

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,
et al.

Plaintiffs-Appellees,

v.

North Dakota Legislative Assembly,

Requested-Intervenor-Appellant.

On Appeal from Decision of the United States District Court
for the District of North Dakota, Case No. 3:22-cv-00022

**APPELLEES' RESPONSE IN OPPOSITION TO LEGISLATIVE ASSEMBLY'S
EMERGENCY MOTION FOR EXTENSION OF DEADLINE**

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INTRODUCTION

Following a 4-day trial at which 11 expert and lay witnesses testified and hundreds of exhibits were received into evidence, the district court concluded that North Dakota’s 2021 redistricting map reduced from 3 to 1 the number of legislators Native American voters in northeastern North Dakota could elect. The enacted map did so by extending District 9—previously wholly contained in Rolette County (home to Plaintiff the Turtle Mountain Band of Chippewa Indians)—into Towner and Cavalier Counties (which are nearly 100% white) rather than to nearby Benson County (home to Plaintiff the Spirit Lake Tribe). As a result, in the 2022 election, the incumbent District 9 Native American senator lost reelection in the face of white bloc voting. For the first time in over 30 years, no Native American serves in the North Dakota senate today. The district court concluded that the evidence established a violation of Section 2 of the Voting Rights Act and provided the Legislative Assembly (“the Assembly”) 35 days to adopt a remedial plan for the court’s review, absent which the task of imposing an interim remedial plan would fall to the district court by law.

The Assembly—which is not a party to the underlying case—has filed a request that this Court delay the district court’s imposition of a court-ordered remedial plan for 49 days. It has done so in an appeal, No. 23-3697, in which the sole issue is the denial of its post-judgment motion to intervene in the district court. And it did so notwithstanding the fact that this Court recently and unanimously denied the party-

Appellant Secretary of State’s motion for a stay of the district court’s order pending his appeal in case no. 23-3655. It is unclear how the Assembly’s request could be procedurally proper given its nonparty status and the limited scope of this appeal.

In any event, to the extent the Assembly seeks more time, it has directed its request to the wrong Court. The district court has jurisdiction to supervise the remedial process and modify its remedial schedule. The district court, with its deep familiarity with the facts, evidence, and parties, is better suited to supervise the remedial process while the Secretary’s and Assembly’s appeals proceed in this Court. The Court should enter an order confirming that the district court has jurisdiction to supervise the remedial process notwithstanding the Secretary’s appeal and that the Assembly’s motion should be directed to the district court. Alternatively, the Assembly’s request should be denied because it contradicts the Assembly’s prior position as to the remedial schedule and is otherwise unmerited.

FACTUAL BACKGROUND RELATED TO MOTION FOR EXTENSION

On November 17, 2023, the district court entered judgment in favor of the Plaintiffs in the underlying action, finding that North Dakota’s 2021 state legislative redistricting plan violates Section 2 of the Voting Rights Act. App.43. The court enjoined the party-defendant Secretary from “administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the North Dakota Legislative Assembly” from districts 9, 9A, 9B, and 15. App.81. The court provided

an opportunity for the non-party Assembly to “adopt a plan to remedy the violation of Section 2,” but set a deadline of December 22, 2023, for the Assembly to act. *Id.* If the Assembly does not enact a plan that remedies the violation by that date, the district court is obligated by law to “devise and impose” a remedial plan *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978).

On December 4, 2023, more than two weeks after judgment was entered, the Secretary of State noticed its appeal and moved to stay the injunction pending the same. App.84; App.92. The Secretary’s appeal was docketed in this Court as Case No. 23-3655. While his notice of appeal encompasses the entire judgment below, *see* App.84, the Secretary’s motion to stay was based solely on his assertion that he was likely to prevail in showing that Plaintiffs lack a cause of action to enforce Section 2 under 42 U.S.C. § 1983, and on concerns that a remedial process that extends beyond December 31, 2023 would interfere with the 2024 election cycle. *See* App.92.

In his motion, the Secretary indicated that the Legislature would not enact a remedial plan by the December 22 deadline. App.108. In response to this representation, and the Secretary’s concerns about the remedial process extending into 2024, Plaintiffs promptly moved to amend the remedial plan set forth by the district court. App.120. Plaintiffs asked the court to set expedited deadlines to review any plan enacted by the legislature in advance of the December 22 deadline and in the event that the Assembly declined to enact a plan by that date—as predicted by the

Secretary—asked that the court order one of Plaintiffs’ demonstrative plans into effect as the remedial plan. App.124

On December 5, 2023, the Assembly took its first action with respect to this litigation—eighteen days after judgment was entered and more than halfway through the 35-day remedial period afforded by the Court—by holding a meeting of the Legislative Management Committee. At the meeting, the Management Committee reviewed written testimony from the Plaintiff Tribes in support of enacting a remedial map, like the demonstrative maps presented at trial, that placed both the Turtle Mountain and the Spirit Lake Reservations in a single district. N.D. Leg. Mgmt. Committee Meeting (Dec. 5, 2023), <https://perma.cc/6LSR-WZ4P>; <https://perma.cc/GM55-QNP4>. The Management Committee then voted to hire counsel, intervene in the underlying case on behalf of the Assembly, and seek a stay of the district court’s judgment. *Id.* Four days later, more than three weeks after judgment was entered, the Assembly moved to intervene in the district court and to join in the Secretary’s motion for a stay. *See* App.132.

