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

In Re 2011 Redistricting Cases	Superior Court No. 4FA-11-2209-CI

POST-TRIAL BRIEF OF AMICUS CURIAE BRISTOL BAY NATIVE CORPORATION

Pursuant to the court's orders of December 27, 2011 and January 23, 2012, Bristol Bay Native Corporation (BBNC) respectfully submits this brief as amicus curiae.

I. INTRODUCTION

As BBNC is not a party – it has little access to documents, other than what was posted on the Internet, and no access to exhibits or a trial transcript (if any) – this brief may necessarily be deficient in proper citations and for that BBNC apologizes. Moreover, BBNC does not have access to the numbered Board record provided to the trial court and therefore could not ascertain whether documents attached to the accompanying affidavit are in fact part of the official stamped Board record provided to the court. None of the documents attached to the affidavit should be new as all were made available to the Board, with the exception of the

Native American Rights Fund
801 B Street, Suite 401
Anchorage, Alaska 99501
P: 907.276.0680 F: 907.276.2466

draft letter, which merely serves as a summary of what information was shared with the DOJ via teleconference.

BBNC recognizes that redistricting is always a challenging process, to put it mildly, and this cycle was perhaps even more so because of the often talked-about migration from rural to urban areas. To that end, BBNC is grateful to the members of the Redistricting Board for their tireless efforts both on behalf of the Native community and on behalf of all Alaskans. To be candid, before the trial, BBNC did not have a clear picture of this case nor "on whose side" we would come out but now having listened to the entire trial and reviewed as much of the record as is available on the Redistricting Board's website, BBNC offers the following.

BBNC agrees with the Redistricting Board on two issues. First, it is very clear that the Voting Rights Act supercedes the requirements of the Alaska Constitution. *See In re 2001 Redistricting Cases,* 44 P.3d 141, 143 n.2 (Alaska 2002). The only question is whether a specific action was necessary to comply with the VRA. *See Id.* at 143 (remanding to the Board to find whether the current configuration is "required by the Voting Rights Act"); *see also Kenai Peninsula Borough v. State,* 743 P.2d 1352, 1361 (holding that a district was not "necessary" under to comply with the VRA). While we agree with that standard, BBNC takes issue with the use of the devil-made-me-do-it "VRA excuse" as described below, particularly in light of the fact that at least two plans the Board had before it (the TB

and PAME plans) also met the benchmark. Second, BBNC agrees with the Board and the court that the proper benchmark is 8 effective seats, 5 in the House and 3 in the Senate. Influence seats no longer "count" toward the benchmark and both experts agreed that benchmark 38 was effective with the exception of the unusual 2010 election. Having no evidence to the contrary, BBNC takes no issue with this standard. Rather, as described below, BBNC's concerns relate to (1) the fatally flawed process that resulted in the Proclamation Plan and (2) the reliance on the VRA excuse when other plans were available.

II. ARGUMENT

A. The Board should not be permitted to claim that no other plan satisfied the benchmark.

As described briefly in its motion to participate as amicus, BBNC has a history of being involved in redistricting and the 2011 cycle was no exception. BBNC was a participant in the group referred to throughout the proceedings as AFFR but BBNC also attended numerous meetings of the Redistricting Board and submitted testimony and conducted a teleconference with the DOJ in its own capacity. Contrary to what was suggested at trial, AFFR was not simply labor unions but a diverse group including five Native corporations. Landreth Decl. ¶ 2, Ex. A.

Without a doubt, the proceedings of the Board did not allow for *meaningful*

public participation. There are two reasons for this: (1) the complete lack of any guidance as to a benchmark standard for almost the entire process; and (2) when the Board finally did have their expert present the benchmark, she was wrong. The end result was even sophisticated organizations like BBNC did not truly have a handle on what was going on or the opportunity to craft and present plans that met the *correct* benchmark.

This is highly relevant to the court's inquiry primarily because throughout its briefing, and indeed throughout trial, the Board argued that no other plan met the benchmark.[1] It reiterates this argument at page 36 of its Trial Brief. The court should not consider this argument to be a defense, or evidence that the Proclamation Plan was the only viable alternative, because the evidence has revealed that the public was never told the correct benchmark. Thus, it would have been nearly impossible for them to present compliant plans.

