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

IN RE 2011 REDISTRICTING CASES

Case No. 4FA-11-02209 CI.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMES NOW, the Riley et. al. Plaintiffs, by and through the undersigned attorney, to proposed Findings of Fact and Conclusions of Law, in the above captioned matter, as follows:

BACKGROUND – PLAN DEVELOPMENT

1) The Alaska Constitution requires the redistricting of the Alaska State Legislature every ten (10) years following the decennial census by the Alaska Redistricting Board (hereinafter referred to as "Board").[1]

2) In preparation for the 2010 redistricting effort, the Legislature created the Redistricting Planning Committee,[2] which was to "make necessary

1 AK CONST. Art. VI, Sec. 3
2 AS 15.10.300

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preparations and arrangements" in advance of the formation of the Board.

3) The Redistricting Planning Committee was composed of Ron Miller (appointed by Speaker of the House Chenault), Linda Hay (appointed by Senate President Stevens) Brynn Keith and Margaret Paton-Walsh (both appointed by Governor Parnell) and Doug Wooliver (appointed by Chief Justice Carpeneti).[3]

4) The Redistricting Planning Committee selected and purchased the Redistricting Software (i.e. Citygate) to be used by the Board,[4] as well as contracted with Dr. Lisa Handley to advise the state on data and information needs for the redistricting process.[5]

5) The work of the Redistricting Planning Committee was not made part of the Record before this Court.

6) The Board is composed of five (5) members, who are respectively

3 ABR00004927
4 ABR00004927-8
5 ABR00004928-9

appointed as follows: two (2) by the Governor, one (1)by the Senate President, one (1) by the Speaker of the House, and one (1) by the Chief Justice of the Alaska Supreme Court.[6]

7) Between June 25, 2010 and August 31, 2010, the Board was appointed as follows: Governor Sean Parnell appointed John Torgerson of Soldotna and Albert Clough of Juneau on June 25, 2010. Senate President Gary Stevens appointed Robert Brodie of Kodiak on June 25, 2010. The Speaker of the House of Representatives, Mike Chenault, appointed Jim Holm of Fairbanks on July 8, 2010. Alaska Supreme Court Chief Justice Carpeneti appointed Marie Greene of Kotzebue on August 31, 2010.[7]

8) On September 13, 2010, the Board conducted its first meeting, met with the Redistricting Planning Committee and was briefed on planning activities and the duties and responsibilities of the Board.[8]

9) Between October 26, 2010, and November 2010, the Board hired staff,

6 AK CONST. Art. VI, Sec. 10
7 Ex. J-41
8 ABR00004925 et. seq.

including Ron Miller to serve as an Executive Director, Taylor Bickford, (Assistant Director,) Mary Core, (Administrative Assistant) Jim Ellis, (Administrative Coordinator) and Eric Sandberg (GIS and Census Data specialist).[9]

10) In November of 2010 the Board retained Michael White, of the Law Firm of Patton Boggs LLP, as Board Counsel.[10]

11) On February 23, 2011 Albert Clough resigned and Governor Parnell appointed Peggy Ann McConnochie from Juneau to replace Mr. Clough.[11]

12) The Board did not meet between December 14, 2010 and March 13, 2011.[12]

13) During this time the Boards staff engaged in research and preparatory work.[13]

9 Ex. J-41 The hiring of the Executive Director and other staff was done outside the Record.
10 Id. The hiring of the Board Counsel was done outside the Record.
11 Id.
12 ABR00002906 and ABR00003587
13 Test. Of Taylor Bickford

14) The Alaska Constitution establishes a mandatory process to be used by the Board, which begins with the reporting of the decennial census and requires the Board to

a) to adopt a proposed plan or plans 30 days after the reporting of the decennial census of the United States.

b) conduct public hearings on the proposed plans, and to

c) adopt a final plan and proclamation of redistricting no later than 90 days after the reporting of the decennial census of the United States.[14]

15) The Board received block-level population data from the U.S. Census Bureau on March 15, 2011,[15] and was required to adopt a proposed plan or plans by April 14, 2011, and a final plan and proclamation of redistricting by June 13, 2011.

14 AK CONST. Art. VI, Sec. 10
15 Ex. J-41

16) Between March 15, 2011 and April 14, 2011, the Board conducted thirteen (13) Board meetings[16] and seven (7) public hearings.[17]

17) During this period, Board developed draft (or proposed) plans (referred to as Board Option 1 and Board Option 2)[18]

18) Also during this period the Board received proposed plans from the RIGHTS Coalition,[19] Alaskans for Fair and Equitable Redistricting ("AFFER"),[20] Alaskans for Fair Redistricting ("AFFR"),[21] the City and Borough of Juneau,[22] the Bristol Bay Borough[23] and the City of Valdez[24] and the Alaska Bush Caucus.[25]

19) Alaska is a "covered jurisdiction" under Section 5 of the Federal Voting Rights Act (VRA) which requires all covered jurisdictions submit any

16 See ABR00003587-3841; ABR0000680-744; ABR00005324-5363; ABR0000765-2118; ABR00004999-5185; ABR00002119-2826
17 See ABR00011861-11933
18 See Draft Plan Option 1 with alternatives at ABR00006091, 609993-8. See Draft Plan Option 2 with Alternatives at ABR00006092, 6099-6103.
19 ABR00006339-6340; 6346-6353
20 ABR00006243-6251
21 ABR00006252-6333
22 ABR00006341-6344
23 ABR00006334-6345
24 ABR00006354-6355
25 ABR00006335-6338

voting qualification or prerequisite to voting, or standard practice or procedure with respect to voting," including redistricting plans, to the Department of Justice ("DOJ") for preclearance before the change may be implemented.[26],

20) "Under section 5 of the Act, a reapportionment plans invalid if it would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[27]

21) Retrogression means "a decrease... in the absolute number of representatives which a minority group has a fair chance to elect."[28]

22) Retrogression is measured by comparing minority voting strength under the new plan with the minority voting strength under the immediately preceding plan using current (2010) census numbers.[29]

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26 42 U.S.C 1973(c) (2000)

27 *Hickel v Southeast Conference, 846 P.2d 38, 49 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

28 DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act. 76 Fed. Reg. 7470 (Feb. 9, 2011) (hereinafter referred to as "DOJ Guidance") citing Ketchum v Byrne, 740 F. 2d 1398, 1402 n. 2 (7th Cir. 1984)

29 DOJ Guidance, supra., at 1417

23) The ''benchmark'' against which a new plan is compared is the last legally enforceable redistricting plan in force or effect.[30]

24) In this case, the Benchmark Plan is the plan in effect for the 2010 election.