On December 12, 2023, the district court denied the Secretary’s motion to stay and the Assembly’s motion to intervene. App.237. With respect to the latter, the district court found that it was “axiomatic” that the intervention motion was untimely, and that the district court lacked jurisdiction to entertain the motion in light of the Secretary’s appeal. App.241. The district court also found that it lacked jurisdiction

to amend the remedial order as requested by the Plaintiffs, and denied their motion as well. App.241.

The following day—nearly a month after judgment was entered and just nine days before the December 22 deadline after which the Court would be obligated to act—the Redistricting Committee met for the first time during the remedial period. App359. Like the Management Committee, the Redistricting Committee also received written testimony from the Plaintiff Tribes in support of enacting a remedial map that placed both the Turtle Mountain and the Spirit Lake Reservations in a single district. Pls. App.003 (Declaration of M. Carter, ¶¶ 5-7). The Redistricting Committee also reviewed the demonstrative plans submitted by the Plaintiffs in the underlying case, which place the Turtle Mountain Reservation and the Spirit Lake Reservation in a single district. App360. The Committee then heard testimony from an individual purporting to represent members of the Turtle Mountain Band of Chippewa Indians. App360. This individual asserted—in conflict with the position taken by the Turtle Mountain Band during two years of litigation and in written testimony submitted to the Redistricting Committee both in 2021 and in advance of the meeting on December 12—that Turtle Mountain did not want to be placed in a district with the Spirit Lake Tribe. App360.

Two days later, this Court unanimously rejected the Secretary’s subsequent emergency application for a stay pending appeal. *See* Dec. 15 Order, *Turtle Mountain v. Howe*, No. 23-3655.

In the interim, the Assembly noticed its appeal of the district court the denial of intervention and that appeal was docketed in this Court as Case No. 23-3697. After this Court denied the Secretary’s request for a stay in Case No. 23-3655, the Assembly moved to intervene in that proceeding, and filed its request for a 49-day delay of remedial deadlines set by the district court in this proceeding, Case No. 23-3697.

ARGUMENT

I. The district court—not this Court—should resolve this motion.

The district court, not this Court, should resolve the Assembly’s motion and otherwise supervise the remedial process while the Secretary’s and the Assembly’s appeals proceed. The district court retains jurisdiction to do so notwithstanding the pending appeals by the Secretary and the Assembly, and the district court’s familiarity with the facts, circumstances, and parties (current and prospective) makes it better suited to supervise the remedial proceedings.

The Federal Rules of Appellate and Civil Procedure provide that the district court retains jurisdiction to supervise proceedings involving remedial injunctions. A motion for an order “modifying . . . an injunction while an appeal is pending” must

first be filed in the district court. Fed. R. App. P. 8(a)(1)(C).¹ The Federal Rules of Civil Procedure, in turn, authorize the district court, “[w]hile an appeal is pending,” to “suspend, modify, restore, or grant an injunction” on various terms. Fed. R. Civ. P. 62(d). In *Board of Education of St. Louis v. State of Missouri*, this Court held that a district court overseeing a school desegregation case had jurisdiction to enter and modify remedial orders that were “injunctive in nature” notwithstanding a pending appeal of the underlying case. 936 F.2d 993, 995 (8th Cir. 1991). Citing Rule 62(d), this Court reasoned that “[t]he general rule that an appeal deprives a district court of jurisdiction over the issues appealed . . . is not absolute.” *Id.* This Court held that a district court is “not divest[ed] . . . of jurisdiction” by a pending appeal where it “supervises a continuing course of conduct and where as new facts develop additional supervisory action by the court is required.” *Id.* at 996 (quoting *Hoffman v. Beer Drivers & Salesmen’s Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976)); *id.* (noting that district court’s remedial jurisdiction while appeal is pending extends to actions that “modif[y] the order from which the appeal is taken”). This Court has likewise emphasized that “a notice of appeal only divests the lower court of jurisdiction over aspects of the case that are the subject of the appeal.” *United*

¹ The Assembly did not file such a motion in the district court, citing the district court’s order denying a stay in which it indicated it lacked jurisdiction to alter the remedial schedule because of the pending appeal. As explained herein, the district court retains jurisdiction over the remedial proceedings and should adjudicate matters related to those proceedings.

States v. Queen, 433 F.3d 1076, 1077 (8th Cir. 2006); see 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3949.1 at n.37 (5th ed.) (“After a permanent injunction has been entered, if there is no stay pending appeal the district court retains jurisdiction to supervise and enforce the injunction”).

The district court retains jurisdiction to supervise the remedial proceeding in this case because (1) it involves a continuing course of conduct by the Assembly (as evidenced by its motion) and (2) the remedial proceeding is not a subject of the pending appeals related to the liability determination or the denial of the Assembly’s motion for intervention. The remedial process is a collateral issue unrelated to the pending appeals, and the notices of appeal thus did not divest the district court of jurisdiction to supervise the remedial process—including, if appropriate, by granting extensions or imposing a remedial plan in the absence of timely legislative action. This case falls squarely within the exception for remedial proceedings acknowledged by this Court in *Board of Education of St. Louis*.