The relevant timeline is quite telling. The Census data was released on March 15. Parties began submitting draft plans on March 31. Dr. Handley was in Afghanistan for three weeks in April.[2] Dr. Handley was not hired until sometime

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1 Order on the Riley/Dearborn Plaintiffs' Motion for Summary Judgment on the Compactness of Districts 1, 2 and 37 at p. 6 ("The Board argues that they looked at other private party plans for alternative solutions, but they were all retrogressive."); ARB's Reply to Petersburg's Opposition to Board's Cross-Motion for Summary Judgment at 16; ARB's Opposition to Plaintiff's Motion for Partial Summary Judgment re:Compactness at 23 ("The Riley Plaintiffs' argument completely ignores the undisputed fact that none of these alternative plans complied with the federal Voting Rights Act.");

2 Handley Depo. 10:18-22.

in late March or April.[3] The available information, including census data, was not sent to Dr. Handley until around April 8.[4] Dr. Handley signed a contract with the Board in late April or early May.[5] Dr. Handley had a teleconference with the Board around May 17.[6] On or around that date, she informed the Board that the standard for effectiveness had changed from 35 percent to about 42 percent.[7] At a public meeting on May 24, Dr. Handley delivered a powerpoint presentation informing the public that the standard was four effective House districts and 2 equal opportunity districts, and three effective Senate districts.[8] At that same meeting, third parties presented adjusted plans. Testimony was closed on that same day.[9] The Board issued its Proclamation Plan on June 13.[10] Dr. Handley did not finalize her report until August 4. In late August or September, Dr. Handley learns from the DOJ that the benchmark is 5 effective House seats and 3 effective Senate seats.[11] At the same meeting, she learned that the DOJ no longer considers influence districts in the benchmark and that equal opportunity districts have no place in Section 5 analysis.[12] She did not inform the Board or the public of this

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3 Bickford cross examination
4 Sandberg cross-examination
5 Handley direct examination
6 Handley Depo. 37:16-23.
7 Bickford direct examination
8 Ex. J-45.
9 Torgerson direct.
10 ARB 0006017.
11 Handley Depo. 96:11- 97:14.
12 Handley Depo. 144:16-22 and 146:2-16.

information.[13]

When the standard was finally revealed, it was wrong. This is no mere mistake of nomenclature, despite the Board's and Dr. Handley's efforts to downplay it. In fact, the error regarding the continuing viability of influence districts meant that third parties submitting plans were creating an extra district. Although this may be only a one seat difference, in a situation like Alaska's where the geography and far-flung population make redistricting extremely difficult, one seat can make or break a plan. The Board's own expert had given the Board and the public a magic number of nine, when it was in fact eight.[14] In fact, from the record it seems that the Board and even the court were under the impression that influence districts were still relevant in December 2011.[15]

BBNC itself and at least one person from AFFR (Kay Brown) told the Board directly that influence districts were no longer required as a matter of law. Landreth Decl. ¶3, Ex. B; see also Handley Depo. 83:12-21. Nevertheless, because the Board insisted that an extra influence district was required, all plans attempted to include it in order to comply with the Board's guidance.

The second major flaw in Dr. Handley's analysis was the inclusion of the

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13 Handley Depo. 149:15-24 and 150:24- 151:5; Torgerson cross examination; Handley cross-examination.

14 Handley Report at p. 2; Handley direct examination

15 Order Denying Petersburg's Motion for Summary Judgment and Granting the Board's Cross Motion for Summary Judgment at p. 10 (December 12, 2011).

mysterious "equal opportunity" districts. She specifically instructed the public on May 17 that the benchmark for the House was four effective and two equal opportunity districts. Ex. J-45 (Handley's Notes for May, 17 Presentation at p. 2-3). BBNC, like many third parties, was totally unfamiliar with this term in the redistricting context and had no idea what percentage of Native VAP was required to create an equal opportunity district. BBNC shared this concern directly with the DOJ on a teleconference conducted in September 2011. Landreth Decl. ¶5. Thus to the degree that any plan submitted after May 17 had two districts that were not at the "effective" percentage of 42 percent, this is very likely due to the confusion regarding equal opportunity districts. Much later, Dr. Handley admitted that she had been wrong about her inclusion of equal opportunity districts.[16]