25) In formulating the various plans prior to May 16, 2011, neither the Board, the various third party groups submitting plans nor the public had the necessary information on the Voting Rights Act (VRA) Benchmark standards for the number of protected districts nor effectiveness standards defining the minimum level of Native Voting Age Population (VAP) because the Board failed to hire a VRA expert who could provide those standards prior to commencing this process.[31]

26) At no time did the Board make an attempt to develop a plan in which the first priority was compliance with the Alaska State Constitution.[32]

30 DOJ Guidance, supra., citing *Riley* v. *Kennedy,* 553 U.S. 406 (2008); 28 CFR 51.54(b)(1).
31 Trial Test. Of Bickford Taylor, Dr. Lisa Handley and Leonard Lawson (on rebuttal)
32 Ex. J-62 (Torgerson Depo @ 49: 7-11); Trial Test. Of Torgerson

27) Rather, the Board and the various third party groups submitting plans using the VRA benchmark and effectiveness standards from the 2002 redistricting process, and assumed that four (4) majority-minority districts and two influence districts were required, with a minimum of 35% Native VAP necessary to constitute a Native influence district.[33]

28) On April 8, 2011, the Board hired Dr. Lisa Handley to serve as its Voting Rights Act expert.[34]

29) On May 8, 2011, Ron Miller passed away and the Board appointed Taylor Bickford as Executive Director and Jim Ellis as Assistant Director.[35]

30) Between April 8 and May 16, Dr. Handley analyzed the various draft plans developed by the board and submitted by third parties.[36]

31) On May 17, 2011 Dr. Handley telephonically appeared before the Board

33 Test. Of Torgerson, Taylor and Lawson (on rebuttal)
34 Ex. J-41
35 Ex. J-41
36 Test. Of Bickford Taylor and Dr. Lisa Handley

and advised the Board respecting her conclusions and advice as to the Voting Rights Act (VRA) Benchmark standards for the number of protected districts and the effectiveness standards defining the minimum level of Native Voting Age Population (VAP)[37]

32) Dr. Handley explained that "effective districts are districts that provide minority voters with the ability to elect candidates of choice to office".[38]

33) Dr. Handley did not explain what an influence district was,[39] 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 response to the interests and concerns of the minority community.[40]

34) Dr. Handley reported that Benchmark House Districts 37, 38, 39 and 40

37 ABR00003841 et. Seq.
38 ABR00003880: 1-3
39 Id.
40 Redistricting Law 2010, (National Conference of State Legislatures, Nov. 2009) at 69

were "effective" Native districts.[41]

35) Dr. Handley reported that Benchmark House District 5 was an "influence" Native district.[42]

36) Dr. Handley stated in regards to Benchmark House District 6 that she "wouldn't call it effective" and should be considered an influence district because it did not elect the minority preferred candidate despite strong support for the Native preferred candidate.[43]

37) Dr. Handley reported that Benchmark Senate District T, F, and C were "effective" Native districts.[44]

38) Dr. Handley reported that the benchmark to avoid retrogression of Native Voting strength for the 2010 plan was four (4) effective house districts and two (2) influence districts and three (3) effective Senate Districts.[45]

41 ABR00003881: 16-19
42 ABR00003881
43 ABR00003881: 1-7; ABR00003886:5-6
44 ABR00003882: 3-9
45 ABR00003881: 12-13; ABR00003882: 3-4

39) Specifically, Dr. Handley advised that the degree of racially polarized voting had increased in Alaska since 2000.[46]

40) Dr. 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: former District 6 which had greater polarized voting and would require 50% Native VAP; and former District 37 which was "not polarized at all" and could be effective at "anything down in the 30's(%)".[47]

41) Dr. Handley also advised the Board that the AFFR, AFFER, and RIGHTS Coalition proposals were all non-retrogressive.[48]

42) The only third party plan that Dr. Handley reviewed "at length" was the adjusted AFFR plan.[49]

46 ABR00003875-6
47 ABR00003877-78
48 ABR00003917-3918; ABR00003922
49 ABR00003917: 16-20

43) The following day, Taylor Bickford and Michael White advised the board that Dr. Handley may have been working with the wrong data, and the Board asked staff to look into that issue.[50]

44) It was later discovered that Dr. Handley had been analyzing the various plans using total Native population figures rather than Native VAP population figures and didn't recognize the problem until the issue was raised by the Board staff.[51]

45) To help clarify Dr. Handley's presentation, Board staff procured Dr. Handley's presentation notes.[52]

46) The notes clarified Dr. 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

50 ABR00004101
51 Trial Test. Of Taylor Bickford and Dr. Handley.
52 Trial Test. Of Taylor Bickford and Dr. Handley.

sufficient support for the minority-preferred candidates to win."[53]

47) The notes clarified that Dr. Handley fixed the benchmark as being four (4) effective house districts (i.e. Dist. 37-40) and two (2) influence or equal opportunity districts (i.e. Dist. 5 and 6) and three (3) effective Senate Districts (i.e. Dist. C, S and T).[54]

48) The notes clarified that Dr. 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.[55]

49) The notes only opined that the AFFR adjusted draft plan was non-retrogressive, but did not reference the other plans.[56]

50) There is no written or oral communication by Dr. Handley to the Board in the Board record retracting her opinions that AFFER, adjusted AFFR, and

53 Ex. J-44 @ 2
54 Ex. J-44 @ 2-3
55 Ex. J-44 @ 3-4
56 Ex. J-44 @ 4

the RIGHTS Coalition plans are non-retrogressive, nor any latter statement in the Record by Dr. Handley to the Board stating that any of these plans are retrogressive.

51) The Board scheduled a meeting with Dr. Handley in person to help clarify some of these issues.[57]

52) On May 24 2011 Dr. Handley traveled to Alaska and met with the Board on person, and clarified her opinion that the VRA benchmark was four (4) effective house districts, two (2) influence or equal opportunity districts, and three (3) effective Senate Districts.[58]

53) On May 24 Dr. Handley also confirmed that the effectiveness standard for a Native district was 42% Native VAP statewide, with two exceptions: former District 6 which had greater polarized voting and would require 50% Native VAP; and former District 37 which could be effective at 35%, but Dr. Handley could not identify the minimum Native VAP in that

57 Trial Test. Of Chairman Torgerson and Taylor Bickford.
58 ABR00004206; ABR00004208

district needed to be effective in the area within former District 37.[59]

54) Between May 16th and June 14th, the Board continued to meet in public meetings, and work sessions.

55) During this period of time, the Board also held executive sessions on June 1, 2011,[60] June 4, 2011,[61] and June 13, 2011[62] to discuss litigation, despite the fact that there was no litigation was pending.[63]

56) It is clear from the record that in at least one of these sessions the Board discussed possible plans.[64]

57) The Board delegated the responsibility to draw the Fairbanks plan to Member Jim Holm, and all members of the Board deferred to his proposed plan in this regard.[65]

59 ABR00004205-6
60 ABR00002909
61 ABR000043348
62 ABR00003565
63 Trial Test. Of Chairman Torgerson
64 ABR000043348
65 Trial Test. Of Chairman Torgerson and Jim Holm; Ex. J-62 (Depo J. Torgerson) at 58:23-24 & 75:1-4

58) The Board did not have any member from Anchorage, so it accepted a proposed plan for Anchorage submitted by Randy Ruedrich, the Chairman of the Alaska Republican Party and Anchorage Mayor Sullivan through AFFER and sponsored by Chairman Torgerson.[66]

59) The Board delegated the responsibility to draw the Rural and Southeast portions of the plan to Marie Green and Peggy Ann McConnochie.[67]

60) During this period, the majority of the Board's focus was on constructing the rural Native districts.[68]

61) The Board believed that some urban population would have to be added to a predominately rural Native effective district.[69]

62) At some unknown point, a decision was made to include the population

66 Trial Test. Of Chairman Torgerson and Taylor Bickford.; Ex. J-62 (Depo J. Torgerson) at 59:18-25
67 Trial Test. Of Chairman Torgerson and Taylor Bickford.; Ex. J-62 (Depo J. Torgerson) at 59:1-4
68 Ex. J-41; Trial Test. Of Chairman Torgerson and Taylor Bickford.
69 Ex. J-41; Trial Test. Of Chairman Torgerson and Taylor Bickford.

of Ester and Goldstream areas of the Fairbanks North Star Borough into a predominately rural Native effective district.[70]

63) The record does not record the decision or the reason for the decision to include the population of Ester and Goldstream areas of the Fairbanks North Star Borough and the Denali Borough into a predominately rural Native effective district, nor explain why decision was made.

