

REDISTRICTING COMMITTEE

The Redistricting Committee was created on December 5, 2023, and assigned the responsibility to develop an alternative remedial map in response to the order of the United States District Court in *Turtle Mountain Band of Chippewa Indians et al. v. Howe*, No. 3:22-CV-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023), directing the Secretary of State and Legislative Assembly to "adopt a plan to remedy the violation of Section 2" by December 22, 2023.

Committee members were Senators Ron Sorvaag (Chairman), Brad Bekkedahl, Dick Dever, Robert Erbele, and Kathy Hogan and Representatives Josh Boschee, Craig Headland, Mike Lefor, Mike Nathe, and Austen Schauer.

BACKGROUND

Legislative Assembly's Redistricting Plan - 2021

Every 10 years, the Legislative Assembly undertakes redistricting following the federal decennial census, as mandated by the Constitution of North Dakota. The resultant map remains in effect "until the adjournment of the first regular session after each federal decennial census, or until changed by law" pursuant to Section 2 of Article IV of the Constitution of North Dakota. After the 2020 Census, a Redistricting Committee was formed pursuant to House Bill No. 1397 (2021) to create a legislative plan for use in the upcoming 2022 primary election and future elections.

The 2021 Redistricting Committee met six times between July and September 2021 and addressed legal requirements, including compliance with the federal Voting Rights Act of 1965 (VRA). In an effort to comply with Section 2 of the VRA, the 2021 Redistricting Committee created subdistricts in Districts 4 and 9, placing the Turtle Mountain and Fort Berthold Reservations each within a subdistrict. According to the 2020 Census population data, the Turtle Mountain and Fort Berthold Reservations were the only reservations in the state with the requisite population for a single-member district under the VRA.

The 2021 Redistricting Committee's proposed map was submitted to the Legislative Management for approval on September 29, 2021. The Legislative Management approved the committee's proposed map for introduction during the special session as House Bill No. 1504 (2021). The Legislative Assembly approved House Bill No. 1504 and the resulting map on November 10, 2021.

Resulting Litigation

Walen v. Burgum

On February 16, 2022, plaintiffs Charles Walen and Paul Henderson filed a complaint against Governor Doug Burgum and Secretary of State Alvin Jaeger, claiming the division of legislative Districts 4 and 9 constituted unconstitutional racial gerrymandering. They sought a preliminary injunction to eliminate the subdistrict lines for upcoming elections, but the court denied this motion on May 26, 2022, citing insufficient evidence and the proximity of the elections.

On February 28, 2023, the plaintiffs moved for summary judgment, arguing race was the predominant factor in the legislative decision to create subdistricts. To prevail on their motion, the plaintiffs were required to show race was the predominant factor in the Legislative Assembly's decision to group together a significant number of voters and the Legislative Assembly's actions fail to meet strict scrutiny. A special panel of three federal judges found the committee had good reasons to believe the subdistricts drawn around the Turtle Mountain and Fort Berthold Reservations were required by the VRA because the committee carefully considered the likelihood of success of voter dilution claims under Section 2 by Native American voters if the committee did not draw the subdistricts. Therefore, the panel held the subdistricts are narrowly tailored to the state's compelling interest in complying with the VRA, satisfying the strict scrutiny required if race is a predominant motivating factor.

The panel did not determine whether race was a predominant factor. The panel also noted the relief the plaintiffs sought - eliminating the subdistricts - would itself be a violation of the VRA and federal law, based on the state's unrefuted evidence. The court denied the plaintiff's motion for summary judgment and granted the state and the Mandan, Hidatsa, and Arikara Nation's motion for summary judgment.

Turtle Mountain Band of Chippewa Indians v. Howe

On February 7, 2022, the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, and several individuals filed a complaint against Secretary of State Alvin Jaeger, claiming the redistricting plan diluted Native American voting power on the Turtle Mountain and Spirit Lake Reservations in violation of Section 2 of the VRA. They alleged Subdistrict 9A was unlawfully "packed" with a supermajority of Native American voters while other Native American voters were "cracked" or dispersed across different districts, including District 15. After the Secretary of State's motion to dismiss was denied, a 4-day bench trial was held in June 2023.

On November 17, 2023, the United States District Court held the redistricting plan approved by the Legislative Assembly prevented Native American voters from electing candidates of their choice, in violation of Section 2 of the VRA, and permanently enjoined the Secretary of State from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the Legislative Assembly from Districts 9 and 15 and Subdistricts 9A and 9B. The district court gave the Secretary of State and Legislative Assembly until December 22, 2023, to adopt a plan to remedy the violation of Section 2.

On December 5, 2023, the Chairman of the Legislative Management appointed the Redistricting Committee in response to the order of the district court. On December 8, 2023, the Secretary of State filed an appeal and the Legislative Assembly, not yet a party to the suit, filed a motion to intervene. The Legislative Assembly also requested a reasonable amount of time to comply with the district court's order and proposed a deadline of February 9, 2024, to replace the district court's December 22, 2023, deadline. On December 12, 2023, the district court denied these requests and concluded it lacked jurisdiction due to the pending appeal.

TESTIMONY AND COMMITTEE CONSIDERATIONS

Committee's Directive

The committee was informed that, in response to the district court's order requiring the Legislative Assembly to adopt a compliant plan by December 22, 2023, the Redistricting Committee was to evaluate Districts 9 and 15 and Subdistricts 9A and 9B. It was emphasized the sole objective of the committee was to recommend a plan to the Legislative Management, that in turn must approve the plan for introduction during a special or reconvened legislative session.

The committee received an update from a representative of the Legislative Management indicating outside counsel was retained to represent the position of the Legislative Assembly, including moving to intervene in the case, and a request for proposals to seek an expert's assistance in drawing a plan was approved.