And although the Board has also attempted to downplay the significance of this error, it is in fact important because using a different term created the impression that a different percentages of Native VAP are required for these districts; indeed, by definition influence districts have lower percentages that effective districts, and *it was never made clear what percentage was required for an equal opportunity district.* It was only after her discussion with the DOJ, long after the public process had closed, that she determined the equal opportunity district was

16 Handley Depo. At 70:10-71:11; 76:4; and 79:16-20 and Handley direct examination.

in fact an effective district.[17] This begs the question, how were third parties supposed to know they had to create plans with five effective districts if even the Board and its expert did not know? Perhaps this explains why Kay Brown, then Executive Director of AFFR, requested Dr. Handley's notes after the presentation – because the information was not clear.[18] Even now it is not clear if the Board would have taken different actions if it had received correct advice.

Mr. Lawson testified to this very thing in both his direct examination and during the Plaintiffs' rebuttal case. During his direct examination, he said that the RIGHTS coalition plans he created probably did not meet the benchmark because he did not know the benchmark at the time he was writing it. He explained this problem in greater detail during the rebuttal case. Specifically, he said that before May 17, the RIGHTS coalition had no information on what the benchmark standard would be, and he described them as "sort of flying blind." (This incidentally echoes a letter BBNC drafted to the Board on June 7, but which they did not ultimately submit because it seemed too late to have any impact. Landreth Decl. ¶4, Ex. C) He then explains that he had one week, or *four business days*, after this new standard was announced to create a new plan. Mr. Lawson testified that the first time he heard the standard was 5 effective House districts, that the total benchmark was 8 and not 9, and that equal opportunity or influence districts did not

17 Handley Depo. 76:5-24.
18 Handley Depo. 57:2-12.

count was in late fall at the earliest – and perhaps even as late as Dr. Handley's deposition. This comports with BBNC's experience, as it only learned this information in the pleadings filed in late December and during the trial.

Quite simply, the Board took what was supposed to be a ninety-day process and turned it into a four-day process, four business days being the entire time between the announcement of the (wrong) benchmark and the final due date for third parties to submit plans. In effect, this took away the right of public participation as all the numerous public meetings (with the exception of the May 24th one in Anchorage) were held *before* the announcement of the standard. It strains credulity to think that the many communities across the state actually knew what they were looking at, actually had the necessary tools to evaluate the different maps, when no one had yet told the public the guiding principle, namely the benchmark that had to be met. This should explain for the court why on earth third parties were repeatedly submitting plans that did not meet the benchmark – they did not know what it was. For a process like this one to be meaningful, the public has to be told what the benchmark (and the percentages that help you meet it) is. When this finally did occur it was too little, too late.

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 timeframe.

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,[19] despite the fact that BBNC expressed concerns about this in its public testimony. Landreth Decl. ¶3, Ex. B. An eleventh hour report that provides the public only four business days to develop a plan is hardly meaningful. When that eleventh hour report is wrong, the error is fatal. As a result, this court should not consider it in any way probative as to any claim or defense that no other third party plans met the correct benchmark.

B. The "VRA excuse" is not blanket protection.

Somewhat related to the first issue is the fact that the Board devotes considerable efforts to relying on certain districts as being required by the VRA. BBNC believes that the Board has taken this argument one step too far for two reasons. First, as described above, there were other complaint plans available but the Board seems to have rejected them due to unspecified "complaints from the Alaska Native community." While this is a factor to be considered in DOJ analysis and BBNC in no way suggests that input from affected communities is not relevant, to suggest that one region or one person has a kind of veto over a plan is unsupported.[20] In fact, if this is the case, why were the Aleutian Pribilofs Islands

19 Torgerson cross examination.

20 It was not explained during trial who or what complained and on what grounds and BBNC does not have access to the court exhibits to determine the basis.

Association's complaints about splitting the Aleutians not persuasive? Why were the Association of Village Council Presidents' complaints about carving up the Yup'ik regions not persuasive? The fact is that the Board's decision to adopt the Proclamation Plan over the two viable alternatives (not to mention what other alternatives could have been offered if the public had been apprised of the correct benchmark in a timely manner) represents a choice. To be sure, Board members testified that they adopted the plan they thought had the best chance of passing DOJ muster, but it must still be acknowledged that they had other options.