64) Chair Torgerson testified that the only option the Board considered other than Fairbanks was Mat-Su, but he was not sure if Peggy Ann McConnochie and Marie Green looked to other areas of the state.[71]

65) Neither Peggy Ann McConnochie nor Marie Green testified at trial to explain why Fairbanks population was selected to be included in a rural Native effective district.

66) At trial the Board staff testified that the reason for selecting

70 Trial Test. Of Taylor Bickford.
71Testimony of John Torgerson,

Ester/Goldstream and Denali Borough population for inclusion into a predominately rural Native effective district was because the Board believed that these populations voted overwhelming Democratic.[72]

67) The decision required Mr. Holm to wait until the completion of the rural plan in order to complete his work on the Fairbanks plan.[73]

68) During this time, the Board developed two plans -- the so-called TB Plan[74] and the PAME Plan[75] --- that Dr. Handley opined would be non-retrogressive.[76]

69) The rejection of the TB and PAME Plans and the reason for these rejections were not recorded in the Board record.

70) At trial the Board staff testified that the neither the TB Plan nor the PAME Plan were adopted because the TB plan paired paired a Native Senate

72 Trial Test. Of Chairman Torgerson and Taylor Bickford.
73 Trial Test. Of Jim Holm.
74 Ex. J. 31
75 Def. Ex. W
76 Trial Test. Of Taylor Bickford.; Trial Test. Of Dr. Handley as to the TB Plan. The PAME Plan is found at Ex.

incumbent with a non-Native Senate incumbent, and the PAME Plan paired two Native Senate incumbents. [77]

71) On or about June 13, 2011 the Board adopted the final plan for redistricting.[78]

72) The Proclamation did **not** make any findings or otherwise proclaim that the Board intended to deviate from the requirements contained in Art. VI, Sec. 6 of the Alaska Constitution. [79]

73) The Proclamation proclaimed that "the configuration of House Districts 34, 36, 37, 38 and 39 were necessary to comply with the requirements of the Federal Voting Rights Act.[80]

74) The Proclamation did **not** proclaim the configuration of House Districts 1,2,5, 6, nor Senate Districts A, B, C, or S were necessary to comply with

77 Trial Test. Of Taylor Bickford.;
78 Ex. J-41 @ 21-2
79 Ex. J.-41 @ 1-2
80 Ex. J.-41 @ 1-2

the requirements of the Federal Voting Rights Act.[81]

75) On or about August 4, 2011, several weeks after adoption of the Proclamation Plan, Dr. Handley submitted her final report.[82]

76) The purpose of Dr. 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.[83]

77) Dr. Handley's report is confusing as to her opinion of the benchmark standard.[84] In discussing the Benchmark plan, Dr. Handley opined that the the VRA benchmark was four (4) effective house districts, one (1) equal opportunity districts, and three (3) effective Senate Districts.[85] However, in her discussion of alternative plans, she infers a different standard: i.e. "(n)one of these alternative plans provide both four majority Alaska

81 Ex. J.-41 @ 1-2
82 Ex. J-40 The Report is not dated. The Board Record Index indicates that the Report was received August 4, 2011. Dr. Handley was unable to remember exactly when the report was submitted, but confirmed that it was sometime after June Ex. 57 (Handley Depo) at 122: 21-22
83 Trial Test. Of Dr. Handley
84 Trial Test. Of Dr. Arrington
85 ABR00004206; ABR00004208

Native VAP house districts and a fifth district that offers a very sizable Alaska Native VAP, as well as two majority Alaska Native senate districts and a third senate district that has a substantial Alaska Native population and is likely to be effective."[86]

78) Dr. Handley's report opines that the Proclamation plan is non-retrogressive because it offers "five effective minority house districts and three effective senate districts."[87]

79) Clearly, Dr. Handley used different standards in evaluating the alternative plans and the proclamation plan. For example, the Proclamation plan does not provide "four majority Alaska Native VAP house districts and a fifth district that offers a very sizable Alaska Native VAP"; rather it only provides for three (3) majority Alaska Native VAP house districts.[88] Nor does the Proclamation plan provide "two majority Alaska Native senate districts;" rather it only provides for one senate district that has a majority

86 Ex. J-40 @ 25-26
87 Ex. J-40 @28-29
88 Cf. Ex. J-40 @ 29

of Alaska Native VAP.[89]

80) Dr. Handley's report does not mention that the Board developed two alternative plans that she determined to be non-retrogressive, thereby creating the misleading impression that the Proclamation Plan was the only plan known to be non-retrogressive.

81) Dr. Handley's Report does not specifically opine as to the effectiveness standard for Native districts. [90]

82) On August 9, 2011, the Board submitted the Proclamation Plan to the DOJ for preclearance under Sec. 5 of the VRA.[91]

83) In the submission to DOJ, the Board represented that the Benchmark was four (4) effective house districts, one (1) and one equal opportunity house district and one (1) influence house district and three (3) effective Senate

89 Cf. Ex. J-40 @ 31
90 See generally J-40
91 Ex. J- 39

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Districts.[92]

84) In the submission to DOJ, the Board represented that the Proclamation plan created five (5) effective house districts[93] and three (3) effective Senate Districts.[94]

85) If the Court was to accept Dr. Handley's report and the Board representations in the DOJ submissions as authoritative and conclusive, this Court would have to conclude that the Proclamation plan exceeded the VRA benchmark by creating five (5) effective districts when the benchmark was only four (4) effective districts.

86) Dr. Handley advised the Board that it should make the plan as "strong as possible," relative to Native effective districts,[95] which was an erroneous statement of the law, in that the Board only had the discretion to exceed VRA Benchmark standards to the extent that the plan did not violate the

92 Ex. J- 39 @ 7-8
93 Ex. J-39 @ 11
94 Ex. J-39 @ 13
95 Trial Test. Of Dr. Handley.

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Alaska Constitution.[96]

87) The Board actions to create a plan that made the Native effective districts as "strong as possible," were taken under a mistaken legal standard respecting its discretion to maximize Native voting strength without regard to the requirements of the Alaska Constitution.

88) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 40 effective was at most 42%, and Proc. HD 40 Native VAP is 62.09%.[97]

89) Dr. Handley testified that the minimum Native VAP to make Proc. HD 39 effective was 42%, and Dr. Arrington testified that the minimum Native VAP to make Proc. HD 39 effective was between 42-50%, but Proc. HD 39 has a Native VAP of 67.09%.[98]

96 *Hickel v Southeast Conference, 846 P.2d 38, 51-52 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

97 Trial Test. Of Dr. Arrington and Dr. Handley. Dr. 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.

98 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29

90) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 38 effective was at most 42%, and Proc. HD 38 Native VAP is 46.36%.[99]

91) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 37 effective was at most 42%, and Proc. HD 37 Native VAP is 46.63%.[100]

92) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 36 effective was at most 35%, and Proc. HD 36 Native VAP is 71.45%.[101]

93) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD R effective was at most 42%, and Proc. SD R Native VAP is 43.75%.

99 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29
100 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29
101 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40: @ 29. Dr. Handley has indicated that she does not know how low Native VAP in this area of the State may go and still allow a District to remain effective. Id.; See also Ex. 57 (Handley Depo) at 67: 13-22

94) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD S effective was somewhere between 42-50%, and Proc. SD S Native VAP is 46.85%.

95) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. SD T effective was at most 42%, and Proc. SD T Native VAP is 65.05%.

96) The Court finds that the Native VAP in Proc. HD 36, 39. 40 and SD T exceeded the minimum effectiveness standards to create Native effective districts.

97) Some members of the Board were under the impression that no other plan existed which was non-retrogressive.[102]

98) The Board never offered the testimony of Members Brodie, Green or McConnochie, so that there is no evidence as to whether those members

102Trial Test. Of Chairman Torgerson and Jim Holms

were under the impression that no other plan existed which was non-retrogressive.

99) The Court finds that other non-retrogressive plans were possible,[103] and to the extent that the Board believed that there were no other non-retrogressive plans available to it, the Board worked under a mistaken factual impression.

100) At some undetermined time after the Board's submission of the Proclamation of the Plan to DOJ for preclearnace and while she was working for DOJ on the Texas redistricting, Dr. Handley discovered that her advice to the Board respecting the Benchmark standard was in error: i.e. that the DOJ did not consider influence or "equal opportunity" districts in their determinations as to whether a plan was retrogressive.

101) After discovery of her error, Dr. Handley did not perform any new computations nor analysis to adjust her opinion respecting the benchmark

103 Trial Test. Of Dr. Arrington, Dr. Handley and Leonard Lawson. See Ex. J-31, Def. Ex. W, and Plt. Ex. 14.

standard or whether the plan was retrogressive. Rather, Dr. Handley merely changed her nomenclature to reclassify Benchmark HD 6 as an "effective" district under the benchmark.[104]

102) As a matter of law, the Court concludes that after the 2006 Amendments to Sec. 5 of the VRA, neither influence nor equal opportunity districts are relevant in determining the benchmark standard nor retrogression of minority voting strength.[105]

103) The Board relied upon Dr. Handley's advise respecting the the applicable benchmark and retrogression standards,[106] which were clearly in error.

104) The Board actions were taken under the mistaken legal standard respecting the applicable benchmark and retrogression standards.

104 Trial Test. Of Dr. Handley

105 See also *Texas v USA*, Civil Action No. 11-13-3 (Memo Opinion, December 22, 2011) at 9 citing H.R. Rep. No. 109-478, at 45 (*reprinted in 2006 U.S.C.C.A.N. 618). See also Texas v USA, supra, at 12, 25-28. Despite* the fact that Dr. Handley was a principle expert witness in the Texas v USA case, upon cross examination, Dr. Handley did not know that Texas was arguing in favor of the counting "opportunity" districts in the benchmark and retrogression standards, and that the the three-judge panel's memorandum opinion in that case held that use of "opportunity" districts was not permissible for such purposes. Dr. Handley also testified at trial that she was familiar with the DOJ Guidelines, however, she was unaware that the DOJ Guidelines clarified that the Department would be guided by the Congressional directive to "ensure that the ability of such citizens to elect their preferred candidate of choice is protected. That ability to elet either exists or it does not in any particular circumstances.". DOJ Guidance Concerning Redistricting Under Section 5 of the Voting Rights, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011)

106 Trial Test. Of Chairman Torgerson and Jim Holms

PLAINTIFFS CLAIMS

105) Plaintiffs have challenged a number of House and Senate Districts as violative of the Art. VI, Sec. 6, and the Equal Protection requirements of of the Alaska Constitution.

106) Defendants have variously denied the violations and, in the alternative, have argued that any such violations may be excused by the necessity to comply with the Federal Voting Rights Act.

107) Prior to Trial, this Court ruled that the Proclamation Plan violated the Alaska Constitution with regard to Proc. HD 2 (compactness), HD 1 (Compactness), HD 38 (socioeconomic integration), and HD 37 (compactness and contiguity). Additionally, the Court ruled that splitting the excess population of the Fairbanks North Star Borough into two house districts (i.e. HD 6 and 38) violated Alaska's equal protection clause.

108) Prior to trial the Court held that the constitutional violations respecting

HD 2 could not be excused by the necessity to comply with the Federal Voting Rights Act. The Court reserved for trial on the issue of whether the remaining violations of Alaska's Constitution may be excused by the necessity to comply with the Federal Voting Rights Act.

109) Plaintiffs reserved for trial their claims that Proc. HD 5 violated the Alaska Constitution's requirement that House Districts be compact.

110) Plaintiffs reserved for trial their claims that Proc. SD A-C and S violated the Alaska Constitution's Fair and Effective Representation requirements.

STANDARD OF REVIEW/ BURDENS OF PROOF

111) This Court reviews the redistricting plan to ensure that it is not unreasonable and is constitutional under Art. VI, § 6 of Alaska's Constitution.[107]

107 *Groh v Eagan,* 526 P. 2d 863 (Alaska, 1974); *Carpenter v Hammond,* 665 P.2d 1204 (Alaska 1983)

112) The Plaintiff shall have the burden of proof to demonstrate that the paln or portions thereof are unreasonable or unconstitutional.[108]

113) Conclusions of law are subject to *de novo* review by this Court.[109]

114) As to mixed questions of law and fact, the Court shall employ the reasonable basis test: i.e. "determine whether the agency's decision is supported by the facts and has a reasonable basis in the law".[110]

115) In the absence of sufficient findings of fact by the Board, the Court has the discretion to exercise *de novo* review of the record or to remand for further findings of fact.[111]

116) Where the Board has made specific findings of fact that are disputed, the "substantial evidence" test applies: i.e. there must be substantial evidence

108 Id.
109 *Ben Lomond Inc. v Fairbanks North Star Borough Board of Equalization,* 760 P.2d 508 (Alaska, 1988)
110 *Gunderson v University of Alaska,* 922 P.2d 229, 233 (Alaska, 1996) quoting *Tesoro Alaska v Kenai Pipeline Co., 746 P.2d 896 (Alaska, 1987)*
111 *City of Nome v Catholic Bishop of Northern Alaska,* 707 P.2d 870, 875 n. 2&3, and 876 (Alaska, 1985)

in the record that support the findings that are disputed.[112]

117) Where a district has been found to violate the requirements of the Alaska Constitution, the Board shall have the burden of proof to show that the geographic configuration of each of these districts is necessary under the Voting Rights Act.[113]

HD 1

118) Proc. HD 1 is a district principally containing the eastern half of the City of Fairbanks.

