

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

Turtle Mountain Band of Chippewa Indians,
Spirit Lake Tribe, Wesley Davis, Zachery S.
King, and Collette Brown,

Plaintiffs,

vs.

Michael Howe, in his official capacity as
Secretary of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER FOR JUDGMENT**

Plaintiffs bring claims against the North Dakota Secretary of State Michael Howe (“Defendant”) under Section 2 of the Voting Rights Act (“VRA”) 52 U.S.C. § 1031 in relation to redistricting conducted in 2021 by the State of North Dakota following the federal Decennial Census. Defendant raises numerous defenses and generally denies the VRA claims have any merit. Defendant moved the Court for Summary Judgment, resisted by Plaintiffs, which motion the Court denied on the basis of disputed factual issues that could only be resolved at trial. The parties brought various motions in limine seeking to exclude evidence, which the Court decided as reflected in its docket.

The Court conducted the bench trial of this matter in Fargo, ND from June 12–15, 2023. Numerous witnesses testified at trial, including one of the individually named Plaintiffs, Collette Brown (“Brown”). Other witnesses were called by Plaintiffs Turtle Mountain Band of Chippewa Indians and Spirit Lake Tribe. Those other witness included former Chairman of the Spirit Lake Tribe Douglas Yankton (“Yankton”), former North Dakota State Senator Richard Marcellais (“Marcellais”), former North Dakota State Representative Marvin Nelson (“Nelson”), current

Spirit Lake Tribal Chairman Jamie Azure (“Azure”), and Plaintiffs’ retained experts Dr. Loren Collingwood (Collingwood), Dr. Daniel McCool (“D. McCool”) and Dr. Weston McCool (“W. McCool”). During its case, Defendant called State Election Director Erika White (“White”), Elections Administration Systems Manager Brian Nybakken (“Nybakken”), and his retained expert Dr. M.V. Trey Hood, III (“Hood”).

Hundreds of exhibits were offered and received by the Court as reflected in the Court’s docket. Other exhibits were offered, but not received by the Court, which is also reflected in the Court’s docket.

The parties stipulated to numerous basic facts concerning the 2020 Federal Census, the changes to the population of North Dakota and its political subdivisions and Legislative Districts, the constitutional and statutory requirements for redistricting in North Dakota, the redistricting process that occurred in mid-2021, and the law and districting map that were enacted as part of a special session of the North Dakota Legislative Assembly in November of 2021. The stipulated facts (Doc. 108) are made part of and incorporated herein by reference.

Considering the testimony and documentary evidence admitted at trial, as well as the stipulated facts, the Court now makes the following FINDINGS OF FACT:

I.

FINDINGS OF FACT

The Decennial Census

The United States Census Bureau (“Census Bureau”) conducted a Decennial Census in 2020, during the COVID-19 pandemic. The Decennial Census is required by Public Law 94-171, enacted by the United States Congress in 1975.

Following the 2020 Census, census data known as Public Law 94-171 data was required to be transmitted to the states by April 1, 2021. 13 U.S.C § 141(a) and (c). However, on February 12, 2021, the Census Bureau announced that due to COVID-19 related delays and prioritizing the delivery of the apportionment results, Public Law 94-171 data would not be available to the states by the April 1, 2021 deadline, but would be available by September 30, 2021.

On August 12, 2021, the Census Bureau released the census data in a technical format suitable for incorporation into redistricting software. The Census Bureau did not release the 2020 Census data in a more user-friendly format until September 16, 2021. The release of the 2020 census data – including North Dakota specific data – was considerably delayed because of the COVID-19 pandemic.

North Dakota has enacted deadlines that apply to various aspects of primary and general elections and the late release of the 2020 census data and those state-specific deadlines imparted a sense of urgency on the redistricting process in North Dakota.

When it was released, the 2020 Federal Census data showed population changes in North Dakota since the last Decennial Census in 2010.

According to the 2020 Census data, North Dakota's population grew to 779,094, with an "any part" Native American (e.g., alone or in combination with another race) voting age population ("VAP") of 35,031 (5.9%). Both figures increased from the 2010 Census, which reported 672,591 North Dakota residents, with a Native American VAP of 26,656 (5.1%).

The Redistricting Committee relied on the "single race" definition of Native American in performing its redistricting work. According to the 2020 Census data, using the "single race" definition of Native American, Native American voting age population was 25,005 (4.2% of the

total voting age population). According to the 2010 Census data, using the “single race” definition of Native American, Native American voting age population was 23,268 (4.5% of the total voting age population).

The Federal Census data indicated there were population changes in the Legislative Districts at issue in this lawsuit, which required the Legislative Assembly to redistrict prior to the 2022 primary and general elections.

Redistricting in North Dakota

Legislative redistricting in North Dakota is governed largely by North Dakota’s Constitution, and is also addressed by State statute. North Dakota’s Constitution provides senatorial districts “continue until the adjournment of the first regular session after each federal decennial census, or until changed by law.” N.D. Const., Art. IV, Sec. 2.

The North Dakota Legislative Assembly (“Legislative Assembly”) is required to “guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates.” N.D. Const., Art. IV, Sec. 2.

The Legislative Assembly is also required to “fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators[,]” and requires that the “senate must be composed of not less than forty nor more than fifty-four members, and the house of representatives must be composed of not less than eighty nor more than one hundred eight members. These houses are jointly designated as the legislative assembly of the state of North Dakota.” N.D. Const., Article IV, Sec. 1.

While a senator and at least two representatives are apportioned to each senatorial district, Section 2 of Article IV allows at large elections of House members or permits the creation of subdistricts for elections of House members. N.D. Const., Art. IV, Sec. 2.

The North Dakota Century Code contains functionally equivalent requirements to the foregoing State Constitutional requirements. N.D.C.C. § 54-03-01.5.

The Legislative Assembly procured licenses on August 16, 2021 for commercial software from the company that released the 2020 State level Census data.

North Dakota utilized the State-level Census data to calculate ideal district population size. With 47 legislative districts in North Dakota, the ideal district population per district in North Dakota was determined to be 16,576 and the ideal subdistrict population was determined to be 8,288.

North Dakota Legislative Committee Meetings Discussing Redistricting

In preparation for the 2021 redistricting process, Governor Doug Burgum signed House Bill 1397 on April 21, 2021, which established a legislative management redistricting committee (“Redistricting Committee”) whose task was to develop and submit to legislative leadership a redistricting plan by November 30, 2021, along with legislation to implement that plan.

As part of its redistricting workup to the later Special Legislative Session that would be tasked with enacting legislation to implement the required redistricting, the Tribal and State Relations Committee of the Legislative Assembly held public meetings in North Dakota, including in Bismarck, Fargo, and on tribal lands of three of the five Tribes located within the State. Such Committee meetings were held on both the Turtle Mountain and Spirit Lake Reservations.

Plaintiff Turtle Mountain Band of Chippewa Indians is a federally recognized Tribe, recognized by the Bureau of Indian Affairs under 88 Fed. Reg. 2112 (2023), possessing “the immunities and privileges available to federally recognized Indian Tribes[.]” The Turtle Mountain Band of Chippewa Indians maintains a government-to-government relationship with the United States and the State of North Dakota.

Plaintiff Spirit Lake Tribe is a federally recognized Tribe, recognized by the Bureau of Indian Affairs under 88 Fed. Reg. 2112 (2023), possessing “the immunities and privileges available to federally recognized Indian Tribes[.]” The Spirit Lake Tribe maintains a government-to-government relationship with the United States and the State of North Dakota.

During the summer of 2021, the Tribal and State Relations Committee held a joint public meeting with the Turtle Mountain Tribal Council on August 17, 2021 at Turtle Mountain Community College on the Turtle Mountain Reservation, where redistricting was discussed. The Tribal and State Relations Committee also held public meetings on August 31, 2021 at the MHA Nation Interpretive Center on the Fort Berthold Indian Reservation, at which meeting redistricting was discussed. That same Committee also held a public meeting on September 1, 2021 at the Spirit Lake Casino and Resort on the Spirit Lake Reservation. Redistricting was addressed at that Committee meeting as well. D436 (1:55:00-2:01:08).

The Tribal and State Relations Committee was chaired by then-Senate Majority Leader Richard Wardner. Senator Marcellais agreed Senator Wardner was a “power player” in the State Legislature, and that his Committee “[] got things done [for State and Tribal Relations], but not everything that was supposed to get done.” Tr. Day 2 (Marcellais) at 58, ll. 14-22; 59, ll. 3-10). Likewise, Turtle Mountain Tribal Chairman Jamie Azure testified Wardner was the majority leader and had quite a bit of power in the Legislature. Tr. Day 3 (Azure) at 63, ll. 12-21.

The Redistricting Committee created by Governor Burgum's executive order did not hold committee meetings on tribal lands, but held several meetings at the Capitol in Bismarck as well as in Fargo, ND. Tribal leaders, Native American public interest organizations, and other interested persons provided testimony concerning redistricting at the Redistricting Committee meetings.

In this regard, the Redistricting Committee held public meetings in Bismarck on August 26, 2021, in Fargo on September 8, 2021, and again in Bismarck on September 15 and 16, 2021. Additional public meetings of the Redistricting Committee were held in Bismarck on September 22 and 23, and then on September 28 and 29.

During the summer and late summer of 2021, both the Tribal and State Relations and the Redistricting Committees consistently heard from North Dakota's tribal leaders, members, and organizations and attorneys advocating on their behalf, the following messages:

1. The State must listen to the tribes, consider tribal needs, and hold hearings on Tribal lands;
2. The State should consider each tribe and each Indian Reservation in North Dakota to be considered a community of shared interest under traditional redistricting principles;
3. The State should enact subdistricts and not carve up reservations into different districts, so that Native American voting is not diluted; and
4. The State should comply with the Voting Rights Act.