Indeed, it is standard judicial practice that a district court in redistricting litigation retains jurisdiction to supervise and finalize the remedial process—in the absence of a stay—while an appeal of the liability ruling simultaneously proceeds. See, e.g., *Williams v. City of Texarkana*, 32 F.3d 1265, 1267 (8th Cir. 1994) (affirming district court’s Section 2 liability determination and subsequent remedial order where remedial process occurred after filing of liability appeal); *Personhuballah v.*

Alcorn, 155 F. Supp. 3d 552, 557 (E.D. V.A. 2016) (three-judge court) (rejecting argument that notice of appeal of liability determination divested district court of jurisdiction to impose remedial plan), *application for stay denied*, *Wittman v. Personhuballah*, 577 U.S. 1125 (2016) (Mem.). Sometimes courts of appeals will even hold liability appeals in abeyance pending resolution of the remedial proceeding in the district court. *See, e.g.*, Order, *Holloway v. City of Virginia Beach*, No. 21-1533 (4th Cir. July 12, 2021), Doc. 29 (granting motion to hold liability appeal in abeyance pending resolution of remedial proceedings in the district court).

The district court is better situated to consider the Assembly's motion to modify the remedial schedule and is likewise better situated to impose a remedial plan should the Assembly fail to act by the district court's deadline. The district court is familiar with the facts, mapping, voting patterns, expert evidence, and parties. This Court has not even received merits briefing and the briefing process will not be completed for months. This Court is not best situated to supervise the remedial process.

For these reasons, Plaintiffs respectfully request that the Court issue an order confirming that the district court retains jurisdiction to supervise the remedial process notwithstanding the pending appeals and deny the Assembly's motion without prejudice to it being refiled with the district court.²

² Were there any doubt as to whether the district court retained jurisdiction over the remedial process (there is not), the most appropriate course would be to issue a limited remand.

II. The requested extension should be denied.

If this Court does not direct the Assembly to file its motion for an extension with the district court, it should deny the requested extension. “When a federal court declares an existing apportionment scheme [unlawful], it is . . . appropriate, whenever practicable, to afford a *reasonable opportunity* for the legislature to . . . adopt[] a substitute measure rather than for the federal court to devise and order into effect its own plan.” *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) (emphasis added). The Supreme Court has explained, however, that “[w]hen those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the unwelcome obligation of the federal court” to devise a remedy. *Id.* (internal citations and quotations omitted). The Assembly’s request for an extension should be denied for several reasons.

First, the district court has provided the Assembly with a reasonable time to adopt a remedial plan. The district court permanently enjoined the Secretary’s further implementation of Districts 9, 15, 9A, and 9B on November 17, 2023, and provided the Assembly until December 22, 2023—35 days—to adopt a remedial proposal and submit it to the Court for review. Doc. 125 at 39.³ That period is more than

³ The district court did not *order* the Assembly to adopt a new plan. *See* Mot. at 3. Rather, it provided a reasonable period of time for the Assembly to adopt a plan—if it wished—after which time the district court would impose a remedial plan in the absence of a legislatively adopted plan.

reasonable. Indeed, it *exceeds* the time most courts provide legislative bodies to adopt remedial plans. For example, this Court has affirmed a district court's imposition of a Section 2 remedial plan that provided the government half as much time as this Court has afforded the Legislature here. *See Williams v. City of Texarkana*, 861 F. Supp. 756, 767 (W.D. Ark. 1992) (issuing liability determination on Sept. 29, 1992 and providing until Oct. 15, 1992 to submit remedial plans), *aff'd*, 32 F.3d 1265, 1268 (8th Cir. 1994) (affirming district court's imposition of remedial map). Following the Supreme Court's *Allen v. Milligan* decision this year, the district court provided the Alabama Legislature 31 days—4 fewer than this Court has provided here—to adopt a remedial plan; the Supreme Court has denied a stay of the subsequent remedial order. Order, *Caster v. Allen*, No. 2:21-cv-01536-AMM (N.D. Ala. June 20, 2023), Doc. 156, *stay denied*, *Allen v. Milligan*, ___ S. Ct. ___, 2023 WL 6218394 (U.S. Sept. 26, 2023) (Mem.). Courts across the country routinely provide less time than the district court has afforded the Legislature. *See, e.g., Robinson v. Ardoin*, 37 F.4th 208, 232 (5th Cir. 2022) (affirming order providing 14 days); *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1326 (N.D. Fla. 2016) (providing 16 days); *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) (providing 14 days); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1356 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004) (providing 19 days). The Assembly's contention that it has not been afforded a reasonable opportunity to propose a remedy is unfounded.

Second, the Assembly misunderstands the nature of the district court’s December 22 deadline. It is not a deadline after which the Assembly is prohibited from adopting and filing with the district court a remedial plan, rather it serves as a deadline on the *district court* after which it will no longer stay its hand and instead will undertake to impose a court-ordered plan in the absence of legislative action. The enacted plan is permanently enjoined; the district court is obligated to ensure that a lawful plan is in effect in advance of the existing, relevant statutory election deadlines. If the Assembly were to—after December 22—adopt a map, submit it to the district court for review, and win approval of the map as compliant with Section 2, that map could be implemented for the next appropriate election in light of the timing and circumstances. The current deadline does not prohibit the Assembly from further action—it merely ensures that the *district court* will timely meet *its* obligation without disturbing existing election deadlines.

