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

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

Order Regarding Hearing on Board Plan(s) and Proposed Board Time Frame

“Poor Joshua!” lamented Justice Blackmun in 1989.¹ Justice Blackmun noted in that case it was a sad commentary upon American life and constitutional principles that an abused child was left without the constitutional protection of 42 U.S.C. sec 1983. We are in a new century and in state court. Alaskans have not had finalized house and senate districts since the announcement of the 2010 census. The lament today is “Poor Alaskans”.

The administrative and judicial proceedings in this case are well-documented. Alaskans are no closer to having constitutional voting districts today than they were on 3 February 2012 when this court held certain districts did not meet constitutional muster. Alaskans are no closer to having constitutional voting districts today than they were on 28 December 2012 when the Alaska Supreme Court upheld the invalidation of the Amended Proclamation Plan and ordered the Board to draft a plan based on strict adherence to the *Hickel* process. Promulgating and submitting a *Hickel* plan is straightforward. This does not require any decision by the U.S. Supreme Court regarding the VRA. Suggestions to the contrary are dilatory and, at the most generous, disingenuous.

Two, and only two, issues are before this court: “Whether Article VI, section 10 of the Alaska Constitution requires public hearings following the adoption of the Board’s plan or plans

¹ *Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 213 (1989).

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and whether the Board's proposed timeline is sufficient to allow judicial review of the Board's work."² Despite requests from parties to rule on broader issues, this court strictly confines its decision to these two questions.

The parties were invited to brief these issues.³ The *amicus* parties were invited to submit briefs on these issues at the time the movants filed replies.⁴ The court has reviewed all pleadings and rules as follows:

A. Public Hearings. The controlling authority is basic, fundamental, precise, and clear:

Within thirty days after the official reporting of the decennial census of the United States or thirty days after being duly appointed, whichever occurs last, the board shall adopt one or more proposed redistricting plans. **The board shall hold public hearings on the proposed plan, or, if no single proposed plan is agreed on, on all plans proposed by the board.** No later than ninety days after the board has been appointed and the official reporting of the decennial census of the United States, the board shall adopt a final redistricting plan and issue a proclamation of redistricting. The final plan shall set out boundaries of house and senate districts and shall be effective for the election of members of the legislature until after the official reporting of the next decennial census of the United States.⁵

The plan or plans ordered under the *Hickel* process directed by the Supreme Court have not been finalized by the Board and certainly not presented to the public. The Board contends it is not required to hold hearings. It is wrong. Any argument that the hearings held in 2011 on plans that were found to be unconstitutional is inartful at best. At worst it is a sad commentary upon Alaskan life and constitutional principles. The opportunity to be heard is not only part and

² S-14721, 24 April 2013 Order.

³ The Petersburg plaintiffs withdrew in the original litigation after the entry of summary judgment regarding its district; however they were permitted to brief these issues. The Petersburg and Riley plaintiffs both filed motions on 15 May 2013. The Board filed a consolidated opposition on 22 May 2013. The Petersburg plaintiffs filed a reply on 24 May 2013.

⁴ The court did not receive any *amicus* briefs.

⁵ AK Const. Art. 6, Section 10(a).

parcel of our traditional notions of fair play and substantial justice, it is specifically required by the Alaska Constitution.

*Answer to Question 1: Public hearings must be held for a new plan or plans promulgated by the Board.*⁶

B. The Board's Proposed Time Frame. The Riley plaintiffs provided a transcript of the Board's meetings.⁷ The proposed time frame discussed by the Board in that transcript is to have a proposed plan(s) by August, despite arguments in the Board's brief that it has not actually finalized a plan. The Board is mistaken in contending the timing and methodology for promulgating a plan are solely within its administrative providence. The Board promulgated the original plan on its own time frame. This court established a time frame for additional work on remand but rescinded the order, on motion of the Board, to allow it to operate in the sphere of its own executive branch influence. Reposing trust in the Board to comply with court orders was misplaced, as evidenced by the absence of a *Hickel* plan.