For example, at the August 17, 2021 Tribal and State Relations Committee meeting held on the Turtle Mountain Reservation, Nicole Donaghy, the Executive Director of North Dakota

Native Vote, asked for subdistricts and indicated Turtle Mountain is its own community of interest. D433 (2:00:38 - 2:01:54).

The Chairman of the Turtle Mountain Tribe, Jamie Azure, convoked the Turtle Mountain Tribal Council to hold its own meeting at the same time and places as the August 17, 2021 Committee meeting. D433 (10:22-11:16). Although some of the Tribal leaders apparently left the meeting during Nicole Donaghy's testimony to the Committee, no Tribal officials corrected or attempted to correct Ms. Donaghy's request the Turtle Mountain reservation be its own subdistrict.

At the August 26, 2021 Redistricting Committee meeting in Bismarck Collette Brown, the Gaming Commission Executive Director of the Spirit Lake Casino and Resort, provided written (D327) and oral testimony (D434) advocating for "Spirit Lake and its communities" to be treated as "a community of interest [] remain[ing] in a single legislative district" and that the reservation not be split into several districts that "would dilute the ability of tribal members to elect the representative of their choice."

Collette Brown later provided written (D351) and oral testimony (D421 – Transcript) at the September 1, 2021 Tribal and State Relations Committee meeting held at the Spirit Lake Casino. At that meeting Collette Brown advocated "on behalf of the Tribe and its members [] (1) for the use of single member districts [. . .] and (3) to demand the North Dakota Redistricting Committee listen to tribal input and hold redistricting meetings and tribal consultations on reservations." D351.

During the September 8, 2023 Redistricting Committee meeting in Fargo, ND, Rick Gion of North Dakota Voters First requested a subdistrict for Turtle Mountain. D437 (3:04:51-3:05:59)

Ms. Brown again testified before the Redistricting Committee on September 15, 2021. At this meeting Ms. Brown provided written (D351) and oral testimony (D438), requesting the same sorts of things on behalf of the Spirit Lake Tribe, but also asked for the Spirit Lake Reservation to be placed in its own subdistrict. D438 (55:43-57:39). When she was asked at trial specifically about the feasibility of subdistricting around the Spirit Lake Reservation given its small population, she deferred to NARF Attorney Matt Campbell of NARF. D438 (1:00:50-1:01:16).

Matt Campbell also testified at the same meeting and requested each tribe be considered a community of interest (D438 - 1:03:51-1:04:16), and he asked for a single member district for Spirit Lake Nation. D438 (1:14:53-1:15:19). Nicole Donaghy of North Dakota Native Vote made the same types of requests at that meeting. (1:19:02-1:19:07) (1:21:53-1:22:12).

At the September 22, 2023 meeting of the Redistricting Committee in Bismarck, Chairman of the MHA Nation Mark Fox asked for subdistricting for his Tribe (D44 - 1:54:40-1:55:27), and also presented a map showing the MHA Nation being subdistricted. D379.

Numerous tribal officials and advocates for Native American interests advocated during Committees meetings in the summer of 2021 for subdistricts and treating each of the tribes as a community of interest.

The Redistricting Committee completed its interim committee work with public hearings on September 28 and 29, 2021.

During the September 28, 2021 Redistricting Committee meeting, legislators discussed the written testimony by the Spirit Lake Tribe (Chairman Yankton and Colette Brown) requesting subdistricting. D428 at 33, l. 25 – 34, l. 11.

Spirit Lake Tribe / Devil's Lake Connections

At trial, Ms. Brown testified she had made those types of requests discussed above at various legislative Committee meetings. Tr. Day 2 at 25; ll. 9-21. She also testified a large population of Spirit Lake Tribal members live off-reservation in Devil's Lake. Tr. Day 2 at 36, ll. 11-19.

At the September 29, 2021 Redistricting Committee meeting in Bismarck, Chairman Yankton provided written testimony (D398) in which he requested on behalf of the Spirit Lake Nation that "the Committee approve the creation of a sub-district encompassing the Spirit Lake reservation." During trial, he admitted making that request and further believed a subdistrict could have been validly created despite the fact the Native American voting age population in his proposed subdistrict was only about 41.5% of the total population. Tr. Day 1 at 104; l. 3 – 105; l. 21.

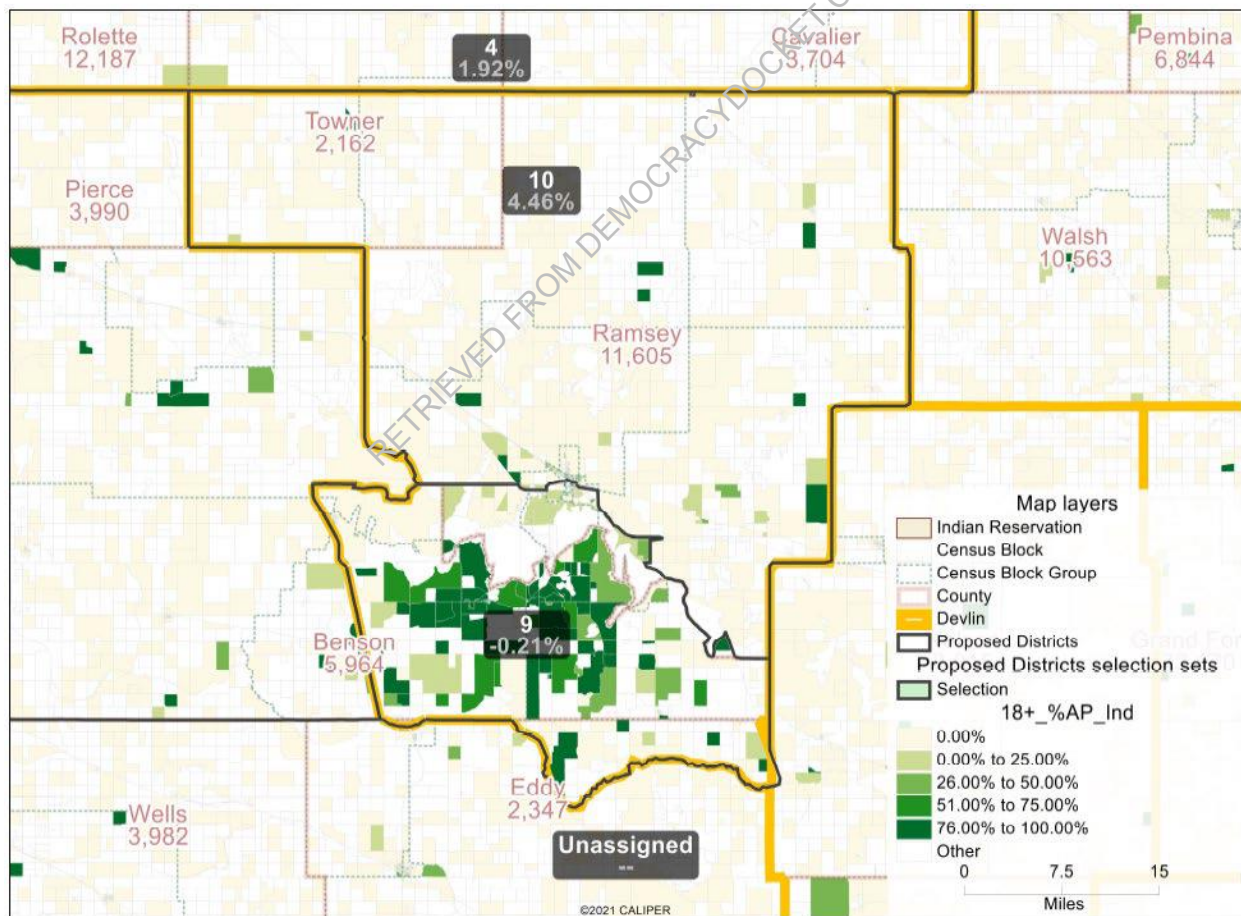
The proposed map Chairman Yankton submitted to the Redistricting Committee on September 29, 2021 (D398) placed the Spirit Lake Reservation in District 15, which includes Devil's Lake – a community both Chairman Yankton and Collette Brown conceded has an "alignment of interest with" the Spirit Lake Tribe. Tr. Day 1 at 109, ll. 14-23 (Yankton); Tr. Day 2 at 36, l. 20 – 37, l. 19.

Upon being questioned at trial and referring to meeting minutes (D334), Chairman Yankton testified he had asked the Tribal and State Relations Committee not to be included in a district with Devil's Lake, but that request was reflected in the minutes of an earlier meeting held September 1, 2021, almost a month prior to his September 29 requested map showing the opposite. Tr. Day 1 at 76, ll. 16-24; 88, ll. 12-21. Chairman Yankton conceded on being cross examined by Defendant's counsel that he had made the request on behalf of the Tribe for a

district that included Spirit Lake Reservation and Devil's Lake in the same district. Tr. Day 1 at 106; l. 24 – 107, l. 11.

The September 1 meeting minutes (D421) also indicate Chairman Yankton agreed Devil's Lake has a sizeable population of Spirit Lake Tribal members living off the reservation. *Id.* at 59, l. 6 – 60, l. 15.

A copy of the map (D398.004) that places the Spirit Lake Reservation in the same district along with Devils Lake, which Chairman Yankton submitted to the Tribal and State Relations Committee on September 29, is found below. The exterior boundary of this proposed map is very similar to the later enacted map of Legislative District 15.



Like Chairman Yankton, Collette Brown also testified a large concentration of Spirit Lake Tribal members live off the Reservation in the Devil's Lake area which is only about 7 miles from the reservation border. Tr. Day 2 at 36, ll. 11-19.