Third, the Assembly’s shifting positions as to the relevant deadlines counsel against granting its request to delay the imposition of a court-ordered map. The Assembly proposes that the district court delay an additional *49 days* beyond the 35 it has already stayed its hand. Moreover, the Assembly proposes that the remedial briefing schedule extend even further—through March 1, with a final remedial decision to come sometime thereafter. Mot. at 14. The Assembly now says that April 8 is the “hard deadline” by which a map must be finalized and that it could simply

change the relevant deadlines by statute. *Id.* at 7 n.5, 14. But it was just 12 days ago that the Assembly joined in the Secretary’s argument to the district court that a map should be finalized by December 31. *See* N.D. Leg. Assembly’s Joinder in Sec’y’s Mot. for Stay at 6, 15, *Turtle Mountain v. Howe*, No. 3:22-cv-22 (D.N.D. Dec. 8, 2023), Doc. 150. Given that the Assembly has made clear it will not adopt a proposed remedial plan by the current December 22 deadline, there is no reason the district court could not impose a remedy by December 31, thus satisfying the date the Assembly and the Secretary originally agreed was a relevant marker. It is troubling that the Assembly’s representation to the court on this timing issue changes depending upon whether it is opposing or seeking relief.⁴

Fourth, the Assembly suggests that it needs more time to evaluate a different proposal than those offered by plaintiffs—one that “eliminat[es] the subdistrict in District 9 and create[es] a subdistrict in District 15.” Mot. at 12.⁵ There is no reason

⁴ To be clear, Plaintiffs agree with the district court that its original schedule, which only had remedial proceedings extending beyond December 31 if the legislature adopted an objectionable proposal by December 31, was appropriate. The Assembly’s new proposal of an April 8 deadline would seem to *require* a change to state law, given that April 8 is the deadline for candidates to submit nomination papers. Although the Assembly’s *counsel* has hinted at that possibility, *see* Mot. at 7 n.5, there is no guarantee such a change of law would win approval of the Assembly and the Governor. This counsels against the delay the Assembly seeks.

⁵ The Assembly attributes this proposal to Scott Davis—an individual citizen who spoke in opposition to the district court’s decision at the last redistricting committee meeting. Mot. at 12-13. The Assembly incorrectly suggests that Mr. Davis spoke “on behalf of members of the Turtle Mountain Band of Chippewa Indians,” Mot. at 12, and “on behalf of Turtle Mountain,” Mot. at 13. He did not. Mr. Davis is an

to delay the remedial process to consider this proposal because on its face it violates Section 2 and is contrary to the district court’s decision. The district court has ruled that white bloc voting in District 9 will usually defeat the Native American candidate of choice in that district. Indeed, it *did* defeat the incumbent Native American senator in the 2022 election. This alternative proposal would *worsen* the VRA violation by (1) failing to create a Native American opportunity district for the state senate, (2) making it likely that the sole representative of choice—currently elected from sub-district 9A—would lose in the full District 9 as it is currently configured, and (3) creating a subdistrict in District 15 that would be sub-majority Native American voting age population and guaranteed not to provide any electoral opportunity for Native American preferred candidates. That is, this alternative proposal would likely result in *zero* legislators of choice being elected by Native American voters.

Indeed, the Assembly unveiled this proposal today. *See* N.D. Leg. Council, Proposed Map #4, <https://www.ndlegis.gov/sites/default/files/resource/committee-memorandum/25.9191.01000.pdf>. As the Assembly’s data reveal, the new subdistrict would have only 44% Native American voting age population. *See* N.D. Leg.

individual who was speaking on behalf of himself. The Tribes, who are plaintiffs in this case, speak through their elected chairpersons, and the chairpersons of both Turtle Mountain and Spirit Lake submitted written testimony—left unmentioned by the Assembly’s motion—reiterating their support for the two demonstrative plans considered by the district court. *See* Pl.’s Appendix (Declaration of M. Carter and Tribal Chairpersons Written Testimony).

Comparison of Proposed Maps, <https://ndlegis.gov/sites/default/files/committees/68-2023/COMPARISON%20OF%20PROPOSED%20MAPS.pdf>. Senator Judy Estenson—who currently represents District 15, including Spirit Lake—testified in support of this map proposal at today’s Redistricting Committee meeting. She commented that “one less senate seat” for Native American preferred candidates would not “make any difference,” that “I think I can represent *those people*”—*i.e.*, members of the Spirit Lake Tribe—“better than whatever would be their preferred candidate,” and that her proposed map “gives them some semblance that they will have a better chance” in a 44% Native voting age population subdivided house seat. N.D. Leg. Redistricting Comm. Mt’g, Meeting Video at 11:29:42-11:30:08 (Dec. 20, 2023) (Sen. Estenson), <https://video.ndlegis.gov/en/PowerBrowser/PowerBrowserV2/20231220/-1/31927?autoplay=false>.

It should go without saying that (1) failing to draw a non-dilutive senate district because the current senator—whom the district court found not to be the candidate of choice of Native American voters, App.475—thinks she can represent Native Americans better than the candidate Native American voters would choose, (2) eliminating the sole house district from which a Native American preferred candidate could be elected, and (3) drawing a new house district that provides “some semblance” of a “better chance” does not “correct the Section 2 violation.” *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006).

The district court's ruling requires an opportunity for Native American voters in the region to elect *three* legislative positions—one senator and two representatives. This alternative proposal suggested by the Assembly is directly contrary to the district court's decision. It certainly does not warrant delaying the remedial process.

