

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No: 3:22-cv-00022

Turtle Mountain Band of Chippewa)
Indians, Spirit Lake Tribe, Wesley Davis,)
Zachary S. King, and Collette Brown.)
)
Plaintiffs,)
)
v.)
)
Michael Howe, in his official capacity as)
Secretary of State of North Dakota.)
)
Defendant)

**NORTH DAKOTA LEGISLATIVE
ASSEMBLY’S COMBINED REPLY TO
PLAINTIFFS’ OPPOSITION TO
EMERGENCY MOTION FOR
EXTENSION OF DECEMBER 22, 2023,
DEADLINE TO ADOPT A REMEDIAL
PLAN AND RESPONSE TO
PLAINTIFFS’ MOTION FOR
REMEDIAL ORDER**

I. INTRODUCTION

Plaintiffs again invite this Court to deprive the North Dakota Legislative Assembly (“Assembly”) of a “reasonable opportunity” to develop a remedial redistricting plan for this Court’s consideration. See (Docs. 159, 159-1, 160, 161). As the Assembly’s arguments overlap, it submits this combined Response to Plaintiffs’ Motion to Amend Remedial Order and Reply to Plaintiffs’ Opposition to the Assembly’s Motion to Extend the December 22, 2023, Deadline. The Assembly must be afforded a “reasonable opportunity” to adopt a remedial redistricting plan and the Plaintiffs’ new attempt to impose “Proposed Map 2” by judicial fiat must be denied.

II. THE REDISTRICTING COMMITTEE’S DECEMBER 20, 2023, MEETING

The Redistricting Committee met on December 20, 2023, and discussed four potential maps. Two of which were proposed by Plaintiffs (Proposed Maps 1 and 2) and two proposed through the legislative process (Proposed Maps 3 and 4).

A. Discussion on Proposed Map 1

The Redistricting Committee voiced concerns with Proposed Map 1. Specifically, Proposed Map 1 removes Rolla and other portions of Rolette County from District 9. As Chairman Sorvaag noted, “this whole purpose of this exercise by the Courts and the tribe[s] is community of interest, and they took five hundred and some tribal members that have always been in that district, always, and took them out.” <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/2023/1220/-1/31927> (accessed Dec. 22, 2023) (“12/20/23 Video”) at 10:33:28-10:33:42. Proposed Map 1 excluded 1,407 total people - of which 563 are Native Americans per the Census data - from District 9. *Id.* at 10:33:44-10:33:52. Chairman Sorvaag believed the excluded portion of Rolette County from District 9 was not number driven, but done for another reason. *Id.* at 10:34:00-10:34:10. Specifically, Chairman Sorvaag stated “there would be no way to go forward on 1 unless somebody could stand in front of us and explain this...from a mapping standpoint we see this as flawed and I can’t think of it any other way unless somebody can stand up here and tell me why I’m wrong. And that’s fine if we’re missing something, but historic, being in a district carries weight too and this is a major change...” *Id.* at 10:35:33 – 10:36:20.

B. Discussion on Proposed Maps 2 and 3.

Senator Klein presented “Proposed Map 3” which he described as “somewhat similar” to “Proposed Map 2.” *Id.* at 10:47:08-10:47:15. Senator Klein explained “Proposed Map 3” avoids impacts to other districts and would keep Pierce County in one legislative district. *Id.* at 10:48:00-10:48:17. Proposed Map 3 also “goes back to the lines that are currently drawn in Benson County.” *Id.* at 10:48:19 - 10:48:26. Senator Klein explained that instead of impacting Pierce County, the line is moved “into Towner County, which is already impacted,” then “come through Ramsay County from the north” and “hook back up to where... Spirit Lake joins in Benson County.” *Id.* at 10:48:50- 10:49:12. Additionally, Proposed Map 3 maintains communities of

interest and “all it does is move that line...in Proposal 2 over just a little so that it doesn’t impact any of Pierce or additional Benson County...we’re not impacting [District] 29,” or District 14, “or anyone else.” Id. at 10:49:50-10:50:46. Proposed Map 3 covers “a lot of water” as it comes south through Ramsay County; therefore, impact on citizens was minimal¹. Id. at 10:50:47- 10:50:58. Senator Klein explained Proposed Map 3 is “well-within what the Judge asked for, I think it falls within what both our tribal chairmen have written in the letter they sent us today.” Id. at 10:51:03-10:51:22. Proposed Map 3 also follows township lines. Id. at 10:51:24-10:52:10.