119) As previously held, Proc. HD 1 has an appendage in the northwestern corner of the District that extends over HD 5 (containing the western half of the City of Fairbanks) and beyond the Fairbanks City Boundaries . It is "akin to the dreaded 'Oosik District" referenced in *Hickel v Southeast Conference.* The Court has found that the configuration violates the

112 Id.

113 In *re 2001 Redistricting Cases, 44* P. 3d 141, 146 (Alaska 2002); See also, *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987)

compactness requirements of the Alaska Constitution.

120) At summary judgment, the Board argued that the configuration of Proc. HD 1 was necessitated by the VRA.

121) The findings in the Proclamation do not include Proc. HD 1 as one of the Districts whose configuration was required by the VRA, and thus, the Board never found that the appendage at issue was necessary under the VRA.

122) Moreover, the testimony of Jim Holm, the architect of the Fairbanks Districts, indicates that the appendage was not required by the VRA.

123) Mr. Holm testified that the district was drawn in this manner in order to generally achieve equal population and reduce population deviations, which this Court had previously held to be non-persuasive.

124) The testimony of Leonard Lawson and demonstration using Maptitude

software showed that the offending appendage contained 412 persons while the area between Cushman Street and the New Steese Highway that was moved from East to West Fairbanks from the Board Option plans contained 433.

125) With the software available to the Board, it was relatively simple to exchange these populations and maintain relative equal population between the two districts without appreciable increasing population deviations.

126) HD 1 is not adjacent to any Native effective District contained within the plan. HD 1 and 5 do not contain sufficient Native population to give rise to concerns about VRA compliance

127) The exchange of population discussed above would have not relevant effect under the VRA.

128) The exchange of population discussed above would result in a more

compact HD 1.

129) It was therefore possible for the Board to create a more compact HD1 without violating the VRA.

130) The violation of the Alaska Constitution resulting from the configuration of Proc. HD 1 is not excused by the necessity to comply with the VRA.

HD 2

131) As previously held, Proc. HD 2 violates the compactness requirements of the Alaska Constitution, and such violation is not excused by the necessity to comply with the Voting Rights Act.

HD 5

132) Proc. HD 5 is a district principally containing the Chena Pump and Chena Ridge areas to the west of the City of Fairbanks,[114] and the Tanana Flats.[115]

133) The vast majority of the population of Proc. HD 5, if not the entire

114 Trial Test. Of Sen. J. Paskvan, Sen. J. Thomas, Jim Holm
115 Trial Test. Of Sen. J. Paskvan, Sen. J. Thomas, Leonard Lawson.

population of Proc. HD 5, is located in the Chena Pump and Chena Ridge areas.[116]

134) The Tanana Flats is a large vacant area located to the south and across the Tanana River from the City of Fairbanks, which is part of Ft. Wainwright and used as a training area.[117]

135) The remaining portion of Ft. Wainwright is located in Proc. HD 1.[118]

136) The Tanana Flats is separated from the Chena Pump/Chena Ridge portions of Proc. HD 5 by the Tanana River.

137) According to Jim Holm, the district was configured to include the Tanana Flats in order to create a corridor of contiguity with Proc. HD 6, which is located to the east of the City of Fairbanks for the purpose of creating Proc. SD C.[119]

116 Trial Test. Of Sen. J. Paskvan, Sen. J. Thomas, Jim Holm
117 Trial Test. Of Sen. J. Paskvan, Sen. J. Thomas, Jim Holm
118 Trial Test. Of Jim Holm
119 Trial Test. Of Jim Holm

138) Mr. Holm testified that Proc. SD 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.

139) Mr. Holm's testimony about the desire to form a Senate district that would unite the farmers of Rosie Creek and Salcha is not creditable because there is no evidence that there is a substantial number of farmers in the resulting Proc. SD C.

140) Proc. HD 6 only contains approximately 2,500 residents of the FNSB, with the remaining population located along the Richardson Highway and the Mat-Su Borough. [120]

141) If the Tanana Flats were not included within HD 5 or 6, the two house districts would not be contiguous and could not be paired to form a Senate District.

120 Trial Test. Of Taylor Bickford

142) The Tanana Flats forms a vacant corridor connecting the populated areas of HD 5 and HD 6.

143) Odd shaped districts such as corridors that only serve to provide contiguity to areas that would otherwise be non-contiguous violate Alaska's compactness standards.[121]

144) There is ample circumstantial evidence that a more likely reason for the inclusion of the Tanana Flats into HD 5 was for partisan political purposes.

145) The Constitution requires that all appointments to the Redistricting Board are to be made without regard to political affiliation,[122] however, all appointing authorities other than the Chief Justice of the Supreme Court are members of the Republican Party[123] and all their appointments were

121 *Hickel v Southeast Conference,* 486 P. 2d , at 455-456
122AK CONST. Art. VI, Sec. 10
123

Republican.[124]

146) According to Jim Holm, the Republicans were in charge of the redistricting process.[125]

147) Mr. 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.[126]

148) Mr. Holm was concerned and took steps to insure that he did not draw Rep. Tammy Wilson nor Sen. John Coghill out of their districts.[127]

149) Both Rep. Tammy Wilson and Sen. John Coghill are incumbent Republican legislators from the Fairbanks area.[128]

150) On the other hand, the Fairbanks plan drafted by Mr. Holm paired two

124
125 Ex. J-61 (Holm Depo) at 22-23
126 Trial Test. Of Jim Holm
127 Trial Test. Of Jim Holm
128 Trial Test. Of Jim Holm

incumbent Democratic senators (i.e. Sen. Joe Paskvan and Sen. Joe Thomas) in the same Senate seat (i.e. SD B which is comprised of HD 4 in 3 which Sen. Paskvan resides and HD 3 in which Sen. Thomas resides). [129]

151) If the Tanana Flats were not part of HD 5 or 6, Proc HD 5 would only be contiguous with Proc. HD 3 or 4, with the necessary implication that HD 3 and 4 could not be paired in a Senate pairing, and Sen. Thomas and Paskvan could not be included in the same Senate District.

152) The Court finds that the inclusion of the Tanana Flats into Proc. HD 5 was not for a legitimate non-discriminatory purpose, and that the district violates the compactness requirement of the Alaska Constitution.

HD 37

153) Proc. HD 37 is a district that includes the Bethel Census area Nunivak Island, Saint Matthew Island, the Pribilof Islands, and all islands of the Aleutian Chain west of Unimak Pass.[130]

129 Trial Test. Of J. Thomas and J. Paskvan
130 ARB 00006578

154) As previously held, Proc. HD 37 splits the Aleutian Islands and combines the Western Aleutians with the Bethel census district which is over 500 miles away over open sea. As a result, HD 37 violates the Alaska Constitutional requirements that districts be comprised of compact and contiguous areas.