The contention that the courts cannot determine what is constitutional is likewise misplaced and has been misplaced since *Marbury v. Madison*.⁸ The courts have consistently overseen government agencies in a variety of situations where governments and agencies acted contrary to the constitutional rights of citizens, including integration of schools and overseeing elections.

⁶ The court notes that the Board has access to, and has used, different forms of technology throughout this process and could hold public hearings through a variety of ways, including video conference, teleconference, Skype, and other technologies designed to promote the widest public input in the shortest amount of time.

⁷ Exhibit 1 to the Riley plaintiffs' motion.

⁸ 5 U.S. 137 (1803).

The U.S. Supreme Court declared on 17 May 1954 that all laws establishing segregated schools were unconstitutional.⁹ Although the Little Rock School Board agreed to implement the decision, Governor Orval Faubus physically prevented the students from entering Little Rock Central High School in 1957. Not surprising, efforts to work out a solution involved the same problem as with redistricting: gerrymandering. Woodrow Wilson, the mayor of Little Rock, asked President Eisenhower to send federal troops to enforce integration and protect the nine students trying to enter the high school.

On 24 September 1957 the President ordered¹⁰ the 101st Airborne Division of the United States Army to Little Rock and federalized the entire 10,000-member Arkansas National Guard. The discrimination cases involved disenfranchising a segment of our population based upon race. Here the failure to adopt a plan consistent with the Alaska Constitution results in depriving the whole state of Alaska of proper representation. The judiciary, not the Board, shall determine the constitutionality of the redistricting process.

While this court declines to set specific deadlines for the Board under the parameters of the 24 April 2013 Order, it agrees with the plaintiffs that the Board's timeline is not sufficient time to promulgate a plan, have hearings, and seek judicial review. There is no reason to delay

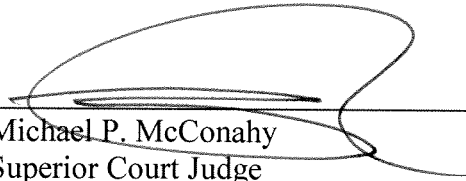
⁹ *Brown v. Board of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

¹⁰ President Eisenhower issued Proclamation No. 3204 on 23 September 1957. When that proclamation was not obeyed he issued Executive Order 10730.

this process any further.¹¹ The Board should begin the *Hickel* process immediately and adopt *Hickel* plan expeditiously.¹²

Answer to Question 2: The Board's proposed timeline is not sufficient to allow judicial review of the Board's work.

DATED at Fairbanks, Alaska, this 30 of May, 2013.


Michael P. McConahy
Superior Court Judge

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¹¹ During trial in this case the court was able to learn about the GIS software used by the Board and the parties and watch it in action. The court notes that maps can be drawn, and changed, quickly. The “Kawasaki finger” and areas along South Cushman Street in Fairbanks were subject to such demonstration and testimony at trial. It is unclear why the Board has not already undertaken the process.

¹² The Supreme Court order did not direct or invite a time frame for conducting hearings. Based on the record in the case, including demonstrations at trial of sophisticated mapping programs already loaded with pertinent data, this court recommends the Supreme Court order the Board promulgate *Hickel* plan(s) within 10 days of any appellate decision on the two points contained herein and post those plan(s) on its website. Further this court recommends that the public submit any alternative plan(s) within 10 days thereafter and that public hearings commence on the last day public plan(s) are due. Finally this court recommends the Board be ordered to adopt a *Hickel* plan(s) within 10 days of the commencement of public hearings. This is a 30 day time frame *at this time*, but the Board actually has been working on this process for several years since the Board first received the 2010 Census redistricting data on 15 March 2011. Judicial review, even on an expedited basis, is slow. Past performance suggests it will take considerable time for a plan to be approved by the Supreme Court. Alaskans should not suffer the fate of “Poor Joshua” by not having constitutionally sound voting districts for the next general election.