Finally, the Assembly's request for an extension is untimely. The Assembly asserts that it had no option but to seek emergency relief in this Court in light of the district court's determination that it lacked jurisdiction over the remedial process. But that ruling was only made *after* the Assembly passed up multiple opportunities to request an extension from the district court, including before the Secretary noticed his appeal—which did not occur until two weeks after the judgment was entered—and as alternative relief when it joined the Secretary's motion for a stay. It was only *after* the stay was denied by both the district court and this Court that the Assembly belatedly sought an extension of the deadline. That it did so first in this Court rather in the district court is not due to the district court's determination that it lacked jurisdiction over the remedial process, but rather to the fact that the Assembly never bothered to ask the district court for an extension before that determination was made. Any purported emergency that exists is of the Assembly's own making, arising solely out of its own dilatoriness and its consternation that the district court's ruling has not been stayed. The Assembly's failure to move expeditiously to assert

its interests in this matter does not justify any delay in these proceedings, particularly in light of this Court's ruling that a stay is not warranted.

CONCLUSION

For the foregoing reasons, the Court should enter an order clarifying that the district court retains jurisdiction to supervise the remedial process and that the Assembly's motion should be directed to the district court, not this Court. Alternatively, the Court should deny the motion.

December 20, 2023

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CERTIFICATE OF COMPLIANCE

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) as it uses the proportionally spaced typeface of Times New Roman in 14-point font.

This response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) as it contains 4,225 words, excluding parts of the brief exempted by Fed. R. App. P. 27(d)(2).

The electronic version of the foregoing Brief submitted to the Court pursuant to Eighth Circuit Local Rule 28(A)(d) was scanned for viruses and that the scan showed the electronic version of the foregoing is virus free.

Dated this 20th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically submitted the foregoing **APPELLEES' RESPONSE IN OPPOSITION TO LEGISLATIVE ASSEMBLY'S EMERGENCY MOTION FOR EXTENSION OF DEADLINE** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

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TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| Declaration of Michael Carter | App.001-006 |
| Exhibit 1 to Declaration of Michael Carter | App.007-021 |
| Exhibit 2 to Declaration of Michael Carter | App.022-036 |
| Exhibit 3 to Declaration of Michael Carter | App.037-054 |

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Bryan Sells
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THE LAW OFFICE OF BRYAN L.
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PO Box 5493
Atlanta, GA 31107-0493
Telephone: (404) 480-4212
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically submitted the foregoing **APPELLEES' APPENDIX IN OPPOSITION TO LEGISLATIVE ASSEMBLY'S EMERGENCY MOTION FOR EXTENSION OF DEADLINE** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Respondents

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS,
et al.

Plaintiffs-Appellees,

v.

North Dakota Legislative Assembly,

Requested-Intervenor-Appellant.

On Appeal from Decision of the United States District Court
for the District of North Dakota, Case No. 3:22-cv-00022

**DECLARATION OF MICHAEL S. CARTER IN SUPPORT OF APPELLEES'
RESPONSE IN OPPOSITION TO LEGISLATIVE ASSEMBLY'S EMERGENCY
MOTION FOR EXTENSION OF DEADLINE**

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** Counsel for Respondents Turtle Mountain Band of
Chippewa Indians and Spirit Lake Nation*

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(404) 480-4212

Counsel for Respondent

DECLARATION OF MICHAEL S. CARTER

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. My name is Michael S. Carter. I am an attorney for the Appellees in the above-captioned case. This declaration is submitted in conjunction with Appellee's Response in Opposition to Legislative Assembly's Emergency Motion for Extension of Deadline.
2. On December 4, 2023, I e-mailed the members of the Legislative Assembly's Legislative Management Committee to provide the Committee with the written testimony of the Spirit Lake Nation Chairwoman Lonna Street and the Turtle Mountain Band of Chippewa Indians Chairman Jaime Azure (collectively "Tribes"). The testimony was submitted for the Legislative Management Committee's December 5, 2023 meeting.
3. Exhibit 1 to this declaration is a true and correct copy of an email sent to Chairman Lafor and Members of the Legislative Management Committee (December 4, 2023). Attached to the email is a copy of the December 5, 2023 Testimony of the Tribes submitted before the North Dakota Legislative Assembly Management Committee.
4. In the December 5, 2023 testimony (Exhibit 1), the Tribes requested that the Legislative Assembly adopt one of the two demonstrative redistricting plans

submitted by the Tribes during litigation, in which both Tribes' reservations are drawn into the same legislative district without subdistricts.

5. On December 12, 2023, I e-mailed the members of the Legislative Assembly's Redistricting Committee to provide the Committee with the written testimony of the Tribes. The testimony was submitted for the Redistricting Committee's December 13, 2023 meeting. This testimony is identical to the testimony previously submitted to the Legislative Management Committee for its December 5, 2023 meeting.
6. Exhibit 2 to this declaration is a true and correct copy the December 12, 2023 email to Chairman Sorvaag and Members of the Redistricting Committee. Attached to the email is a copy of the re-submitted December 5, 2023 Testimony of the Tribes submitted before the North Dakota Legislative Assembly Management Committee.
7. In this testimony (Exhibit 2), the Tribes requested that the Legislative Assembly adopt one of the two demonstrative redistricting plans submitted by the Tribes during litigation, in which both Tribes' reservations are drawn into the same legislative district without subdistricts.
8. On December 19, 2023, I e-mailed the members of the Legislative Assembly's Redistricting Committee to provide the Committee with the written testimony

of the Tribes. The testimony was submitted for the Redistricting Committee's December 20, 2023 meeting.

