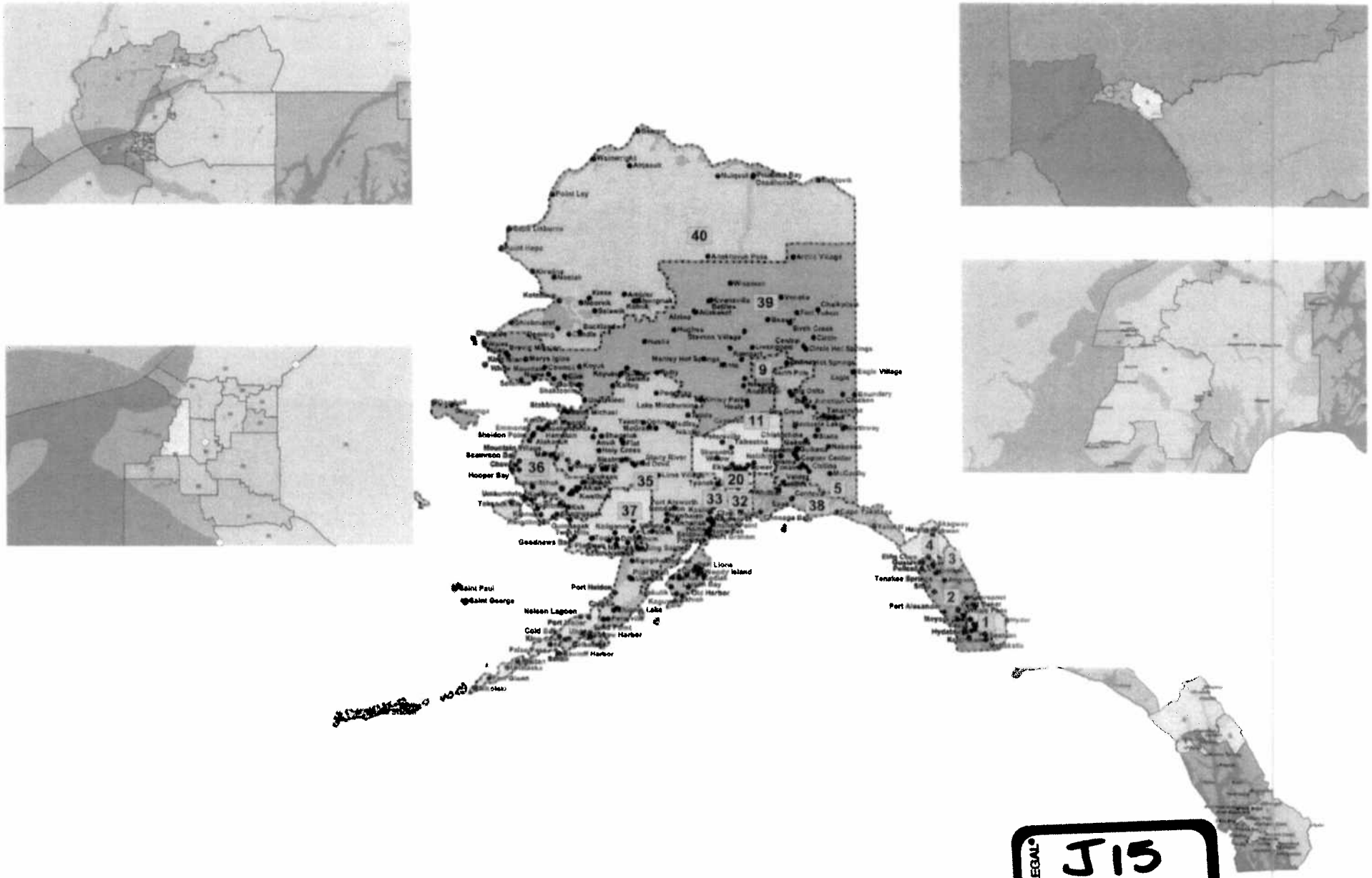




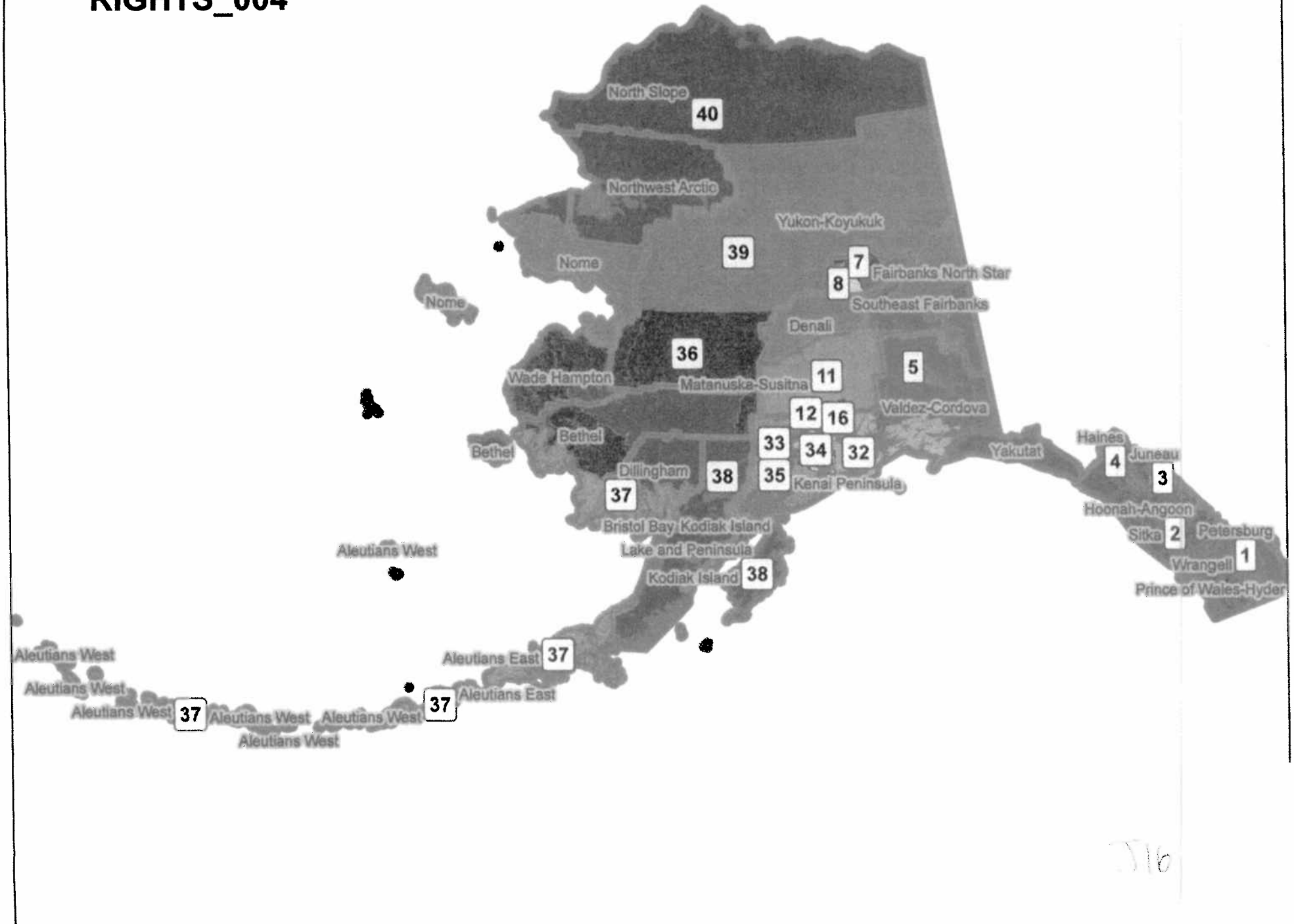
The RIGHTS Coalition



The RIGHTS Coalition
Alternative 1



RIGHTS_004