The Proposed Redistricting Plan in House Bill 1504

As part of its required report to the Legislature, the Redistricting Committee reported it had received "updates from committee members who serve on the Tribal and State Relations Committee, which met with representatives of the Turtle Mountain Band of Chippewa, Three Affiliated Tribes, and Spirit Lake Nation on their respective reservations regarding redistricting and other matters" and that "The updates generally were consistent with the testimony presented to the Redistricting Committee." P135.029.

On October 29, 2021, North Dakota Governor Doug Burgum issued Executive Order 2021-17 (D451), convening a special session of the North Dakota Legislative Assembly to begin on November 8, 2021, to provide for redistricting of government pursuant to Article IV, Section 2, of the North Dakota Constitution, among other purposes.

At the time of the Executive Order, there had been no requests by the Turtle Mountain Tribe or the Spirit Lake Tribe for anything other than (1) not splitting reservations and treating each reservation as a community of interest, (2) the State must listen to the tribes and hold committee meetings on tribal lands, and (3) the State should enacted subdistricts around reservations.

On November 1, 2021, the Redistricting Committee proposed a legislative redistricting plan described in House Bill 1504, and delivered the proposed plan, proposed legislation, and a final report to legislative management. D415.272–D415.283; D410, and D416.

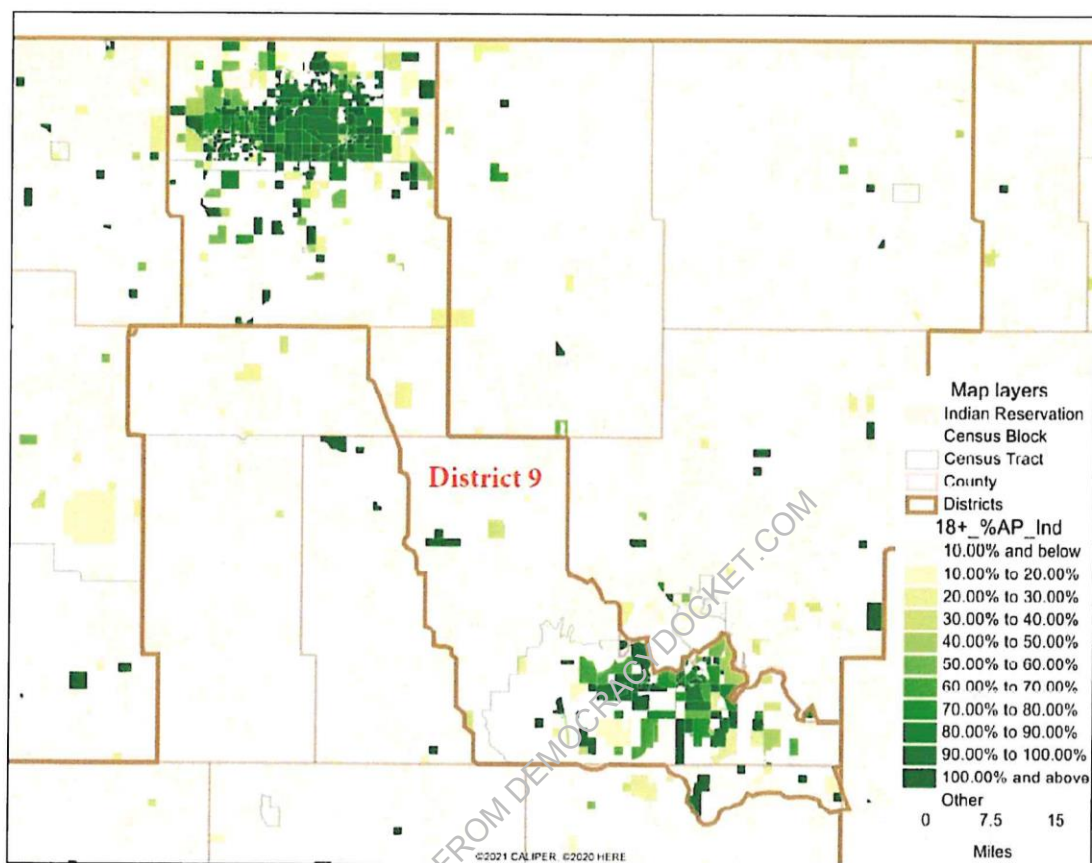
The version of House Bill 1504 and the version of the Bill later enacted (reflected in D416) placed the Spirit Lake Reservation in the same district (District 15) as Devil's Lake, and, it served to expand District 9 eastward into parts of Towner and Cavalier Counties. In addition, House Bill 1504 proposed to divide District 9 into two subdistricts, 9A and 9B, for purposes of state house districts.

House Bill 1504 served to split Benson County, with its western portion in District 14 and its eastern portion, home to the Spirit Lake Nation, in District 15. Benson County was previously split between Districts 14 and 23 in the prior redistricting. District 15 would include Ramsey County, part of Towner County, and part of Eddy County. Benson County, along with portions of Eddy, Ramsey, and Nelson Counties, are home to the Spirit Lake Nation.

The New Plan Proposed by Turtle Mountain and Spirit Lake

On November 1, 2021, Chairman Jamie Azure of the Turtle Mountain Band of Chippewa Indians and then-Chairman Douglas Yankton of the Spirit Lake Nation sent a letter to Governor Burgum and other legislative leadership requesting an alternative District 9 to include the Turtle Mountain Reservation and the Spirit Lake Reservation within its boundaries. D410.019-024.

Chairmen Azure and Yankton attached to the November 1, 2021 letter an alternative version of the Legislature's proposed statewide plan, which included their alternative District 9. D410.022. Figure 1 from the November 1st Letter is included below.

Figure 1 – Proposed District Including Spirit Lake and Turtle Mountain Reservations

District	Population	Deviation	%Deviation	18+ Native American Population	% 18+Native American Population
9	17,341	765	4.62%	7,887	69.06%

The November 1 letter was the very first request by the Plaintiffs in this lawsuit requesting both the Turtle Mountain and Spirit Lake Tribes to be joined in a single district.

At the November 8, 2021 Joint Redistricting Committee hearing in Bismarck, Chairman Yankton, Chairman Azure, and Senator Marcellais all testified in favor of the Legislature adopting their proposed map that joined Spirit Lake and Turtle Mountain Reservations together in a single district. D444.

Chairman Azure testified the proposed map joining Spirit Lake and Turtle Mountain “would be the first of its kind in North Dakota by allowing two tribal nations to share one voice in the State Senate and House elections.” D429 at 30, ll. 13-15. Chairman Azure also apologized for bringing up an alternative map so late in the process, and stated essentially it had not been easy for the two tribes to get together and come to an agreement. D444 (51:12-51:42).

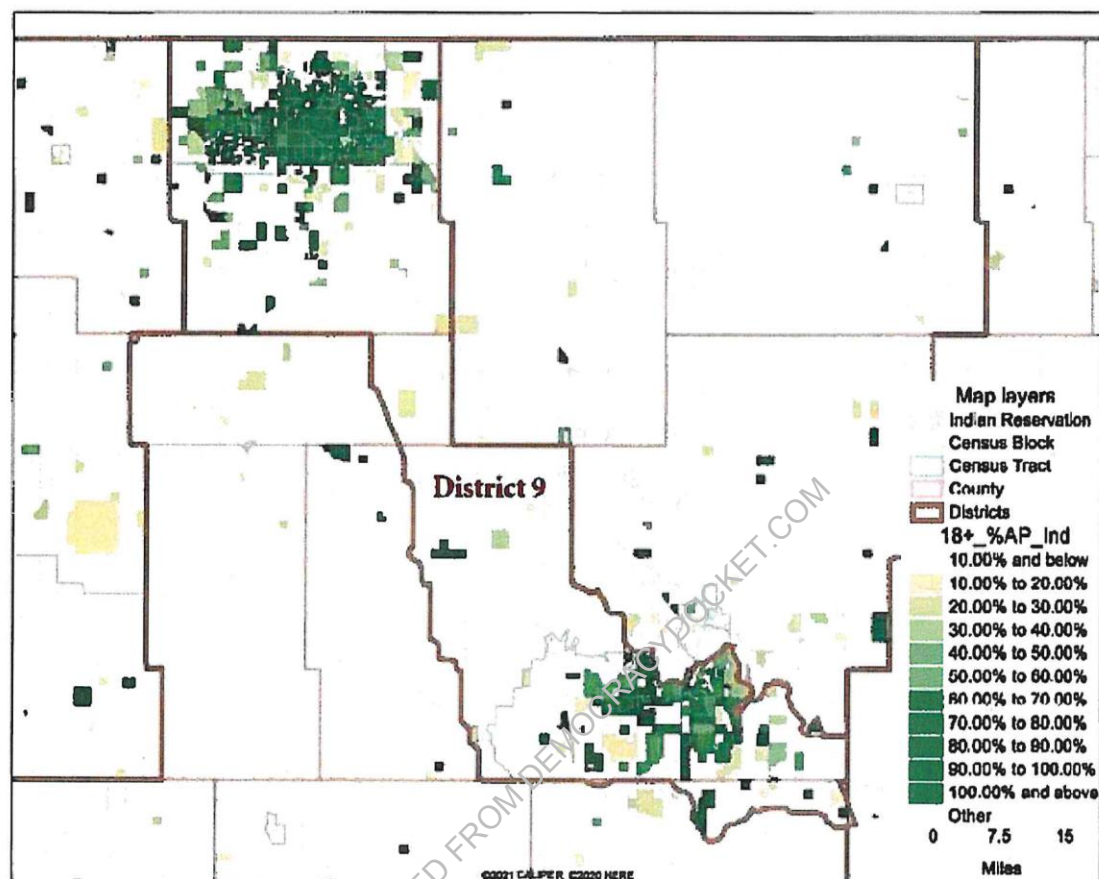
At the November 8, 2021 Redistricting Committee hearing, Representative Boschee moved the adoption of an amendment to include the Turtle Mountain and Spirit Lake proposal, but the Committee rejected it.