9. Exhibit 3 to this declaration is a true and correct copy the December 19, 2023 email to Chairman Sorvaag and Members of the Redistricting Management Committee. Attached to the email is a copy of the December 20, 2023 Testimony of the Tribes.
10. In this testimony (Exhibit 3), the Tribes requested that the Legislative Assembly adopt one of the two demonstrative redistricting plans submitted by the Tribes during litigation, in which both Tribes' reservations are drawn into the same legislative district without subdistricts. The Tribes also stated that the written testimony submitted by Chairman Azure and Chairwoman Street "represents the full and complete official position of the Tribes," and that "no other person has been authorized to provide testimony on behalf of our Tribes to the Redistricting Committee." This testimony also explicitly rejected the idea of the approval of any district that does not include both the Tribes' reservations within the same legislative district, as placing the reservations in separate districts would violate the Voting Rights Act.

/s/ Michael S. Carter
Michael S. Carter
OK Bar No. 31961
NATIVE AMERICAN RIGHTS
FUND
250 Arapahoe Ave.
Boulder, CO 80302
Telephone: (303) 447-8760
Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2023, I electronically submitted the foregoing **DECLARATION OF MICHAEL S. CARTER IN SUPPORT OF APPELLEES' RESPONSE IN OPPOSITION TO LEGISLATIVE ASSEMBLY'S EMERGENCY MOTION FOR EXTENSION OF DEADLINE** to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by using the CM/ECF system and that ECF will send a Notice of Electronic Filing (NEF) to all participants who are registered CM/ECF users.

/s/ Mark P. Gaber
Mark P. Gaber
Counsel for Respondents

Subject: FW: LMC Testimony
Attachments: 2023.12.05 Joint Testimony of Chairman Azure and Chairwoman Street.pdf

From: Michael Carter
Sent: Monday, December 4, 2023 9:40 PM
To: 'gdbosch@ndlegis.gov' <gdbosch@ndlegis.gov>; 'jboschee@ndlegis.gov' <jboschee@ndlegis.gov>; 'bbekkedahl@ndlegis.gov' <bbekkedahl@ndlegis.gov>; 'kdavison@ndlegis.gov' <kdavison@ndlegis.gov>; 'khogan@ndlegis.gov' <khogan@ndlegis.gov>; 'dhogue@ndlegis.gov' <dhogue@ndlegis.gov>; 'zmista@ndlegis.gov' <zmista@ndlegis.gov>; 'djohnson@ndlegis.gov' <djohnson@ndlegis.gov>; 'djohnson@ndlegis.gov' <djohnson@ndlegis.gov>; 'bkoppelman@ndlegis.gov' <bkoppelman@ndlegis.gov>; 'jklein@ndlegis.gov' <jklein@ndlegis.gov>; 'mlefor@ndlegis.gov' <mlefor@ndlegis.gov>; 'tmathern@ndlegis.gov' <tmathern@ndlegis.gov>; 'jmyrdal@ndlegis.gov' <jmyrdal@ndlegis.gov>; 'eobrien@ndlegis.gov' <eobrien@ndlegis.gov>; 'dgschaible@ndlegis.gov' <dgschaible@ndlegis.gov>; 'paulthomas@ndlegis.gov' <paulthomas@ndlegis.gov>; 'rweisz@ndlegis.gov' <rweisz@ndlegis.gov>
Cc: 'jbjornson@ndlegis.gov' <jbjornson@ndlegis.gov>
Subject: LMC Testimony

Chairman Lefor and Members of the Legislative Management Committee:

Please find the attached written testimony for tomorrow's Legislative Management Committee meeting from Spirit Lake Nation Chairwoman Lonna Street and Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure. Thank you.

Michael Carter
Senior Staff Attorney
Native American Rights Fund
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**Testimony of Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure
and Spirit Lake Nation Chairwoman Lonna Street
Before the North Dakota Legislative Assembly Legislative Management
Committee
December 5, 2023**

Chairman Lefor and members of the Legislative Management Committee, we are Jamie Azure, Chairman of the Turtle Mountain Band of Chippewa Indians, and Lonna Street, Chairwoman of the Spirit Lake Nation. We submit this testimony jointly on behalf of our respective Tribes. As you know, the United States District Court for the District of North Dakota recently found that the Legislative Assembly’s 2021 redistricting plan violates the federal Voting Rights Act (“VRA”) by unlawfully diluting the voting strength of Native American voters who live on and around the Turtle Mountain and Spirit Lake reservations. We submit testimony once again to respectfully request that the Legislature follow the law and fix its map to provide fair representation to the Native American voters living in Legislative Districts 9 and 15.

After conducting a trial, the District Court on November 17, 2023 found that the Legislature’s “2021 redistricting plan, as to districts 9 and 15 and subdistricts 9A and 9B, prevents Native American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the VRA.” Judgment, 3:22-CV-00022-PDW-APS, ECF No. 126 at 2. The court permanently enjoined the Secretary of State from permitting any elections to take place in Districts 9 and 15

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

until a legal map is in place. The Secretary of State and the Legislative Assembly have been given until December 22, 2023 to adopt a new map.

We were saddened to see that rather than seeking to correct the unlawful vote dilution being suffered by the Native American voters in districts 9 and 15, the Secretary of State announced he will be appealing the District Court's decision. Though seeming to lack a substantive argument that unlawful vote dilution is not occurring, it appears that the appeal will seek to have the case dismissed based on a procedural argument that the tribal member voters, and the Tribes on their behalf, do not have the authority to challenge violations of their own voting rights.