Senator Klein explained that “because of...how late...that proposal number 2 came in, there wasn’t time to really think that through...had they had more time to think that through and had some...additional input from people who are involved with this, we would probably come up with this better plan and still made all the criteria that they are looking for.” Id. at 10:55:32-10:56:03. Chairman Sorvaag explained he hoped “to have the opportunity” to obtain additional information and have discussions “in a timely and orderly manner.” Id. at 10:57:05-10:57:30.

C. Proposed Map 4

Senator Estenson proposed Map 4 to keep District 15 whole and not impact other districts because she believed it could be a viable solution. Id. at 11:16:16-11:16:28. She believed this proposal would keep Districts 14 and 9 the same and District 15 would be adjusted into subdistrict A and B. Id. at 11:22:58-11:23:08. While this proposal does not connect Turtle Mountain and Spirit Lake, there was support for this general concept during the 2021 redistricting process from Spirit Lake Nation. See Doc. 157 at p. 14 (summarizing statements from Collette Brown requesting Spirit Lake Nation receive a subdistrict).

¹ The “dogleg” connecting Turtle Mountain and Sprit Lake in Proposed Plan # 3 encompassed 429 total people of which 9 are American Indians per the Census data. Id. 10:59:00-10:59:13.

III. LAW AND ARGUMENT

“Redistricting is primarily the duty and responsibility of the State” and necessarily involves the legislative process. Abbott v. Perez, 138 S.Ct. 2305, 2324-28 (2018) (internal quotation omitted). “The legislative process...includes delivering an opinion, uttering a speech...proposing legislation...holding hearings and introducing materials at Committee hearings.” Fields v. Office of Eddie Bernice Johnson, 459 F.3d 1, 10-11 (D. C. Cir. 2006). “Redistricting is never easy...and is primarily and foremost a state legislative responsibility.” Singleton v. Merrill, 582 F.Supp.3d 924, 943-44 (N.D. Ala. 2022). This Court must reject the Plaintiffs’ attempts to deprive the Assembly of its reasonable opportunity to continue the legislative process required to complete its constitutional duty. Wise v. Lipscomb, 437 U.S. 535, 539 (1978) (explaining redistricting is a “legislative task which the federal courts should make every effort not to pre-empt.”) The Assembly has responded and there is no reason for this Court to exercise its “unwelcome obligation” and impose a remedial plan at this time. Id. at 540.

As previously explained, the Assembly’s request is supported by Supreme Court, Eighth Circuit, and district court case law. Sound guidance on appropriate judicial restraint is found in Covington v. State, 267 F.Supp.3d 664 (M.D. N.C. 2017), where on August 15, 2016, the district court found North Carolina’s State House and Senate districts violated federal law. Id. at 665. Covington declined to order modifications to the challenged districts prior to the “fast-approaching November 2016 election,” but rather “order[ed] the North Carolina General Assembly to draw remedial districts in their next legislative session to correct the constitutional deficiencies in the Enacted Plans.” Id. Moreover, the court ordered supplemental briefing to address “the appropriate

deadline for the North Carolina legislature to draw new districts²...” Id. After briefing, the district court “issued an order on November 29, 2016, directing the General Assembly to draw new districting plans by March 15, 2017.” Id. The defendants obtained a stay of the district court’s order pending appeal. Id. The Supreme Court affirmed the district court’s judgment on June 5, 2017. Id. On July 27, 2017, the district court held an evidentiary hearing to establish timelines for drawing remedial plans. Id.

The plaintiffs requested August 11, 2017 as the deadline to enact remedial districts. Id. at 666. The Legislative Defendants proposed November 15, 2017 as the deadline to enact a remedial plan because they needed time:

...to conduct public hearings and engage in the robust deliberations necessary to develop districting plans that fully remedy the constitutional violations in the 2011 districting plans. To that end, Legislative Defendants represented to the Court that the North Carolina Senate Redistricting Committee... and the North Carolina House Redistricting Committee... intend to hold public hearings throughout the State to receive comment on both the proposed criteria to be used in drawing the maps and the proposed remedial districting maps subsequently drawn in accordance with those criteria.

Id. at 666.