The Marcellais Amendment, and the Debate, Passage and Enactment of House Bill 1504

On November 9, 2021, the House of Representatives debated and passed House Bill 1504.

On November 10, 2021, the Senate debated House Bill 1504. During that process, Senator Marcellais proposed an amendment, proposing an alternative proposed map that would encompass the Turtle Mountain and Spirit Lake Reservations and other land into a single legislative district without subdistricting. D410.005-006; D410.012-013.

Senator Marcellais’ proposed map that accompanied his amendment was similar to the one proposed via November 1 letter by Chairmen Azure and Yankton. A copy of the map (D410.014) is reproduced below:

Figure 1 – Proposed District Including Spirit Lake and Turtle Mountain Reservations

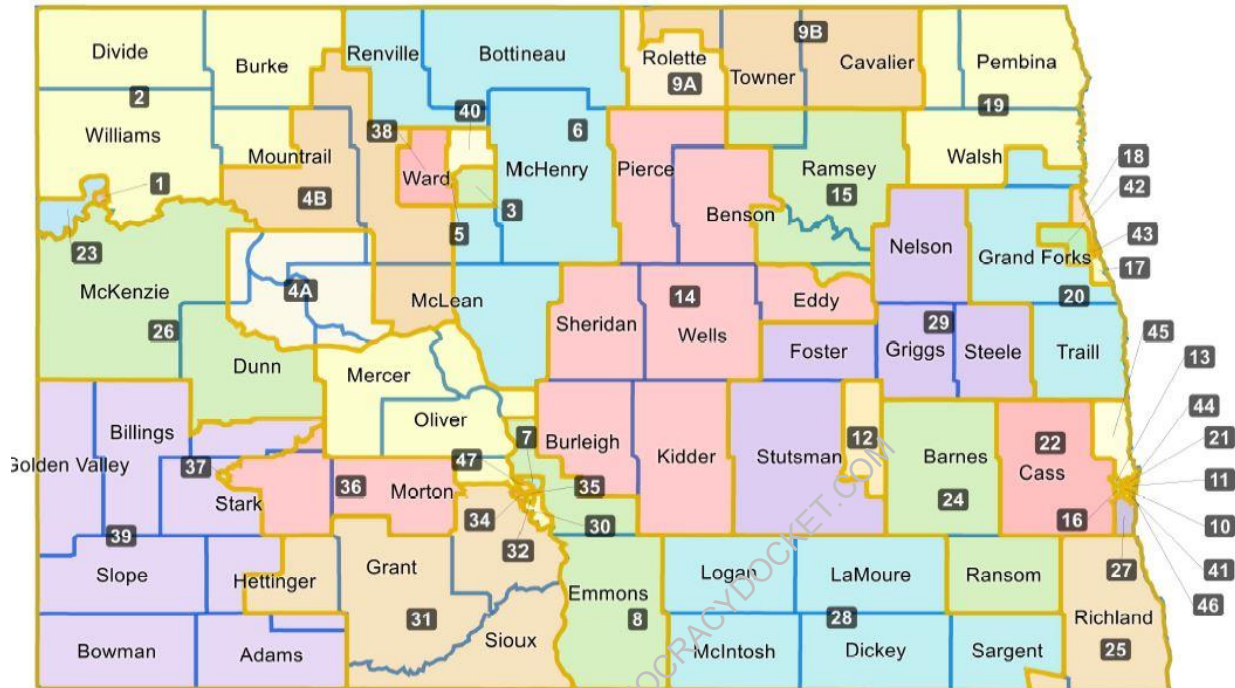
District	Population	Deviation	%Deviation	18+ Native American Population	% 18+Native American Population
9	17,341	765	4.62%	7,887	69.06%

The Senate ultimately rejected Senator Marcellais' amendment and passed House Bill 1504.

House Bill 1504 was signed by Governor Burgum on November 11, 2021 (D450) and became law when filed with the Secretary of State the next day.

The district descriptions were codified as North Dakota Century Code Section 54-03-01.14 after technical corrections were made.

The final districting map (D416) reflecting the redistricting enacted into law is included below.



The 2021 Redistricting Plan, as enacted by HB 1504, created 47 state legislative districts and subdivided District 4 and District 9 into single-member House Subdistricts 4A, 4B, 9A, and 9B.

The 2021 Redistricting Plan, as enacted by HB 1504, did not place the Turtle Mountain and Spirit Lake reservations in the same state legislative district.

The 2021 Redistricting Plan, as enacted by HB 1504, placed the Turtle Mountain Reservation into Senate District 9 and State House Subdistrict 9A and placed portions of Turtle Mountain Trust Lands located within Rolette County into State House Subdistrict 9B.

The 2021 Redistricting Plan, as enacted by HB 1504, placed the Spirit Lake Reservation into District 15.

Voters in Senate District 9, Senate District 4, and Senate District 15 each elect a single State Senator.

Voters in House Subdistricts 9A and 9B and 4A and 4B each elect a single representative to the North Dakota House of Representatives.

Voters in District 15 elect two representatives at-large to the North Dakota House of Representatives.

State and Tribal Interactions

During his trial testimony, former Senator Richard Marcellais testified about the interactions he had with the State on behalf of his own Tribe and the tribes generally. Senator Marcellais was an elected Senator from District 9 for nearly 16 years.

During his trial testimony, Chairman Yankton talked about the significant tribal interactions to get things done with the State of North Dakota, including in relation to taxation, funding for tribal colleges, and the Indian Child Welfare Act (ICWA). Tr. Day 1 (Yankton) at 65, l. 23 – 66, l. 13; 68, ll. 18-25.

He also testified about the level of cooperation and responsiveness between the tribes and Senator Wardner with respect to “certain items or issues that might be able to be addressed or resolved” with the State. Tr. Day 1 (Yankton) at 91, ll. 13-19.

Chairman Yankton knew about the Governor’s Indian Affairs Commission, and he testified he sent his November 1 letter to then-Director Erica Thunder “[j]ust so it would get to somebody at that – at that level, you know to adhere to our request.” Tr. Day 1 (Yankton) at 93, ll. 8-20.

Turtle Mountain Tribal Chairman Azure likewise testified about significant cooperation between the State and Tribes (including through the United Tribes Gaming Association) to solve

issues affecting the tribes and tribal members, including gaming, road maintenance, and the passage of State ICWA legislation. Tr. Day 3 (Azure) at 25, l. 23 – 27, l. 11.

Chairman Azure also testified he was familiar with the Indian Affairs Commission, which he described as “a facilitator to the executive branch of the State of North Dakota [] between the tribes.” Tr. Day 3 (Azure) at 27, l. 24 – 28, l. 8.

And Chairman Azure testified about the importance of the Tribal and State Relations Committee holding a meeting on the Reservation at the Turtle Mountain Community College, where issues such as taxation, social, funding, road, and redistricting were all discussed. Tr. Day 3 (Azure) at 30, ll. 10-21.

He further testified about each tribe, including the Turtle Mountain Tribe, having its own interactions and agreement with the State in relation to fuel taxation. Tr. Day 3 (Azure) at 56, ll. 6-15.

The 2018 General Election – High Native American Turnout

A general election was held in North Dakota in November of 2018. Voter turnout amongst tribal members was extremely high during this election, as reflected in a table that was part of Plaintiffs’ expert Dr. Collingwood’s report. P043.

At trial, Collette Brown testified she was familiar with the “2020 settlement of the challenge to the 2018 voter ID law[,]” which required certain actions by the State of North Dakota to assist the tribes and tribal members with voter identification and alternative ballot verification mechanisms. Tr. Day 2 at 17, l. 25 – 18, l. 23.

Although none of those additional voter identification and related ballot verification mechanisms that were included in the settlement were in effect at the time of the 2018 primary

and general elections, Native Americans in North Dakota nevertheless were highly successful in turning out the vote in that election.

According to various tribal members who testified at trial, the successful 2018 voter turnout was on account of significant efforts undertaken at the tribal level.

For example, Chairman Doug Yankton testified during direct examination about his Tribe's efforts to turn out the vote in 2018, and described the backlash from the 2018 voter ID law passed in North Dakota. Tr. Day 1 (Yankton) at 82, ll. 2-11. He testified:

Q. And what motivated Native voters to get out in 2018 and vote at those numbers?

A. I think what motivated is when you try to take something away, we're going to rally and not let them take it away.

Q. Call it a backlash?

A. Yeah.

Tr. Day 1 (Yankton) at 86, ll. 5-10.

Chairman Yankton went on to testify about the significant efforts undertaken locally by his Tribe to turn out the vote in 2018, including as follows:

So when I was on council, and the rest of the tribal leaders at that time, you know, we kind of met and we said that we -- you know, we need to -- we need to rally, so to speak, rally the troops, and we created organizations. We reached out to other organizations and started, so to speak, campaigning the importance of getting out there to vote. In Indian -- in Indian country specifically show -- you know, show the country or the state that we're still here. You know, so we created organizations. We supported. We funded. We kept open our ID place. We helped our people try to figure out what is your physical address. We'll help you. You know, we set up things like that.

Tr. Day 1 (Yankton) at 84, ll. 2-19.

He also testified on cross examination about what Tribal leaders had done to turn out the vote in 2018:

Oh, we -- as a tribe we did a lot of public events, predominantly separate public events because we are comprised of four districts that are kind of scattered throughout the nation. The communities encompass anywhere from 5 miles to 25

miles apart just depending on, you know, which community you come from. So we had different tribal leaders, different directors of programs and different committee members organize and have luncheons or suppers and just talk about the importance of voting.