We hope the Secretary of State and the Legislative Assembly have considered that a prior unsuccessful motion to dismiss filed in the case already resolved the plaintiffs' right to sue on grounds that are unaffected by the Eighth Circuit's recent decision, which the Secretary has cited as the basis for his forthcoming appeal; but we hope more that the Legislature will decide to do the right thing for the Native American voters and who have only ever asked for one thing – that the Legislature simply follow the law.

On November 1, 2021, the Legislative Management Redistricting Committee (“Redistricting Committee”) was notified by a letter from the Tribes that the Redistricting Committee's proposed redistricting plan, if enacted, would violate the VRA. A true and correct copy of the letter is attached to this testimony as

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

Attachment 1. The letter included a detailed VRA election analysis and a proposed alternative map that would satisfy the VRA. The VRA analysis submitted by four North Dakota Tribes (Spirit Lake Nation, Turtle Mountain Band of Chippewa Indians, MHA Nation and Standing Rock Sioux Tribe) and tribal members throughout the redistricting process is the only known VRA analysis to have been reviewed by the Redistricting Committee. There is no evidence in the legislative record that the Legislature or the Redistricting Committee engaged a VRA expert to conduct its own analysis, which could have corroborated the Tribes' analysis and perhaps prevented this violation from occurring in the first place.

In fact, in the recent *Walen v. Burgum* case, in which the Mandan, Hidatsa and Arikara ("MHA") Nation intervened to defend Subdistrict 4A, the District Court relied on the abundant analysis and testimony supplied by the tribes in the legislative record in upholding the Subdistrict 4A as reasonably necessary to comply with the VRA.

Besides providing the Redistricting Committee with the VRA analysis and a proposed remedy map, the letter from the Tribes also put the Redistricting Committee on notice that its map "is illegally drawn and we believe will be struck down in court if it is adopted by the State Legislature." The Redistricting Committee and a majority of the Legislature failed to heed this warning. A proposed amendment

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

to the Redistricting Committee's plan, which would have prevented this foreseeable violation, was voted down by the Redistricting Committee and then by the Senate.

In review of the map proposed by the Tribes to the Legislature, as well as another similar map proposed by the Tribes during the litigation, the District Court found:

The evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest . . . Indeed, the evidence at trial demonstrated that the proposed districts did not appear more oddly shaped than other districts, and both proposed districts are reasonably compact. The proposed plans are also comparatively compact when viewed against other districts in the 2021 redistricting plan. (citations omitted).

Findings of Fact and Conclusions of Law, 3:22-CV-00022-PDW-APS, ECF No. 125 at 18-19. A true and correct copy of the map proposed by the Tribes in the District Court is attached to this testimony combined as Attachment 2.

It was not too late to do the right thing when the Tribes brought their VRA analysis to the Redistricting Committee in 2021, and it is not too late now to ensure that the 2024 elections will respect the voting rights of Native Americans. As in 2021, we once again ask that the Legislature adopt a redistricting plan that complies with the VRA and protects the right to vote of all voters.

Thank you for your consideration of this request.

ATTACHMENT 1



November 1, 2021

The Honorable Doug Burgum
Governor of the State of North Dakota
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joshua Boschee
Minority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Kim Koppelman
Speaker
North Dakota House of Representatives
600 East Boulevard Ave.
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The Honorable Rich Wardner
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The Honorable Chet Pollert
Majority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joan Heckaman
Minority Leader
North Dakota State Senate
600 East Boulevard Ave.
Bismarck, ND 58505

Dear Governor Burgum, Speaker Koppelman, and Leaders Pollert, Boschee, Wardner and Heckaman:

On behalf of the Turtle Mountain Band of Chippewa Indians (“Turtle Mountain”) and the Spirit Lake Nation (“Spirit Lake”), we write to express concerns with the proposed legislative map to be considered for approval by the State Legislature on November 8, and to respectfully request that our Tribal Nations be incorporated into the same legislative district.

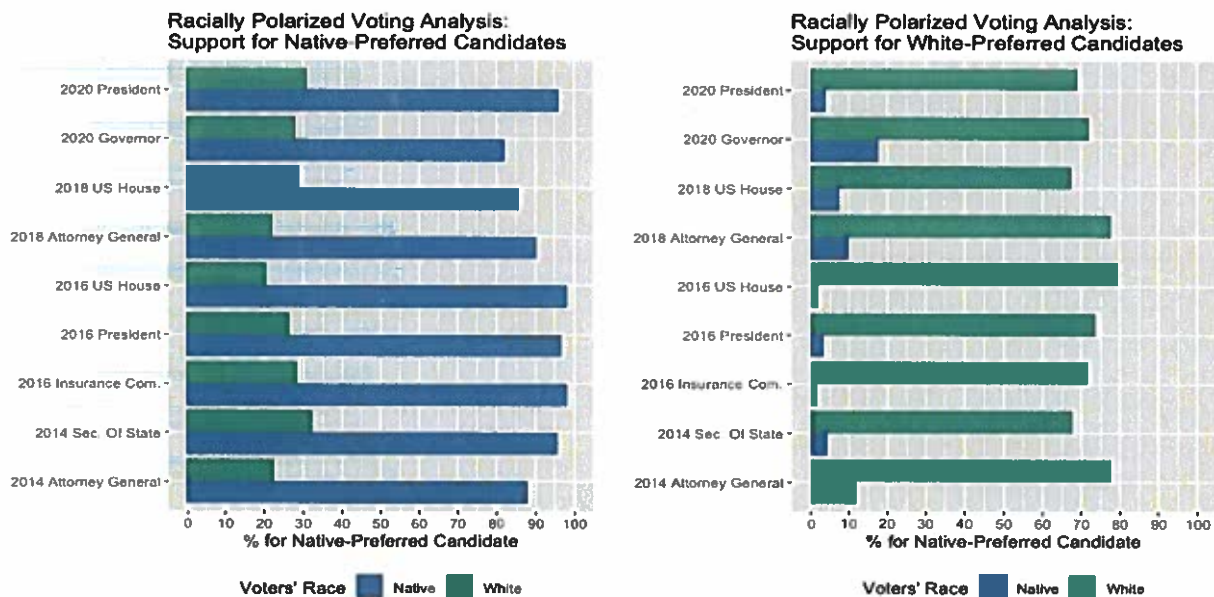
Throughout the redistricting process, the Tribes of North Dakota made numerous requests to the Legislature’s Redistricting Committee to hold redistricting hearings on and near reservations to allow tribal members an opportunity to be heard on how their state legislative representation will be guided for the next ten years. Those requests fell on deaf ears. Many of our tribal members lack the means to travel to Bismarck and were therefore shut out of the redistricting process. Also concerning was the Redistricting Committee’s position that the Tribal and State Relations Committee could report back to it if any redistricting comments happened to be brought up during the Tribal and State Relations Committee meetings. That approach was wholly inadequate. Despite repeated requests, the only outreach from the