155) At summary judgment, the Board argued that the configuration of Proc. HD 37 was necessitated by the VRA.

156) The Proclamation does not acknowledge this violation of Alaska's Constitution, but does claim that the district's configuration was required by the VRA.

157) The remainder of the Aleutian Islands (i.e. the Eastern Aleutians) are located in Proc. HD 36.

158) Dr. Handley and Dr. Arrington both testified that the minimum Native

VAP to make Proc. HD 37 effective was at most 42%, and Proc. HD 37 Native VAP is 46.63%.[131]

159) Dr. Handley and Dr. Arrington both testified that the minimum Native VAP to make Proc. HD 36 effective was at most 35%, and Proc. HD 36 Native VAP is 71.45%.

160) As a matter of law, the Board does not meet its burden of proof to assert a viable VRA excuse to a Constitutional violation where the Board increased Native VAP in a district in excess of the amount minimally necessary to comply with the VRA.[132]

161) Proc. HD 36 has a population of approximately 17,095.[133]

162) Proc. HD 37 has a population of approximately 16,899.[134]

131 Trial Test. Of Dr. Arrington and Dr. Handley. See also, Ex. J-40 @ 29

132 *Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) [increased Native VAP in a district from 27.5% (Benchmark district) to 41.9% (Proclamation District) unnecessary to comply with VRA and did not excuse violation of Alaska Constitution] *Hickel v Southeast Conference,* 846 P.2d 38, 51-52 (Alaska 1993) [District that raised Native VAP by 2% over the benchmark was not justification for violation of the compactness requirement.]

133 Ex. J-41; ARB 00006034

134 Ex. J-41; ARB 00006034

163) Uniting the Western Aleutians with the remaining Aleutians in Proc. HD 36 would resolve the Constitutional infirmities manifest in Proc. HD 37.

164) The Board offered no evidence as to the effect of uniting the Aleutians with respect to the effectiveness of HD 36 and 37.

165) The Western Aleutians have a population of approximately 5500 people, who are predominately non-Native, and include 1600 Asians, who exhibit low voter turnout.[135]

166) Assuming that the entire population of the Western Aleutians were non-Native and they were added to HD 36, and an equal population comprised entirely of Natives were removed from the northern portion of HD 36, the resulting Native population of HD 36 would decline to only about 46% in the resulting district.

135 Trial Test. Of Taylor Bickford.

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167) The resulting modified HD 36 would likely be above the 35% Native VAP, which according to the testimony of Dr. Handley and Dr. Arrington, is sufficient to allow the District to remain a Native effective district.

168) Removing the predominately non-Native population of the Western Aleutians from HD 37 would necessarily have no impact upon the effectiveness of a modified HD 37, even if the compensating population added to the district were entirely non-Native.

169) Thus, it is possible to unite the Aleutians into a single district without reducing the effectiveness of either HD 36 or 37.[136]

170) The Board has failed to demonstrate that the configuration of Proc. HD 37 was required by the VRA.

HD 38

171) Proc. HD 38 is a district that includes the Ester/Goldstream suburban area

136 See Plt. Ex. 14, Def. Ex. W, Ex. J – 31, Ex. J-4

of the FNSB, the Denali Borough, the Iditarod Area REAA and the Wade Hampton Census Area.[137]

172) Ester/Goldstream is composed of predominately English speaking non-Native population, who historically vote Democratic.[138]

173) The Denali Borough contains a number of communities along the Parks Highway composed of predominately English speaking non-Native population, who historically vote Republican.[139] It has a population of 1,826.[140]

174) The Iditarod Area REAA contains a number of communities composed of predominately Alaska Native people that were in Benchmark HD 6.[141]

175) The Wade Hampton area contains a number of communities composed of predominately Alaska Native people that were in Benchmark HD 39.[142]

137 Ex. J-41; ARB00006046
138 Trial Test. Of Sen. Joe Thomas and Joe Hardenbrook.
139 Trial Test. Of Sen. Joe Thomas and Joe Hardenbrook.
140 Ex. J-47
141 Trial Test. Of Taylor Bickford and Leonard Lawson
142 ARB 00013486; Trial Test. Of Taylor Bickford and Leonard Lawson

176) While generally, Alaska Natives vote Democratic, there are a couple of precincts in the Native areas of Proc HD 38, that have more substantial Republican vote.[143]

177) This Court has previously entered partial summary judgment that Proc. HD 38 violates the Alaska Constitution in two particular ways: 1) it was largely undisputed that the district does not comprise a relatively socioeconomically integrated area as required by Art. 6, Sec. 6 of the Alaska Constitution, and 2) the plan splits the excess population of the FNSB into two districts (Proc. HD 38 and 6) in violation of Alaska's Equal Protection Clause.

178) The Board asserts that these violations of the Alaska Constitution were necessary in order to comply with the VRA, and bears the burden of proof on that point.

143 Ex.J-58 (Arrington Depo), at 92

179) The Board argues that in order to maintain a fifth effective Native House District it was necessary to create a cross-over district comprised of rural Native communities and urban/suburban non-Natives in an area that would be predisposed to cross-over and vote for a Native preferred candidate.[144]

180) The Board claims that it relied upon the advise of Dr. Handley, who is reported to have opined that Alaska Natives generally vote Democratic, and an effective Native district could be constructed by adding urban/suburban non-Native population that vote Democratic so long as the added non-Native population was not sufficiently large to actually control the district.[145]

181) There is no evidence in the record of Dr. Handley actually providing this advice directly to the Board, and all such advise was filtered through either the Board Counsel White or Taylor Bickford.[146]

144 Trial Test. Of Taylor Bickford; Ex. J-39 (ARB00013486) (DOJ Submission Statement); See also ARB0000445 (Statement of Member McConnochie)
145 Trial Test. Of Taylor Bickford; Ex. J-39 (ARB00013486) (DOJ Submission Statement
146 Trial Test. Of Taylor Bickford; E.g. ARB00004451-2; ARB00004518-9

182) As the Court in *Texas v USA* noted, "Section 2 (of the VRA) concerns itself with the possibility of a minority groups present, but **unrealized** opportunity to elect."[147] In contrast "Section 5 looks at gains that have already been **realized** by minority voters and protects them from future loss."[148] In the realm of cross-over districts, Section 5 only protects a cross-over district that has been realized; it does not protect the potential to take advantage of an opportunity to create a previously unrealized cross-over district.[149]

183) The Benchmark Plan did not contain a cross-over Native effective district comprised of rural Native communities and a suburban non-Native area.[150]

184) Section 5 of the VRA did not require the Board to create a new, and previously unrealized cross-over district such as Proc. HD 38.