And then we had some of our programs that issued, for example, the tribal IDs help assist our tribal members to establish a legal physical address, residential address. And so there we charged a fee, but we waived the fees for our tribal members to come and take the time to get an ID. You know, so we tried different types of efforts to, you know, reiterate the importance of getting out there to vote, you know, because of what was being -- or what was going on or what was happening to us as Native Americans.

(. . .)

A. So just like our local -- our local tribal -- so we have different programs, and we encouraged our programs, you know, to do some fliers about Voting Rights Act and just kind of making our people aware of the importance of why they need to get out there to vote. And for us as Natives, the only thing that entices people to pay attention or participate is we have to have food involved, so we had little luncheons or even, you know, offered evening dinners to come and hear, come and listen to why we're doing what we were doing.

Q. These local efforts, providing food and so forth, that could be done in other election years too, couldn't it?

A. Now we do it, yeah. We will be doing it, I'm sure, in the future. It's hard to say.
(. . .)

Tr. Day 1 (Yankton) at 113, l. 25 – 115, l. 16.

The Chairman of the Turtle Mountain Tribe, Jamie Azure, also testified about his own Tribe's efforts to turn out the vote in the 2018 election. He attributed the high turnout to Native Americans being told "we couldn't vote", which he described as a reaction to North Dakota's voter ID laws enacted prior to that election.

The following trial testimony illustrates these points:

A. We had a record turnout of voters.

Q. And why do you -- why was that?

A. Many reasons. I would say the easiest reason was because we were told that we couldn't vote. And if you want to inspire Native nation to get out and rise up, tell them that they can't do something.

Q. And how were they told they couldn't vote?

A. We were told that -- across the board that we needed to have physical addresses on our ID's that we had not previously needed in the past. I think it's

been very well-documented on the struggles of a lot of our Native people and getting that physical address and making sure that they followed all those rules to get in. There's just a lot of barriers to entry to -- for Native nations to begin with, and then to keep adding really inspired a lot of people, and it inspired our youth to rise up and make a difference, so it was a great time to be part of a Native nation.

Tr. Day 3 (Azure) at 19, l. 21 – 20, l.

Plaintiffs' expert Dr. Collingwood included the 2018 election results in his analysis, although he gave that particular contest almost no weight. He testified as follows during his direct examination:

Q. In your expert opinion, what, if any, probative weight would you give the 2018 elections in analyzing Gingles prong 3?

A. That's a good question. It's an extremely anomalous election, but it's still an election. It's still data. So I think, like, if you assigned it some sort of weight between zero to 100, maybe 2 or 3.

Tr. Day 1 (Collingwood) at 157, l. 23 – 158, l. 3. He conceded during cross examination that he had provided very little weight to the 2018 Native American election turn out results. Tr. Day 1 (Collingwood) at 178, l. 24 – 179, l. 9.

Defendants' expert Dr. Hood testified that the Native American turnout in 2018 was historically high, and that the results from those contests should not necessarily be excluded from a performance analysis as Dr. Collingwood effectively did. Dr. Hood testified that those 2018 results “prove[] that Native American turnout can be that high” and that if “[i]t was that high in 2018”, it could be that high again. Tr. Day 3 (Hood) at 86, ll. 7-15.

II.

ANALYSIS AND CONCLUSIONS OF LAW

1. Section 2 of the Voting Rights Act

The sole cause of action asserted by Plaintiffs in this case is that Legislative District 9 (including Subdistricts 9A and 9B) and Legislative District 15 violate Section 2 of the Voting

Rights Act. *See* Doc. 1, ¶¶ 124-31. Section 2(a) of the Voting Rights Act provides, “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color. . . .” 52 U.S.C. § 10301(a). Section 2(b) provides clarification, stating:

A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected] class of citizens . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b).

For almost forty years, federal courts have analyzed claims brought under Section 2 of the Voting Rights act using the framework created in *Thornburg v. Gingles*, 478 U.S. 30 (1986), a case which presented the United States Supreme Court with its first opportunity since the passage of the 1982 amendments to the Voting Rights Act to address how the new Section 2 would operate. *Allen v. Milligan*, 599 U.S. ___, 143 S. Ct. 1487, 1502–03 (2023). The United States Supreme Court has explained what Section 2 (using the *Gingles* framework) guards against as follows:

Gingles began by describing what § 2 guards against. “The essence of a § 2 claim,” the Court explained, “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters.” *Id.*, at 47, 106 S.Ct. 2752. That occurs where an “electoral structure operates to minimize or cancel out” minority voters’ “ability to elect their preferred candidates.” *Id.*, at 48, 106 S.Ct. 2752. Such a risk is greatest “where minority and majority voters consistently prefer different candidates” and where minority voters are submerged in a majority voting population that “regularly defeat[s]” their choices. *Ibid.*

Allen, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 47-48). “To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three ‘preconditions.’” *Allen*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 50).

The first precondition is that the “minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district.” *Allen*, 143 S. Ct. at 1503 (quoting *Wisconsin Legislature v. Wisconsin Elections Comm’n*, 595 U. S. ___, ___, 142 S.Ct. 1245, 1248 (2022) (per curiam) (citing *Gingles*, 478 U.S. at 46–51)). The first precondition, which is “focused on geographical compactness and numerosity, is ‘needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.’” *Allen*, 143 S. Ct. at 1503 (quoting *Grove v. Emison*, 507 U.S. 25, 40 (1993)). The United States Supreme Court has explained that a district is reasonably configured if it comports with traditional redistricting criteria. *Allen*, 143 S. Ct. at 1503 (citing *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015)). United States Supreme Court has recognized various traditional redistricting principles that states must consider in the redistricting process, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. These traditional redistricting principles were first referenced in *Shaw v. Reno*, 509 U.S. 630 (1993) and were expanded in later case law to include categories such as compactness¹, contiguity², preservation of counties and other political subdivisions³, preservation of communities of interest⁴, preservation of cores of prior districts⁵, and protection of incumbents.⁶

¹ *Shaw v. Reno*, 509 U.S. 630 (1993).

² *Id.*

³ *Id.*

⁴ *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

⁵ *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)

⁶ *Id.*

Under the second *Gingles* precondition, “the minority group must be able to show that it is politically cohesive.” *Allen*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 51). “The second [precondition], concerning the political cohesiveness of the minority group, shows that a representative of its choice would in fact be elected.” *Allen*, 143 S. Ct. at 1503 (citing *Grove*, 507 U.S. at 40).

According to the third *Gingles* precondition, “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... to defeat the minority's preferred candidate.” *Allen*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 51). “The third precondition, focused on racially polarized voting, ‘establish[es] that the challenged districting thwarts a distinctive minority vote’ at least plausibly on account of race.” *Allen*, 143 S. Ct. at 1503 (citing *Grove*, 507 U.S. at 40).

“[A] plaintiff who demonstrates the three preconditions must also show, under the ‘totality of circumstances,’ that the political process is not ‘equally open’ to minority voters.” *Allen*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 36-38, 45-46).

If all three preconditions are established, then a court must consider the totality of the circumstances and determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case,’ and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms. In undertaking this practical evaluation, courts look to the non-exhaustive list of “typical factors” identified in the Senate Report accompanying the 1982 amendments to the VRA (“Senate Factors”).

Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist., 201 F. Supp. 3d 1006, 1016 (E.D. Mo. 2016), *aff'd*, 894 F.3d 924 (8th Cir. 2018) (internal citations and quotations omitted). The Senate Factors include:

1. The history of official voting-related discrimination in the state or political subdivision;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet voting;
4. The exclusion of members of the minority group from candidate slating processes;
5. The extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process;
6. The use of overt or subtle racial appeals in political campaigns; and
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29. “[T]he totality of circumstances inquiry recognizes that application of the *Gingles* factors is “peculiarly dependent upon the facts of each case.” *Allen*, 143 S. Ct. at 1503 (quoting *Gingles*, 478 U.S. at 79). Therefore, the United States Supreme Court has explained that, [b]efore courts can find a violation of § 2..., they must conduct ‘an intensely local appraisal’ of the electoral mechanism at issue, as well as a ‘searching practical evaluation of the ‘past and present reality.’” *Id.*

2. Analysis of Legislative District 9

Legislative District 9 in the enacted State plan is comprised of 54.5% Native American voting age population (measured by “any part” Native American). As such, under Section 2 of the Voting Rights Act it would be described as a minority, opportunity-to-elect district. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). Legislative District 9, which elects one Senator in the North Dakota Senate, is also subdivided into Subdistrict 9A and Subdistrict 9B where each subdistrict serves as a single-member district for the purpose of electing Members to the North

Dakota House. Subdistrict 9A is 79.8% Native American voting age population (any part) and Subdistrict 9B is 32.2% Native American voting age population (any part). Given Legislative District 9 is majority Native American in terms of voting age, per the first *Gingles* precondition it is possible to create a district where the minority group in question comprises a majority of the district's population. The North Dakota Legislative Assembly created such a district with the creation of Legislative District 9.

As related to the second *Gingles* precondition, Plaintiffs' expert Dr. Lauren Collingwood analyzed a total of 38 elections configured to the present boundaries of Legislative District 9. Of these, he reported the presence of racially polarized voting in 36 of 38 races analyzed. Stated differently, Plaintiffs' expert Dr. Collingwood found that a clear candidate of choice for Native Americans can be identified in most of the elections he analyzed. Conversely, this would mean that the white community has a different preferred candidate of choice. However, Plaintiffs' expert Dr. Collingwood admitted there is insufficient precinct level data to conduct ecological inference to determine racial polarization in Subdistrict 9A or Subdistrict 9B. Tr. Day 1 at 194; ll. 14-25; Tr. Day 1 at 195; ll. 1-24. Dr. Collingwood described ecological inference as follows: "Well, it is the go-to method for conducting racially polarized voting studies in voting rights' cases. I don't -- I know very few cases at least since the nineties that don't use ecological inference." Tr. Day 1 at 193; ll. 19-22. While the parties' experts agree there is racially polarized voting in District 9 as a whole and District 15 as a whole, there is not sufficient precinct level data in Subdistrict 9A or Subdistrict 9B to determine if there is racially polarized voting using ecological inference, the "go-to method for conducting racially polarized voting studies". Thus, the second *Gingles* precondition is not met in Subdistrict 9A or Subdistrict 9B.