Legislative Council

The committee received information from the Legislative Council staff regarding the legal requirements the committee must consider to comply with the VRA and remedy a violation of Section 2. The committee was informed the remedial plan must satisfy the requirements of the VRA, whether by adopting one of the plaintiffs' maps or creating a new map. The committee was advised to consider traditional districting principles, including respecting political subdivision boundaries and communities of interests. The committee was advised to ensure members of the minority group do not have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice and, in doing so, consider traditional districting principles. The committee reviewed the plaintiff's proposed maps and received additional testimony related to redistricting data, county-by-county data, and reservation populations.

The committee received information regarding whether a member of the Legislative Assembly is precluded from serving in a district in which the member no longer resides due to legislative redistricting. The testimony indicated a member of the Legislative Assembly residing outside a district in which the member was elected to serve likely is disqualified from continuing to serve regardless of the reason the member no longer resides in the district. However, historically, the member has been allowed to serve until December 1 after the next general election at which a new member may be elected to serve the district.

Turtle Mountain Band of Chippewa Indians

The committee received oral testimony from a representative of the Turtle Mountain Band of Chippewa Indians who expressed the tribe's preference against combining the Turtle Mountain and Spirit Lake Reservations into a single voting district. The testimony indicated the representative's preference for creating a more compact District 9 without a subdistrict. According to the testimony, during the initial redistricting process in 2021, representatives from the Spirit Lake Tribe requested the Spirit Lake Reservation be included within a subdistrict of District 15.

Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation

The committee received written testimony on behalf of the Turtle Mountain Band of Chippewa Indians and Spirit Lake Nation encouraging the Legislative Assembly to rectify the map to ensure fair representation for Native American voters in Legislative Districts 9 and 15. The testimony indicated the tribes' disappointment over the Secretary of State's decision to appeal the ruling. According to the testimony, the tribes had cautioned the Redistricting Committee about the plan's legality and submitted a detailed VRA analysis, including proposed maps. The testimony encouraged the Legislative Assembly to correct this violation and protect Native American voting rights before the 2024 elections.

According to the testimony, and in contrast to the oral testimony received from a representative of the Turtle Mountain Band of Chippewa Indians, the tribes advocated for a single, unsubdivided legislative district that encompasses both reservations, asserting their tribes' official position against unauthorized testimony on their behalf. The testimony attributed the legal challenges stemming from the 2021 redistricting process to the Redistricting Committee's failures,

including the lack of a redistricting expert and dismissal of the tribes' analysis. The testimony argued the district court's recent ruling confirmed the previous redistricting plan unlawfully diluted Native American voting strength and the tribes' proposed maps were found compliant with the VRA, potentially leading to the election of three legislators instead of just one. The tribes encouraged the Redistricting Committee to adopt one of their proposed maps and abandon any suggestions that would further violate the VRA, emphasizing the need for fair representation for Native American voters.

Secretary of State

The committee received testimony from a representative of the Secretary of State's office emphasizing April 8 was the critical deadline for successfully administering the election. Testimony indicated many important preparations, including assigning precincts, proofing ballots, and training election workers, must be completed before the start of voting under the federal Uniformed and Overseas Citizens Absentee Voting Act. The testimony explained adoption of a different map would require affected districts to reorganize.

Interested Persons

The committee received testimony demonstrating a potential error in the proposed maps related to the city of Judson, which was not present in the Legislative Assembly's 2021 redistricting plan.

Comparison of Proposed Maps

The committee reviewed a document comparing several proposed maps for legislative districts. In reviewing "Plaintiff's Proposed Map #1," the committee expressed concerns regarding a lack of explanation for adjustments, such as moving the city of Rolla from District 9 to District 15, which would separate 515 Native Americans from their community. Committee discussion revealed additional concerns regarding the removal of parts of Ramsey and Pierce Counties containing very few Native American residents, potentially affecting existing representatives. The committee discussed the need for clear information regarding the rationale behind these boundary changes, particularly because "Plaintiff's Proposed Map #1" had not been presented during the 2021 special legislative session.

"Plaintiff's Proposed Map #2," which placed the Turtle Mountain and Spirit Lake Reservations in one district, had been presented in 2021. The committee acknowledged the potential differences in the communities of interest among the tribal nations.

A review of "Plaintiff's Proposed Map #3" indicated the map was similar to "Plaintiff's Proposed Map #2" but would not impact District 14 and aimed to align with the district court's opinions.

A member of the Legislative Assembly indicated a preference for further revisions to "Plaintiff's Proposed Map #4," such as restoring the subdistricts in District 9 to better represent community interests. Testimony indicated, dividing proposed District 15 into subdistricts, each to include a portion of the city of Devils Lake, would be more representative of a community of interest than the districts proposed in the other maps that include the Turtle Mountain and Spirit Lake Reservations in one district.

Committee Discussion

The committee emphasized the importance of including tribal nations in discussions about redistricting plans. A committee member suggested focusing on "Proposed Map #3" and "Proposed Map #4" for further discussion. Acknowledging differing opinions within the Legislative Assembly regarding the district court's decision, members agreed the Legislative Assembly should respect the court's role as a check on legislative power while proceeding carefully in the best interest of the legislative branch.

Chairman Sorvaag noted the committee would reconvene at his discretion, with a clear intention to engage with tribal leadership in future discussions. On January 4, 2024, Chairman Sorvaag called a meeting of the Redistricting Committee to be held on January 9, 2024. However, on January 8, 2024, the district court denied the Legislative Assembly's request for an extension and imposed "Plaintiff's Map #2." Chairman Sorvaag postponed the meeting and the Redistricting Committee did not reconvene.