147 *Texas v USA*, Civil Action No. 11-13-3 (Memo Opinion, December 22, 2011) at 27, citing *Reno v Bossier Parish School Bd.,(Bossier I)* 520 U.S. 471 , 480 (1997) (emphasis in original)
148 *Texas v USA*, Civil Action No. 11-13-3 (Memo Opinion, December 22, 2011) at 27-28, citing *Reno v Bossier Parish School Bd.,(Bossier I)* 520 U.S. 471 , 478 (1997) (emphasis in original)
149 *Texas v USA*, Civil Action No. 11-13-3 (Memo Opinion, December 22, 2011) at 36-7
150 Trial Test. Of Taylor Bickford;

185) While the Board had the discretion to create a new, and previously unrealized cross-over district such as Proc. HD 38, such an opportunity may only be realized provided that the creation of such a district would not violate the Alaska Constitution.[151]

186) As previously noted, Dr. Handley advised the Board that it should make the plan as "strong as possible," relative to Native effective districts,[152] which was an erroneous statement of the law, in that the Board only had the discretion to exceed VRA Benchmark standards to the extent that the plan did not violate the Alaska Constitution.[153]

187) The creation of Proc. HD 38, a previously unrealized cross-over district, were taken under a mistaken understanding of the legal standard respecting the Board's discretion to maximize Native voting strength without regard to the requirements of the Alaska Constitution.

151 *Hickel v Southeast Conference, 846 P.2d 38, 51-52 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

152 Trial Test. Of Dr. Handley.

153 *Hickel v Southeast Conference, 846 P.2d 38, 51-52 (Alaska, 1992); citing Kenai Peninsula Borough v State,* 743 P.2d 1352, 1361 (Alaska, 1987) *quoting Beer v United States,* 425 U.S. 130, 141 (1988)

188) Moreover, the evidence is largely uncontroverted that the Board chose to add the Ester/Goldstream area of the FNSB to an otherwise rural Native district because the Board perceived the the Ester/Goldstream area as historically voting Democratic and that the Native's in HD 38 historically voted Democratic.[154]

189) The Court finds that the Board used race as a proxy for political characteristics vise-a-vis the Native and non-Native populations in Proc. HD 38.

190) To the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation under federal constitutional law.[155]

191) Section 5 of the VRA is not an excuse for using race as a proxy for political characteristics where a covered jurisdiction seeks to augment a minority district using non-minority population, rather than maintaining the

154 Trial Test. Of Taylor Bickford; Ex. J-39 (ARB00013486) (DOJ Submission Statement); See also ARB0000445 (Statement of Member McConnochie)

155Bush v Vera, 517 US 952, 968 (1996)

benchmark previously realized.[156]

192) The Court finds that in configuring Proc. HD 38, the Board sought to augment a Native effective district rather than maintaining a previously existing Native effective cross-over district.

193) Moreover, there is conflicting evidence as to whether Benchmark HD 6 and Proc. HD 38 are effective Native house districts.

194) Both Dr. Handley and Dr. Arrington opinions that the districts are effective Native district are not without qualification.

195) There is ample evidence in the record that during all of the Board's process, Dr. Handley did not consider Benchmark HD 6 an effective Native District because in 2010, the District failed to elect a Native preferred candidate.[157] Indeed, Dr. Handley did not know how DOJ

156 Bush v Vera, 517 US 952, 982-983 (1996) ["A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonabley necessary to avoid retrogression."]

157 ABR00003881: 1-7; ABR00003886:5-6; See also, Ex. J-44 @2-3; See Ex. J- 57 (Handley Depo) at 69:9-70:10, 78:18-79:5 & Depo Ex. 5.

would consider Benchmark HD 6.[158]

196) Similarly, Dr. Arrington struggled with the same problems as Dr. Handley and was uncertain as to whether Benchmark HD 6 should be counted as an effective District.[159]

197) While Dr. Handley now considers Proc. HD 38 effective,[160] her opinion is based upon general statewide averages, and not any analysis of the precincts actually in Proc. HD 38.[161]

198) Dr. Arrington explained that while using the general numbers and analysis that he and Dr. Handley normally use, Proc. HD 38 was effective, however, he had serious qualifications given the existence of several factors that neither he nor Dr. Handley investigated nor had the expertise to investigate.[162]

158 See Ex. J- 57 (Handley Depo) at Depo Ex. 5.
159 Ex. J-58 (Arrington Depo) at 109:11-25; 133:20-134:2; 134:20-135:2.
160 Ex. J- 57 (Handley Depo) at 110:18; See also Trial Test. Of Dr. Handley.
161 Trial Test. Of Dr. Handley.
162 Ex. J-58 (Arrington Depo) at 95:20-25; 96:8-12

199) Dr. Handley erroneously believed that all the suburban non-Native population added to Proc. HD 38 was Democratic voting, and was unaware that the non-Native population from the Denali Borough actually tended to vote Republican.[163]

200) Dr. Handley was unaware that certain Native precincts within Proc. HD 38 tended to vote Republican.[164]

201) Dr. Handley relied solely upon general state-wide averages respecting Native voting cohesion, and did not conduct any analysis to determine whether the Athabaskan precincts in Proc. HD 38 would vote in a cohesive manner with the Yupik areas of the District,[165] nor whether the upriver and coastal Yupik areas of Proc. HD 38 vote in a cohesive manner.[166]

202) The Ester/Goldstream precincts have some of the highest voter turnout of any precincts in the FNSB.[167]

163 Trial Test. Of Dr. Handley.
164 Trial Test. Of Dr. Handley.
165 Ex. J- 57 (Handley Depo) at 108:10-17
166 Trial Test. Of Dr. Handley. The Plaintiffs proffered evidence that the Court ruled as irrelevant that the up-river and coastal Yupik populations in HD 38 do not always vote in a cohesive manner.
167 Trial Test. Of Joe Hardenbrook

203) In recent Democratic primaries, the turn out in Ester/Goldstream exceeded the turn out in the Yupik areas of Proc. HD 38.[168]

204) Dr. Handley relied solely upon general state-wide averages respecting Native and non-Native voter turn out which estimated that Native turnout was generally higher than non-Native voter turnout, and she was unaware of the reverse trend between Ester/Goldstream and Wade Hampton voter turn out in Democratic primaries.[169]

205) The Court therefore finds that the Board failed to present evidence that Proc. HD 38 is an effective Native House District sufficient to show a compelling state interest in creating the District to overcome the Constitutional infirmaries.

206) Finally, there is significant evidence of partisan motivation in the configuring of Proc. HD 38.

168 Trial Test. Of Joe Hardenbrook
169 Trial Test. Of Dr. Handley.

207) As previously noted, the Board was controlled by partisan Republicans.

208) Chairman Torgerson had indicated that the Redistricting process would provide "payback" for perceived Democratic partisan gerrymandering in the 2002 process.[170]

209) Prior to his work for the Redistricting Board, Taylor Bickford had worked for the Republican party as director of their coordinated "Victory Campaign" in the 2010 elections. [171]

210) As noted above, Taylor Bickford, in association with Board Counsel White, was the staff that advocated for the inclusion of Ester/Goldstream Democrats in the rural area.[172]

211) Taylor Bickford worked closely with Ms. Green and McConnochie in the

170 Trial Test. Of Joe Hardenbrook
171 Trial Test. Of Taylor Bickford;
172 Surpa.

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construction of the rural districts.[173]

212) Jim Holm characterized the placement of Ester/Goldstream into the rural house district as "shedding Democrats" out of the FNSB.[174]

213) AFFR, which proposed placing Eilson AFB population into the rural district because of the historic low voter turn out in the military base.[175]

214) Dr. 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.[176]

215) Nonetheless, Jim Holm advocated to keep as much military population in Republican areas of the FNSB districts, which he knew would have the effect of enhancing the civilian Republican vote.[177]

173 Trial Test. Of Taylor Bickford;
174Trial Test. Of Jim Holm.
175 Trial Test. Of Taylor Bickford and Dr. Handley
176 Trial Test. Of Taylor Bickford and Dr. Handley
177 Trial Test. Of Jim Holm.