Plaintiffs' expert Dr. Collingwood conducted a functional analysis (also referred to as a performance analysis) in order to determine if the Native American candidate of choice is typically defeated for those races where racially polarized voting is present. Dr. Collingwood chose the elections to include in his analysis. Defendants' expert Dr. Hood analyzed all of the same elections analyzed by Plaintiffs' expert Dr. Collingwood, and summarized the results in the following table (D468):

Table 1. Summary of Races Analyzed by Professor Collingwood (LD 9, LD 9A, LD 9B)		
Contests	Number	Percent
Number of races analyzed	110	----
No clear Native American candidate of choice	2 ⁶	1.8%
Clear Native American candidate of choice	108	98.2%
Native American candidate wins	66	60.0%
Native American candidate defeated	42	38.2%

The foregoing table includes all of the races analyzed by the experts across Legislative District 9, Subdistrict 9A, and Subdistrict 9B. Based on the foregoing table, even though most of the races were found by Dr. Collingwood to have a clear Native American candidate of choice, the Native American candidate of choice is not typically defeated by the white voting bloc in the district. As summarized in Table 1, of the races analyzed by the experts, the preferred Native American candidate loses less than a majority (38%) of the time. In his testimony, Dr. Collingwood agreed with Dr. Hood's opinion that the Voting Rights Act guarantee of an opportunity to elect minority candidates of choice means "more often than not," in other words 51%. Tr. Day 1 at 180; ll. 20-25; Tr. Day 1 at 181; ll. 1-13. Legislative District 9 and its subdistricts, functioning together as a unit, are functioning as a district where the Native American community can typically elect its candidates of choice. Thus, the third *Gingles* precondition is not met.

Even though Dr. Collingwood chose the elections to include in his analysis, and Dr. Hood analyzed the same elections, Dr. Collingwood gives little weight to the elections in 2018, a year with high Native American voter turnout, and gives little weight to earlier elections in 2014 and 2016, assigning higher probative value to the more recent 2020 and 2022 elections. However, as indicated by Dr. Hood, the 2018 results “prove[] that Native American turnout can be that high” and that if “[i]t was that high in 2018”, it could be that high again. Tr. Day 3 (Hood) at 86, ll. 7-15. Additionally, according to various tribal members who testified at trial, the successful 2018 voter turnout was on account of significant efforts undertaken at the tribal level. The 2018 races should not be excluded from the analysis.

Further, on the principle that older elections have less probative weight than more recent elections, Dr. Collingwood gave little weight to the elections from 2014 through 2016 analyzed by experts for both sides. However, Dr. Collingwood admitted from 2014 to 2022, there was no change in preferred candidates (with Native American voters consistently preferring Democratic candidates and white voters preferring Republican candidates) and Dr. Collingwood admitted he did not conduct any empirical analysis on whether there were population changes in the subject districts that may have impacted election results from 2014 to 2022. Tr. Day 1 at 182, ll. 1-20. When Dr. Collingwood gave more weight to more recent elections among all the races he chose to analyze, he was simply applying the general rule of thumb that more weight is given to more recent elections, not based on an analysis of any change in the relevant voting populations. Tr. Day 1 at 182, ll. 21-25; Tr. Day 1 at 183, l. 1.

Dr. Collingwood asserts the Native American candidate of choice loses more often than not in the enacted Legislative District 9, meaning that according to him, Native Americans do not have an opportunity to elect their candidates of choice. In order to make this determination,

Dr. Collingwood utilized a methodology in which he chose elections to include in his analysis, but then simply points out that some elections are more probative than others. However, unlike his expert report in the *Walen* case, in the present case, Dr. Collingwood has not shown his math. He has not provided a summary chart or provided the percentage of elections analyzed in which the Native American candidate of choice is defeated. Dr. Hood, on the other hand, has provided a summary and percentage in this case, which shows that the Native American candidates of choice are not defeated the majority of the time in the enacted District 9. Dr. Hood's methodology and analysis is more persuasive and reliable than Dr. Collingwood.

Dr. Hood also compiled the functional analysis results based on Legislative District 9 without subdistricts, showing similar results even if the State had not created Subdistricts 9A and 9B. Those results are shown in the following table (D469):

Table 2. Summary of Races Analyzed by Professor Collingwood (LD 9)		
Contests	Number	Percent
Number of races analyzed	38	----
No clear Native American candidate of choice	2	5.3%
Clear Native American candidate of choice	36	94.7%
Native American candidate wins	23	60.5%
Native American candidate defeated	13	34.2%

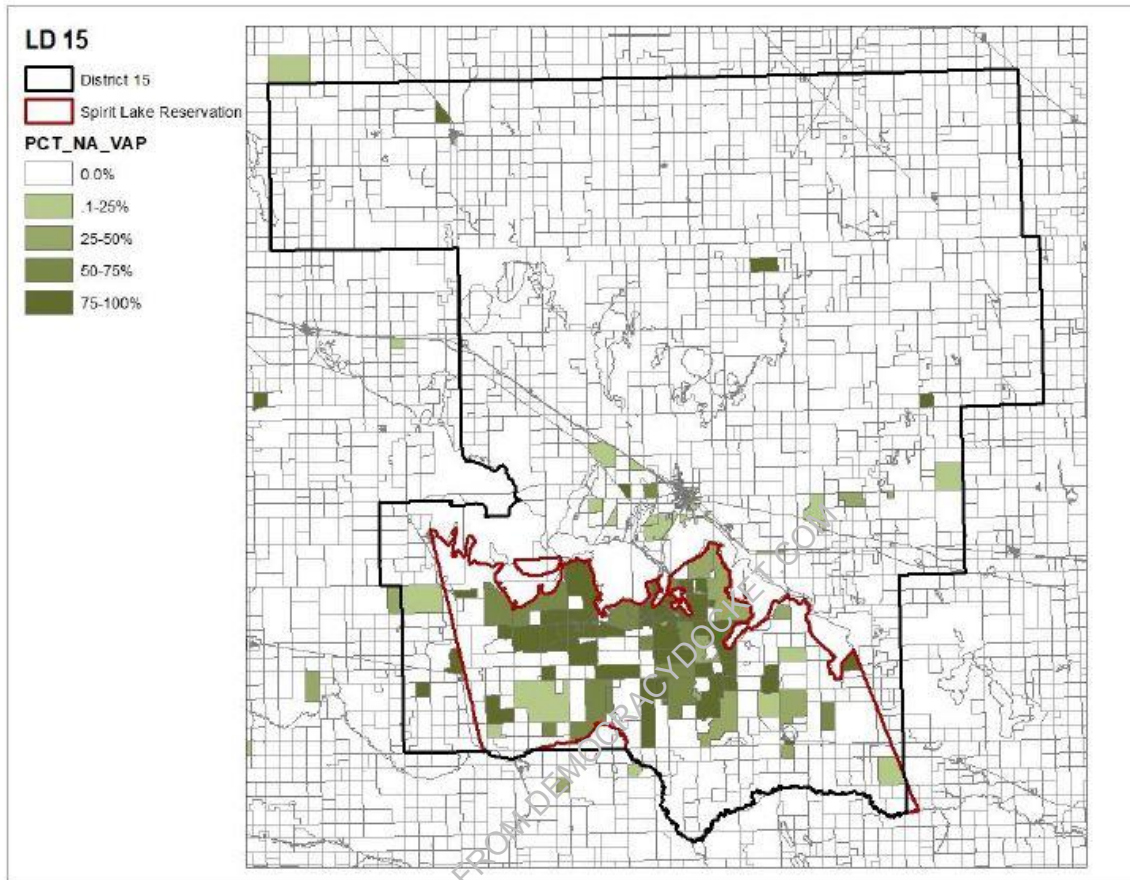
As shown in Table 2, although Dr. Collingwood found that most (94.7%) of the races contain a clear Native American candidate of choice, more often than not these candidates are not defeated by the white voting bloc. Of the 38 races analyzed by the experts, the Native American preferred candidate is defeated only 34.2% of the time. For the other cases, there was either no clearly defined Native American preferred candidate of choice (5.3%) or the Native American preferred candidate of choice prevailed (60.5%).

The third *Gingles* precondition is not met in Legislative District 9 because the Native American candidates of choice win more often than not in the elections analyzed by both

Plaintiffs' expert Dr. Collingwood and Defendant's expert Dr. Hood. Plaintiffs' counsel attempted on cross-examination to establish that Dr. Hood's analysis in his opinion in another case (*Charles Walen and Paul Henderson v. Doug Burgum and Alvin Jaeger*, Civil No. 1:22-CV-00031), when combined with the results of the 2022 elections, supports a finding that the Native American candidate of choice loses more often than not in the enacted District 9. However, not only did Dr. Collingwood not provide such an analysis in either his report or rebuttal report or in his testimony at trial, but also the Court excluded at trial Plaintiff's proffered evidence of the 2022 election results. The Court cannot conclude based on counsel's closing statements that Native American candidates of choice lose more often than not. The functional analyses of the elections by both experts Dr. Collingwood and Dr. Hood in the present case shows the Native American candidate of choice prevails more often than not in the enacted Legislative District 9. On the evidence presented at trial, the Court cannot conclude Plaintiffs have met their burden of proof on the third *Gingles* precondition.