Unlike here, the North Carolina General Assembly had “been in session several times since the Court entered its Order directing the General Assembly to draw new districts in August 2016.” Id. The court recognized “adequate districts should be enacted as quickly as possible to protect the rights of North Carolina citizens...” but noted:

At the same time, we recognize the legislature's right to draw the new districts in the first instance, if it will do so in a timely fashion. We do not disagree with Legislative Defendants that there are many benefits to a time line that allows for the General Assembly (1) to receive public feedback on the criteria to be used in

² The Plaintiffs in Covington named the Chairman of the North Carolina House of Representatives Redistricting Committee, Chairman of the North Carolina Senate Redistricting Committee, Speaker of the North Carolina House of Representatives, and President Pro Tempore of the North Carolina Senate in their official capacities as parties to the lawsuit. Covington, M.D. N.C. Case No. 1:15-cv-00399. (Doc. 8-1, 8-4, 8-8, 8-10).

drawing the remedial districts and proposed remedial districting plans applying those criteria; (2) to revise the proposed plans based on that feedback; and (3) to engage in robust deliberation...Therefore, we prefer to give the legislature some additional time to engage in a process substantively identical to the one they have proposed.

Id. (emphasis added).

The court extended “the time for the General Assembly to adopt and enact remedial districting plans to September 1, 2017. This is...over a year after the Court ordered the legislature to redistrict, and is almost three months after the Supreme Court upheld this Court’s order...” Id.

The district court explained:

If the Senate Redistricting Committee and the House Redistricting Committee (1) publicly disclose the criteria to be used in drawing the remedial districts, (2) draw and publicly disclose proposed remedial districting plans applying those criteria and remedying the constitutional deficiencies with the Subject Districts, and (3) make public a method and process for receiving comments and evidence from the public and other legislators on or before August 21, 2017, the Court will...extend this deadline to September 15, 2017.

Id. at 667-68.

In light of Covington, it is clear the Assembly has not been afforded a reasonable opportunity to develop a remedial plan. North Carolina knew of the district court’s order for more than a year, the Supreme Court’s decision for approximately three months, and the General Assembly had “been in session several times” during that timeframe. Id. at 666-67. Even under those circumstances, the court allowed the General Assembly thirty-two days to adopt a remedial plan and extended that deadline if the General Assembly actively engaged in the legislative process. Covington, 267 F. Supp. 3d at 667-68.

Here, the Assembly first learned of this Court’s decision on November 17, 2023. (Doc. 125, 126). The Assembly has not been in session since that date. Unlike Covington, this Court unilaterally imposed the December 22, 2023, deadline to adopt a remedial plan. See Covington, 267 F.Supp.3d at 666-67. Like the Covington court, the Assembly also believes public feedback,

revisions to proposed plans, and robust deliberations are beneficial. See Covington, 267 F. Supp. 3d at 667. The Redistricting Committee is actively engaged in the legislative process to adopt a remedial plan and attempt to comply with this Court's Order. See Doc. 158.

Plaintiffs seek to deprive the Assembly of this opportunity, and now request this Court impose "Proposed Map 2" (Doc. 160) - instead of their previous request for "Proposed Map 1" (Doc. 134) - on the North Dakota electorate. Unsurprisingly, the Plaintiffs' revised request came after the legislative process disclosed their "Proposed Map 1" is "flawed" from a mapping standpoint as it excluded 563 Native Americans from the existing District 9 per Census data. See 12/20/23 Video at 10:33:28-10:36:20. Further, numerous improvements over "Proposed Map 2" were discussed in "Proposed Map 3" to minimize impacts on citizens, other districts, and county lines. Id. at 10:47:08-10:56:03. The Assembly requests it be afforded its "reasonable opportunity" to complete this legislative process and adopt a remedial plan that complies with this Court's order and best serves the North Dakota electorate under the circumstances³.

IV. CONCLUSION

For the aforementioned reasons, Plaintiffs' Motion to Amend Remedial Order (Doc. 159) should be denied and the Assembly's Emergency Motion for Extension of December 22, 2023, Deadline to Adopt a Remedial Plan (Doc. 156) should be granted.

³ The Plaintiffs' criticism of the legislative process shows their desire for this Court to ignore Supreme Court precedent and impose a remedial redistricting plan on the North Dakota electorate by judicial fiat. Doc. 161 at pp. 5-8. Plaintiffs may not like or agree with how ideas and comments are expressed to elected officials; however, they cannot utilize the federal judiciary to deprive the Assembly of a reasonable opportunity to do its job.

Dated this 26th day of December, 2023.

SMITH PORSBORG SCHWEIGERT
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of December, 2023, a true and correct copy of the foregoing **NORTH DAKOTA LEGISLATIVE ASSEMBLY'S COMBINED REPLY TO PLAINTIFFS' OPPOSITION TO EMERGENCY MOTION FOR EXTENSION OF DECEMBER 22, 2023, DEADLINE TO ADOPT A REMEDIAL PLAN AND RESPONSE TO PLAINTIFFS' MOTION FOR REMEDIAL ORDER** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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