216) Dr. Handley had previously written an article explaining how "at the state level, helping to elect more (minorities) will also help elect more Republicans".[178] The article explains that advocacy for the strongest minority effective districts will necessarily help Republicans because the resulting plan will pack Democrats.

217) There is significant circumstantial evidence that the "shedding" of Democrats from the Ester/Goldstream area by the implementation of a plan to create "as strong Native influence districts as possible," in excess of Benchmark standards, merely implemented the blueprint contained in Dr. Handley's article to manipulate the VRA for partisan gain.

218) The Court finds that there is substantial evidence that the configuration of Proc. HD 38 was, in part, motivated by partisan desires to enhance Republican voting strength in the FNSB legislative districts, which is evidence rebutting any evidence the Board may have presented as to legitimate non-discriminatory purpose motivating the configuration of

178 Plt. Ex. 10

HD 38.

CITY OF FAIRBANKS SENATE PAIRING (SD A& B)

219) The Benchmark Plan provides for a Senate District E which is primarily comprised of the area within the the City of Fairbanks, including Fort Wainwright.[179]

220) Under the Benchmark plan, residents of the City of Fairbanks comprise a majority of the voters in Senate District E.[180]

221) The City of Fairbanks is a First Class Home Rule City inside the Fairbanks North Star Borough, which is a Second Class Borough.[181]

222) The City of Fairbanks has a population of approximately 31,000,[182] and comprises 88.8% of an ideal Senate District.[183]

179 Trial Test. Of Sen. Joe Paskvan
180 Ex. J-46, at 18 (ARB Admissions)
181 Trial Test. Of Sen. Joe Paskvan
182 Trial Test. Of Sen. Joe Paskvan. According to the Census, the City of Fairbanks has a population of 31,535. See Ex. J-7
183 The ideal population for a house district is 17,755. See J.-41 at 3. An ideal Senate district would be two ideal house districts.

223) The City of Fairbanks is the second largest city in Alaska,[184] and the only city of its size within an organized borough.

224) Under the Proclamation Plan, the area within the City of Fairbanks is located in two House Districts (i.e. HD 1- East Fairbanks City, and HD 4 – West Fairbanks City).[185]

225) Under the Proclamation Plan, the two house districts within the City of Fairbanks are located in separate Senate Districts: i.e. HD 1- is in SD A and HD 4 is in SD B.[186]

226) Under the Proclamation Plan, residents of the City of Fairbanks do not comprise a majority of residents within any Senate District.[187]

227) The Equal Protection Clause of the Alaska Constitution guarantees voters 'fair and effective representation,[188] which guarantees the right to

184 Ex. J-46, at 18 (ARB Admissions)
185 Trial Test. Of Sen. Joe Paskvan; See J-41; ARb00006035-6
186 Trial Test. Of Sen. Joe Paskvan; See J-41; ARb00006035-6
187 Ex. J-46, at 18 (ARB Admissions)
188 *Hickel v Southeast Conference, 846 P.2d 38, 48-49 (Alaska, 1992)*

proportional geographic representation.[189]

228) The right of fair and effective representation prohibits the Board from intentionally discriminating against a borough or other "politically salient class" of voters by invidiously minimizing that class 's right to an equally effective vote.[190]

229) A primary indication of intentional discrimination against a geographic region is a lack of adherence to established political boundaries.[191]

230) An inference of discriminatory intent may be negated by a demonstration that the challenged aspect of a plan resulted from legitimate nondiscriminatory policies such as the Article VI, Section 6 requirements of compactness, contiguity and socioeconomic integration.[192]

231) The residents of the City of Fairbanks constitute a "politically salient

189 *Kenai Peninsula Borough v State, 743 P.2d 1352, 1369, 1372-73 (Alaska 1987)*
190 *In re 2001 Redistricting Cases,* 44 P.3d 141, 144 (Alaska, 2002)
191 *Hickel v Southeast Conference, 846 P.2d 38, 52 (Alaska, 1992) citing Kenai Peninsula Borough v State, 743 P.2d 1352, 1369, 1372-73 (Alaska 1987)*
192 *In re 2001 Redistricting Cases,* 44 P.3d 141, 144 (Alaska, 2002)

class" that are distinct from the other residents of the Fairbanks North Star Borough, which is supported by uncontrverted evidence that

a) services provided to the residents of the City include local police, professional fire, curbside garbage, building code enforcement and paved streets, while services provided to the residents of the Borough outside the City do not include local police (served only by Alaska State Troopers), volunteer fire service areas, road-service areas that generally maintain unpaved streets, no local building codes, and trash services through a system of dumpster transfer stations,[193] and

b) the City has independent taxing authority and receives state assistance such as revenue sharing, operational and capital funding directly from the State while Borough residents receive state assistance though a complex system of borough pass-thru and non-profit corporations in cooperation with the Borough,[194] and

193 Trial Test. Of Sen. Joe Paskvan, Sen. Joe Thomas, and Joe Hardenbrook.
194 Trial Test. Of Sen. Joe Thomas, and Joe Hardenbrook.

c) 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.[195]

232) While the Board generally adhered to the city boundaries in the construction of house districts, the city boundaries were ignored with regard to the construction of Senate seats, which creates an inference of geographic discrimination as to the Senate plan.

233) The Board offered no credible evidence that the division of the City into separate Senate Districts was in furtherance of achieving compactness, contiguity, or socioeconomic integration nor any other legitimate nondiscriminatory purpose.

234) Indeed, this Court has found that both House Districts within Proc. SD A (i.e. HD 1 and 2) violate the compactness requirements of the Alaska

195 Trial Test. Of Sen. Joe Paskvan,

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Constitution.

235) The Board offered no argument, testimony or other evidence that the division of the City of Fairbanks voters into separate Senate districts was necessary under the VRA.

236) The Board offered no argument, testimony or other evidence that the division of the City of Fairbanks voters into separate Senate districts resulted in greater proportionality in representation of either the City residents or FNSB residents outside the City.

237) As noted above, the Fairbanks senate pairings resulted in pairing two Democratic incumbent Senators within Proc. SD B.

238) If the Senate pairing had united the two house districts including the City of Fairbanks, no pairing of Democratic incumbent Senators would have been possible.

239) The pairing of two Democratic incumbent Senators in light of the evidence of partisanship in the redistricting process discussed above, constitutes a rebuttal inference as to the absence of a legitimate non-discrimnatory purpose for the division the City into separate Senate Districts.

Date: January 23, 2011

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I certify that a true and correct copy of the foregoing was served by e-mail on this January 23, 2011 to:

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