3. Analysis of Legislative District 15

The first *Gingles* precondition asks if the minority group is of sufficient size and geographically compact enough to allow for the creation of a majority-minority district for the racial group in question. In the case of Legislative District 15, there is a geographic concentration of Native Americans located in and around the Spirit Lake Reservation, and in Devil's Lake. Outside of these concentrations, there is little Native American population found within Legislative District 15, as shown in the following figure (D453):

Figure 1. Legislative District 15—Block-Level Native American Voting Age Population

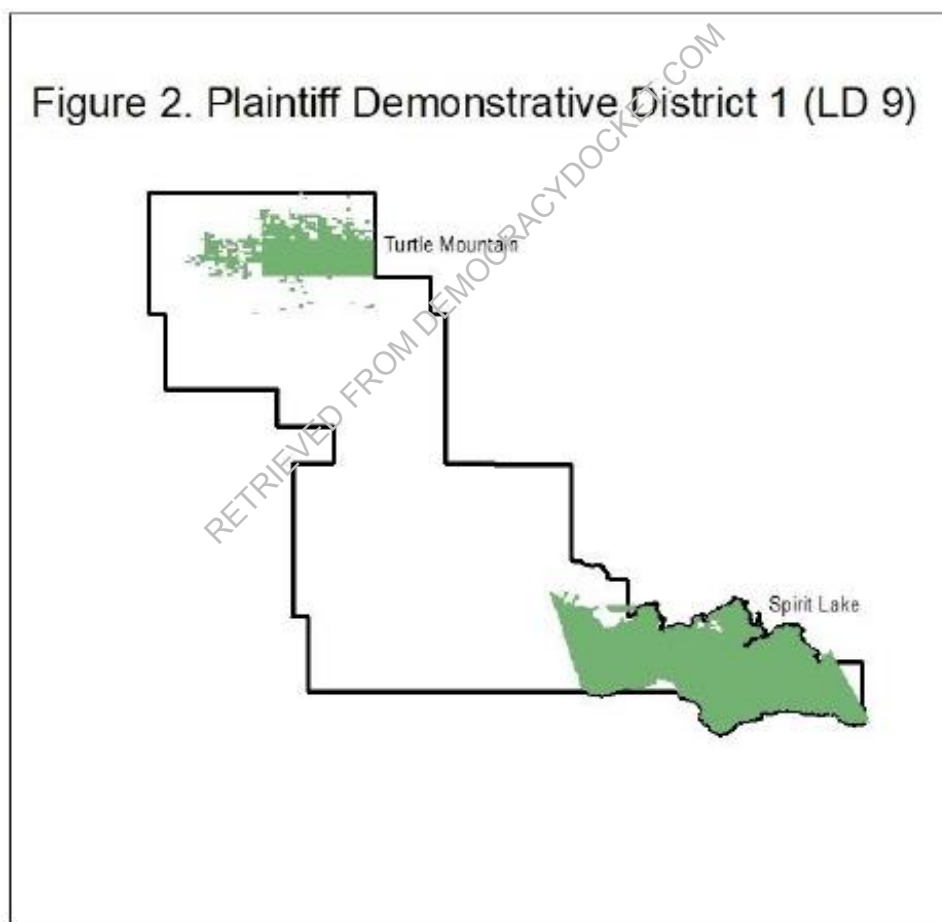
Native Americans of voting age make up 20.4% of the total voting age population for enacted Legislative District 15. Even if Legislative District 15 was subdistricted, the Native American voting age population would not constitute a majority in either subdistrict. As related to the first *Gingles* precondition, Native Americans within Legislative District 15 do not comprise a majority of the voting age population.

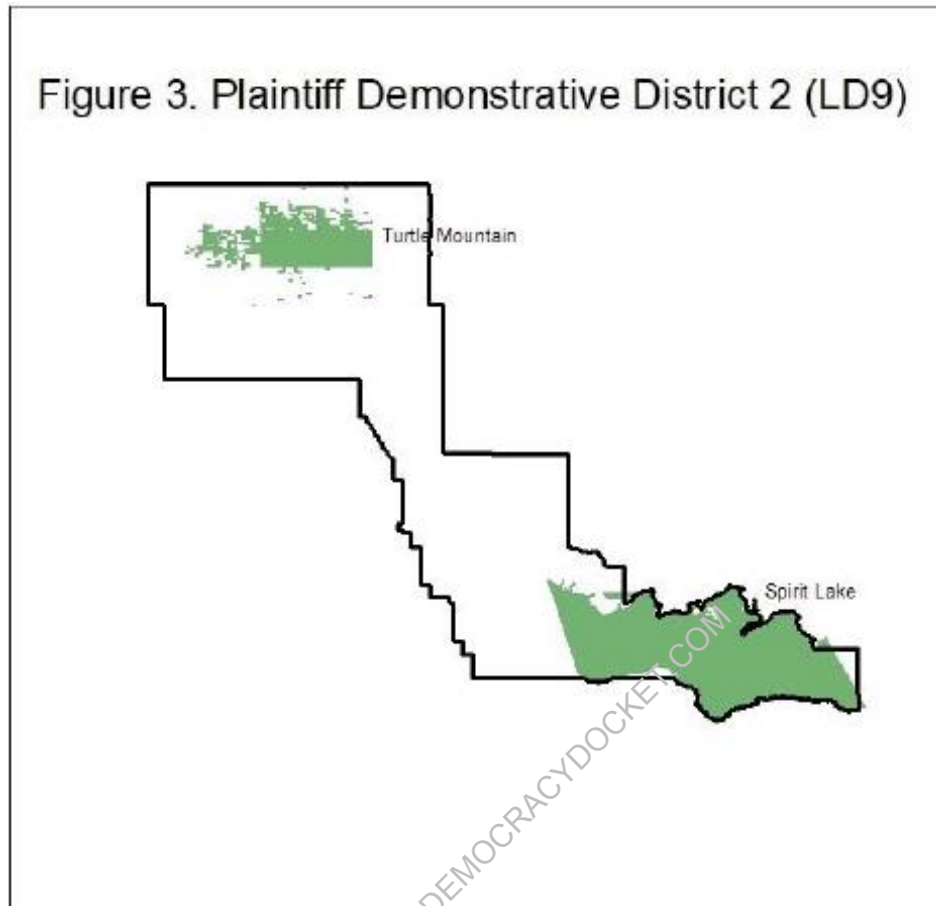
Plaintiffs' expert Dr. Collingwood concludes that racially polarized voting exists in 30 of 32 races analyzed for Legislative District 15. He further concludes that the Native American candidate of choice would win only one of the thirty election contests analyzed where racially polarized voting is present in the current Legislative District 15. Based on this analysis, the

second and third *Gingles* preconditions could be met in Legislative District 15. However, in order for a vote dilution claim to be substantiated, there must be evidence to substantiate all three *Gingles* preconditions, not one or two. The first *Gingles* precondition is not substantiated in the case of Legislative District 15.

4. Comparison of the As-Enacted State Map with the Plaintiffs' Proposed Maps

Plaintiffs have provided the following two proposed alternative maps for Legislative District 9, both of which include the Turtle Mountain Reservation and the Spirit Lake Reservation in a single district (D454 and D455):





Both of Plaintiffs' proposed maps use a land bridge to link Native American population clusters centered around the Turtle Mountain Reservation (currently in Legislative District 9) and the Spirit Lake Reservation (currently in Legislative District 15).

In relation to the first *Gingles* precondition, the United States Supreme Court cites with approval a District Court's comparison of the as-enacted state map with the plaintiffs proposed maps to determine which performed generally better with respect to traditional redistricting criteria. *See Allen*, 143 S. Ct. at 1504. Defendant's expert, Dr. Hood, performed this comparison of the enacted Legislative District 9 with the Plaintiffs' two proposed maps, and concluded the as-enacted map performs generally better than Plaintiffs' proposed maps on multiple traditional redistricting criteria. On the other hand, although Plaintiffs argued prior to and at trial that comparisons of the as-enacted and demonstrative maps are not allowable when analyzing a VRA

claim under the first prong of the *Gingles* test – the *Allen* Court and this Court disagree. Plaintiffs’ comparisons of their proposed maps with maps in other parts of North Dakota and to districts in other states, including Virginia, are not persuasive in light of the comparison with the enacted Legislative District 9 at issue.

A. Proposed Map 1

i. Population Deviation

The ideal district size of North Dakota legislative districts from the 2020 Census is 16,576 persons based on total population. Legislative District 9 under the enacted plan contains 16,158 people, producing a deviation of -2.52%. Legislative District 9 under the first proposed map would contain a population of 17,096, 3.14% over the ideal district size. The as-enacted Legislative District 9 performs better with respect to population deviation.

ii. Compactness

There are multiple measures of compactness to analyze legislative districts. Dr. Hood made use of three of the most commonly employed compactness scores: Reock, Polsby-Popper, and Schwartzberg. The Reock measure is also denoted as the smallest circle score in that it compares the area of the district to the area of a circle. More formally the Reock measure is the ratio of the district area to the area of the minimum circumscribing circle. The Polsby-Popper measure, a perimeter-to-area comparison, calculates the ratio of the district area to the area of a circle with the same perimeter. The Schwartzberg measure is a ratio that compares the perimeter of a district to the perimeter of a circle of equal area.

The Reock and Polsby-Popper measures range between 0 and 1, with one an indication of perfect compactness. For both measures a district analogous to a circle would score a value of 1. A circle would also score a value of one on the Schwartzberg index and less compact shapes

would be represented by values greater than one. Dr. Hood modified the standard Schwartzberg measure in order that it would range from 0 to 1, with higher scores an indication of greater compactness. The adjusted Schwartzberg scores presented below are now scaled in the same manner as the Reock and Polsby-Popper measures.