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Matanuska-Susitna
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Valdez-Cordova
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Yakutat
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Juneau
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Kenai Peninsula
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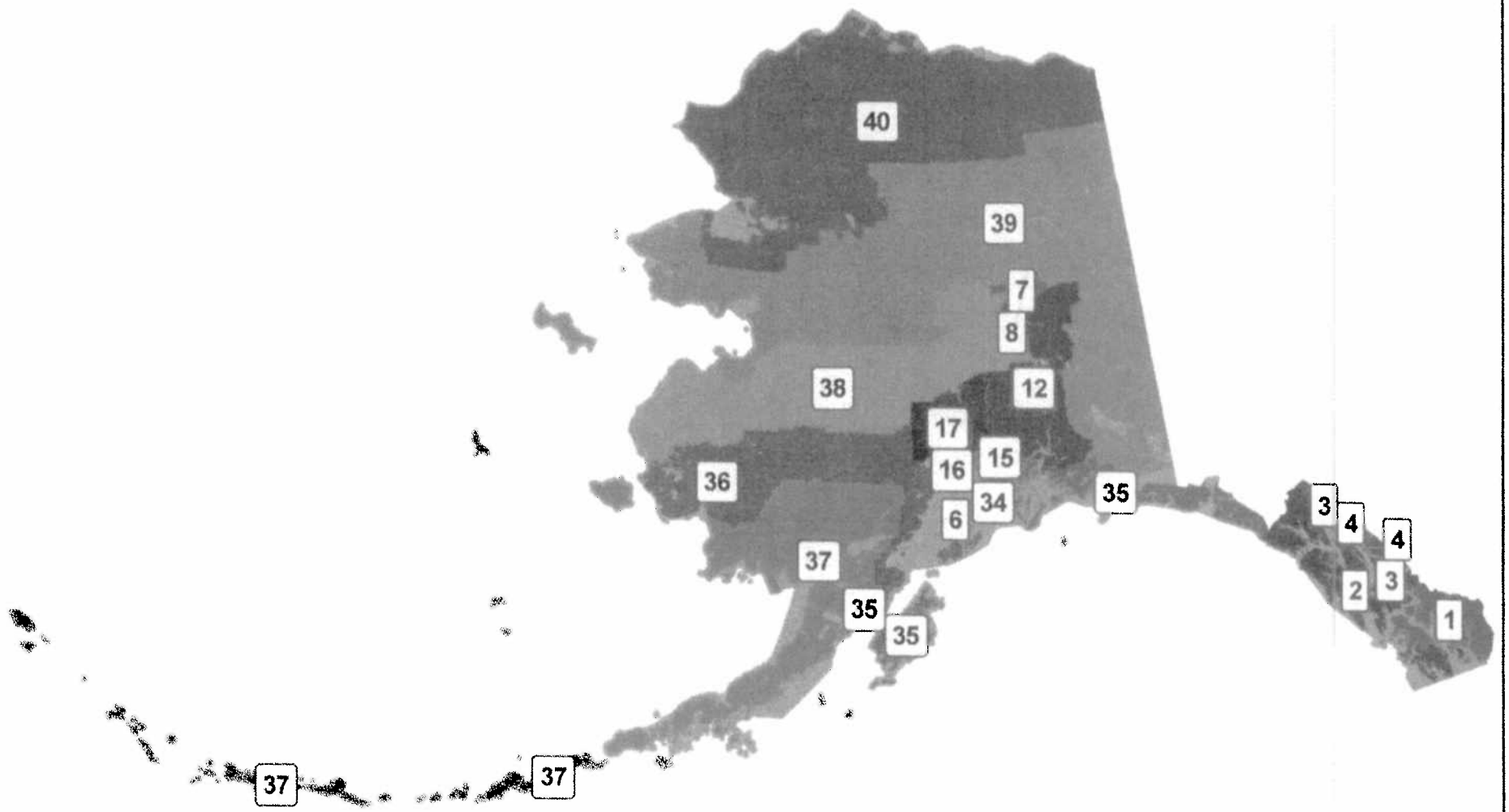
PAME Plan



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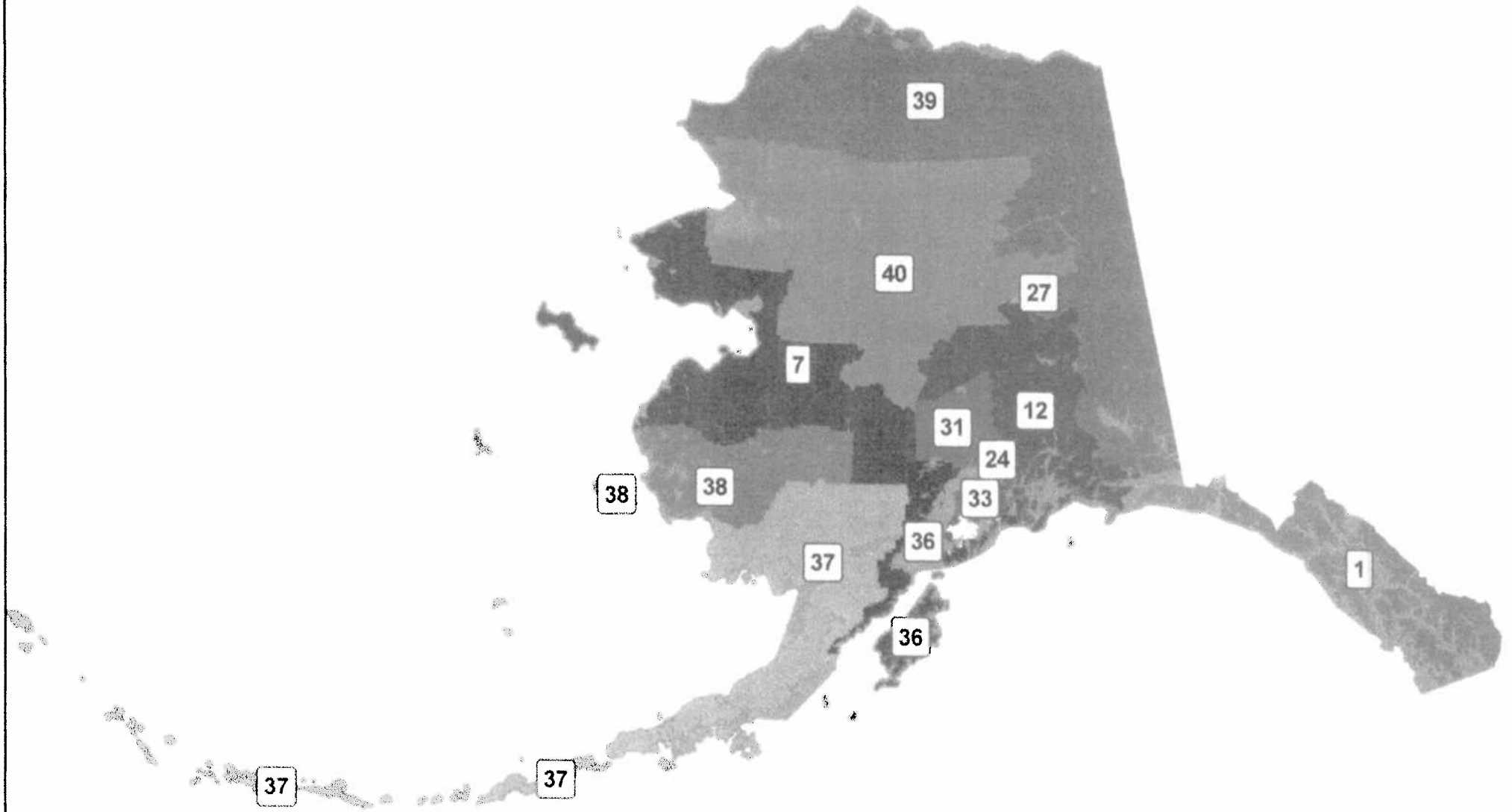

J31
4FA-11-2209CI

Appendix C