Second, and most importantly, BBNC takes issue with the Board's argument that House District 1 is somehow justified by the "ripple effect" of complying with the VRA.[21] As the court is no doubt aware by now, District 1 is in the middle of Fairbanks. It does not abut House District 38. While it is conceivable that a district could be affected by a Native effective district, such a situation only arises if the two districts meet or if both are rural and short on population. In that scenario, a domino effect could be a justification. Here, however, the Board was creating a district in one of the most populous areas of the State and could draw population from any direction. There is no basis, in logic or in law, for claiming that House District 1 was in any way required by the VRA. Such a holding that some direct causal link was not required, merely a "ripple," is an unjustified expansion of the

21 ARB's Trial Brief at 25-27.

Alaska Supreme Court's holdings and would undoubtedly cause mischief. In fact, on cross examination, Board member Holm seemed to indicate quite clearly that the VRA did not require District 1; he suggested instead he was trying to minimize population deviations. The Board seems to have little basis for asserting the "VRA excuse" for House District 1.

BBNC is also not entirely persuaded that House Districts 37 and 38 are absolutely required by the VRA. While BBNC understands that the Board had legitimate concerns about pairing incumbents given the possibility of a DOJ objection, and we share those concerns, we return to the fact that, according to testimony at least, the "TB plan" did not raise incumbent pairing concerns and yet passed the benchmark. To be clear, BBNC is not advocating any one plan over another – *in fact BBNC has not seen the TB plan as it cannot be located on the Board's website* (only Board Options 1 and 2 and third party plans are available) – and we are not suggesting that this plan is the ideal or only viable alternative. Rather, BBNC raises this to suggest that the Proclamation Plan was not necessarily the only solution. At a minimum, the court should consider remanding to the Board to explain in detail why the percentages in the TB plan were not satisfactory. This plan does not appear in Dr. Handley's final report and since it was created at the tail end of the public process, BBNC has no copy of it or memory of its discussion. In the end, districts 37 and 38 may be the only option, but at this point

it is not clear.

III. CONCLUSION

BBNC thanks the court and the agreement of the parties for allowing it to contribute to this process. While there are points with which BBNC agrees with the Board, namely the actual benchmark of 8 seats and the precedence to be afforded to federal law, BBNC has had and continues to have very serious concerns with the public process that resulted in no other plans meeting the benchmark. As explained herein, that is largely due to the fact that the public only heard of the Board's benchmark four business days before the close of public testimony and opportunity to present plans. Even then, this benchmark contained an extra seat which the public now discovers was not required. To those of us that attempted to follow this process quite closely, this is not a "red herring." Given these deficiencies, the Board should not be permitted to point to an absence of alternatives as evidence of the true lack of alternatives. Finally, BBNC is not persuaded that any precedent justifies the reliance on the VRA excuse for House District 1. However, with respect to House Districts 37 and 38, the record remains unclear. Therefore, BBNC respectfully requests that the plan be remanded to the Board to examine these three districts and to allow for meaningful public participation in the configuration of possible alternatives.

Respectfully submitted this 23rd day of January 2012 at Anchorage, Alaska.

By: s/nlandreth

Natalie A. Landreth (#0405020)
Heather Kendall-Miller (#9211084)
NATIVE AMERICAN RIGHTS FUND
801 B Street, Suite 401
Anchorage, Alaska 99501
Phone: (907) 276-0680
Fax: (907) 276-2466

Certificate of Service

The undersigned hereby certifies that the on the 23rd day of January 2012, a true and correct copy of the **POST-TRIAL BRIEF OF AMICUS CURIAE BRISTOL BAY NATIVE COPRORATION and AFFIDAVIT OF NATALIE LANDRETH** was sent by electronic mail to:

Office of the Clerk, Fairbanks	4faclerk@courts.state.ak.us
Karen Erickson	kerickson@courts.state.ak.us
Kelly Krug	kkrug@courts.state.ak.us
Michael White	MWhite@PattonBoggs.com
Michael Walleri	walleri@gci.net
Thomas Klinkner	tklinkner@bhb.com

By: s/jbriggs

Jonathan Briggs
Legal Administrative Assistant