Table 3 below compares Reock, Polsby-Popper, and Schwartzberg (adjusted) measures for the enacted Legislative District 9 with Plaintiffs' first proposed map. Using the Reock, Polsby-Popper, or adjusted Schwartzberg compactness measures, Plaintiffs' first proposed map is less compact as compared to enacted Legislative District 9. The Reock score difference is .14, for the Polsby-Popper score it is .37, and the Schwartzberg score it is .31. For the Reock metric there is a 36% decrease in compactness between the two districts; for the Polsby-Popper measure there is a 63% decrease; and for the Schwartzberg measure the decrease is over half (53%).

Within Plaintiffs' first proposed map of District 9, it ranks 45th out of forty-seven districts using the Reock measure. (For these comparisons lower rankings are indicative of higher compactness. For example, a district ranking first would be the most compact district and a ranking of 47th would mean the district was the least compact.) Using the Polsby-Popper measure, Plaintiffs' first proposed map ranks 44th in terms of compactness and for the Schwartzberg measure it ranks 45th in terms of compactness. For the enacted plan, Legislative District 9 ranks 33rd in terms of compactness using the Reock measure; 5th using the Polsby-Popper measure; and 6th using the Schwartzberg measure. To summarize, using any of the three compactness measures deployed, Plaintiffs' first proposed map is less compact as compared to Legislative District 9 under the enacted plan. Plaintiffs' expert Dr. Collingwood used fewer measures of compactness in his analysis, but regardless, he does not disagree with Defendant's

expert Dr. Hood's conclusion that the enacted District 9 is more compact than Plaintiffs' proposed maps for District 9.

Table 3. Compactness Score Comparisons

Plan/District	Reock	Polsby-Popper	Schwartzberg-Adjusted
Demonstrative-1			
LD 9	.25	.22	.28
Rank	(45 th)	(44 th)	(45 th)
Enacted			
LD 9	.39	.59	.59
Rank	(33 rd)	(5 th)	(6 th)
Difference	.14	.37	.31

Note: A higher ranking indicates a less compact district. A ranking of one would be indicative of the most compact district and a ranking of 47th the least compact district.

(See D470.)

iii. Communities of Interest

As a recognized traditional redistricting criteria, counties are important political subdivisions and, to the extent possible, should not be split across districts. On this metric the enacted plan splits 20 counties (38%), while Plaintiffs' first proposed map splits 21 (40%). In the enacted plan, Legislative District 9 splits Cavalier County and Towner County, while Plaintiffs' first proposed map for Legislative District 9 splits three counties: Eddy, Pierce, and Rolette.

Plaintiffs claim the two Reservations constitute a single community of interest, and testimony at trial from Chairpersons Azure and Yankton discussed some joint interests of the two tribes, as well as certain differing interests. All of the testimony before the legislative committees prior to November 8, 2021 established that the individual Reservations each constituted separate individual communities of interest. Both the enacted plan and the Plaintiff's proposed maps serve to preserve the tribal communities of interest, either separately or jointly, although as discussed above, the enacted plan splits fewer counties.

iv. Core Retention

District core retention is another factor that can be considered under traditional redistricting criteria. The presence of a district core is closely linked to incumbent electoral success and, as such, is an important element related to protecting incumbents across a redistricting cycle. Core retention for the various plans is measured as the percentage of the population in a new district carried over from the corresponding 2011 (benchmark) district. As such, district core retention is a measure that ranges from 0% to 100%. The higher the percentage, the more a district is representative of its former self. According to Dr. Hood's analysis, under the enacted plan, district core retention for Legislative District 9 was 75% using total population and 72% using voting age population. Under Plaintiffs' first proposed map, the core retention is 63% using total population and 63% using voting age population. Dr. Collingwood incorrectly compared the Plaintiffs' proposed map to the 2021 enacted map rather than comparing to the 2011 benchmark. Core retention for Plaintiffs' first proposed map is lower than core retention for Legislative District 9 under the enacted plan.

A. Proposed Map 2

Plaintiff's second proposed map is geographically similar to their first proposed map in that it also links Native American population clusters centered around the Turtle Mountain Reservation (currently in Legislative District 9) and the Spirit Lake Reservation (currently in Legislative District 15).

i. Population Deviation

Under the enacted plan, Legislative District 9 contains 16,158 people, producing a deviation of -2.52% from the ideal district size. Plaintiff's second proposed map would contain a population of 17,327, making it 4.53% over the ideal district size. The as-enacted Legislative District 9 performs better with respect to population deviation.

ii. Compactness

Table 4 below compares Reock, Polsby-Popper, and Schwartzberg (adjusted) measures for the enacted Legislative District 9 with Plaintiffs' second proposed map. Plaintiffs' second proposed map has a Reock score of .20 compared to enacted Legislative District 9 with a score of .39, producing a difference of .19. This equates to a drop of 49% in compactness. For the enacted plan, Legislative District 9 ranks 33rd on compactness using the Reock score, while Plaintiffs' second proposed map ranks 45th on compactness using this measure (Again, a higher ranking equates with lower compactness). Looking at the Polsby-Popper measure, Plaintiffs' second proposed map scores a .19, compared to enacted Legislative District 9 at .59, for a difference of .40 (a 68% drop in compactness). Plaintiffs' second proposed map ranks 46 out of 47 districts in terms of compactness (For reference, Legislative District 9 in the enacted plan is the 5th most compact district on this measure). Finally, on the Schwartzberg measure, Plaintiffs' second proposed map has a value of .24, compared with .59 for Legislative District 9 under the enacted plan, for a difference of .35. This equates to a decline of 59% in compactness. In comparison to the rest of Plaintiff's second proposed map, Plaintiffs' second proposed map of District 9 ranks 46th on the basis of the Schwartzberg measure, while Legislative District 9 under the enacted plan ranks 6th. Plaintiffs' expert Dr. Collingwood used fewer measures of compactness in his analysis, but regardless, he does not disagree with Defendant's expert Dr. Hood's conclusion that the enacted District 9 is more compact than Plaintiffs' proposed maps for District 9.

Table 4. Compactness Score Comparisons

Plan/District	Reock	Polsby-Popper	Schwartzberg-Adjusted
Demonstrative-2			
LD 9	.20	.19	.24
Rank	(45 th)	(46 th)	(46 th)
Enacted			
LD 9	.39	.59	.59
Rank	(33 rd)	(5 th)	(6 th)
Difference	.19	.40	.35

Note: A higher ranking indicates a less compact district. A ranking of one would be indicative of the most compact district and a ranking of 47th the least compact district.

(See D471.)

iii. Communities of Interest

Under Plaintiffs' second proposed map, a total of 20 counties are split across legislative districts, which is the same number of counties split under the state's enacted plan. However, where only Cavalier County and Towner County are split under Legislative District 9 in the enacted plan, Plaintiffs' second proposed map for District 9 splits a total of three counties: Benson, Eddy, and Pierce.

iv. Core Retention

Under Plaintiffs' second proposed map, core retention for District 9 is 70% using total population or 71% using voting age population. This represents a decline from that of enacted Legislative District 9 which had core retention scores of 75% (Total Population) and 72% (Voting Age Population). Dr. Collingwood incorrectly compared the Plaintiffs' proposed map to the 2021 enacted map rather than comparing to the 2011 benchmark. Core retention for Plaintiffs' second proposed map is lower than core retention for Legislative District 9 under the enacted plan.

5. Summary of Gingles Findings

The first *Gingles* precondition is met in the as-enacted Legislative District 9, with its subdistricts. However, it is not met in the as-enacted Legislative District 15, where the Native American population is too low. Further, with respect to the first *Gingles* precondition, the as-enacted Legislative District 9 performs better on traditional redistricting criteria than Plaintiffs proposed maps.

The second *Gingles* precondition is met in the overall District 9 and District 15, however, there is insufficient precinct level data to conduct a proper analysis with ecological inference to determine racially polarized voting exists in Subdistrict 9A and Subdistrict 9B.

The third *Gingles* precondition is not met because the as-enacted District 9, with its subdistricts, allows Native Americans the opportunity to elect their candidates of choice. The Native American candidate of choice prevailed more often than not in a functional analysis of the elections analyzed by the experts for both Plaintiffs and Defendant.

Additionally, the Court notes that Plaintiffs two proposed maps result in the Native American candidate of choice prevailing in 91%-93% of elections analyzed by the experts. This is far beyond the requirement of the Voting Rights Act to provide an opportunity to elect. A degradation of traditional redistricting criteria, combined with such a high chance of Native Americans' candidates of choice being elected in the Plaintiff's proposed maps, gives rise to concerns that if the State were to enact one of Plaintiffs' proposed maps, there could be a claim of racial gerrymandering asserted against the State. This concern is even stronger in light of the fact that Plaintiffs' proposed maps have a barbell shape connecting two separated pockets of Native American populations (centroid to centroid the distance between the two Reservations is 77 miles). *See Sensley v. Albritton*, 385 F.3d 591, 595–98 (5th Cir. 2004).

5. Totality of the Circumstances

Since the *Gingles* preconditions have not been met by the Plaintiffs at trial, the Court need not move on to an analysis of the totality of the circumstances.

III.

ORDER FOR JUDGMENT

ACCORDINGLY, having made the aforementioned findings of fact and conclusions of law, and having concluded Defendant's defenses are meritorious and that Plaintiffs have failed to meet their burden of proof on any of their claims at trial:

THE COURT DISMISSES ALL OF PLAINTIFFS' CLAIMS IN THIS ACTION WITH PREJUDICE. THE CLERK IS ORDERED TO ENTER FINAL JUDGMENT CONSISTENT WITH THIS ORDER.

Dated this _____ day of _____, 2023.

BY THE COURT:

The Honorable Peter D. Welte, Chief Judge
United States District Court for the District of North
Dakota

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT** was on the 7th day of July, 2023, filed electronically with the Clerk of Court through ECF:

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