Redistricting Committee was the e-mailing of a hearing notice to the Tribes with one day’s notice. Of course, given the short notice, not all of the Tribes were able to make it to Bismarck to attend the hearing. Indeed, we as tribal leaders are governing in the middle of a pandemic with limited resources, and so one day’s notice is far from sufficient.

At that redistricting hearing, representatives from the Spirit Lake Nation, Standing Rock Sioux Tribe, and Three Affiliated Tribes advocated for the creation of legislative subdistricts to improve their representation. Of these requests, only a subdistrict for the Three Affiliated Tribes reservation area was approved by the Redistricting Committee. The Committee, however, also decided to create subdistricts in the Turtle Mountain reservation area, even though no subdistricts were ever requested by Turtle Mountain to the Redistricting Committee.

As a result of the poor outreach to our Tribal Nations, despite our repeated requests, the Redistricting Committee’s proposed District 9, containing the Turtle Mountain reservation, is illegally drawn and we believe will be struck down in court if it is adopted by the State Legislature. To remedy this situation, and to also allow the members of Turtle Mountain and Spirit Lake to be able to elect the representatives of their choice in accordance with federal law, we have developed a proposed district containing the Turtle Mountain and Spirit Lake reservations. (**Attached as Figure 1**).

Given that our Tribal communities together would be sufficiently large and geographically compact to form a majority-minority district, and given the racially polarized voting that exists when comparing our communities to the surrounding areas, our proposed district satisfies the Voting Rights Act, and would negate the need for a subdistrict. To illustrate, the below charts show the differences between Native American and non-Native American voting patterns in 2016 and 2020 state-wide elections for the precincts within the district we have proposed. Our Tribal communities have voted cohesively in favor of clearly identified Native American preferred candidates. On the other hand, the non-Native American voters have, without exception, overwhelmingly voted against the Native American candidate of choice.

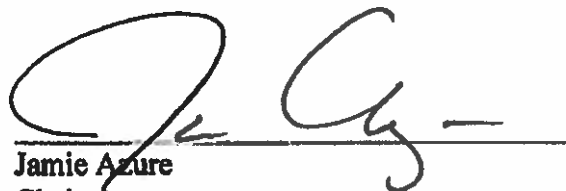


The disparity is even more severe when Native American candidates have run for office. In the 2016 election for the United States House of Representatives, a Native American candidate, Chase Iron Eyes, was preferred by an estimated 98 percent of Native American voters, but received only 21 percent of the vote from white voters. The vast majority of white voters rallied behind the eventual winner of the race, Kevin Cramer, who received only an estimated 2 percent of the Native American vote. A similar pattern is visible in the 2016 race for Insurance Commissioner, where an estimated 98 percent of Native American voters cast a ballot in favor of the Native American candidate, Ruth Buffalo, while being favored by only 28 percent of white voters.

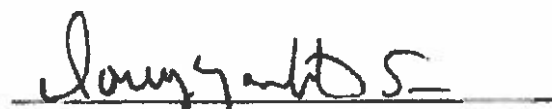
Not only will adopting the district proposed by our Tribes allow the State of North Dakota to forgo costly litigation (which would likely result in the Redistricting Committee's map being overturned anyway), the proposed district can also be incorporated into the overall state-wide redistricting map very easily, with minimal impacts to the districts proposed by the Redistricting Committee for the rest of the state. We have taken the additional step of drawing a full state-wide map that incorporates our proposed district. **(Attached as Figure 2)**. To illustrate this minimal impact, we have additionally provided a map that shows the lines of a proposed state-wide map that incorporates our proposed district, overlaid with the lines of the Redistricting Committee's proposed map. **(Attached as Figure 3)**. As you can see, incorporation of our proposed district only creates small changes to the other districts proposed by the Redistricting Committee, and only in the northeast corner of the state.

We respectfully bring this request forward, not only as the leaders of sovereign Tribal Nations, but as fellow citizens of the State of North Dakota. All citizens deserve to have their voices heard and to be treated fairly and equally under the law. Our proposed district accomplishes this, which benefits our Tribes as well as the State of North Dakota and all of its citizens. We appreciate your thorough attention to this matter.

Sincerely,

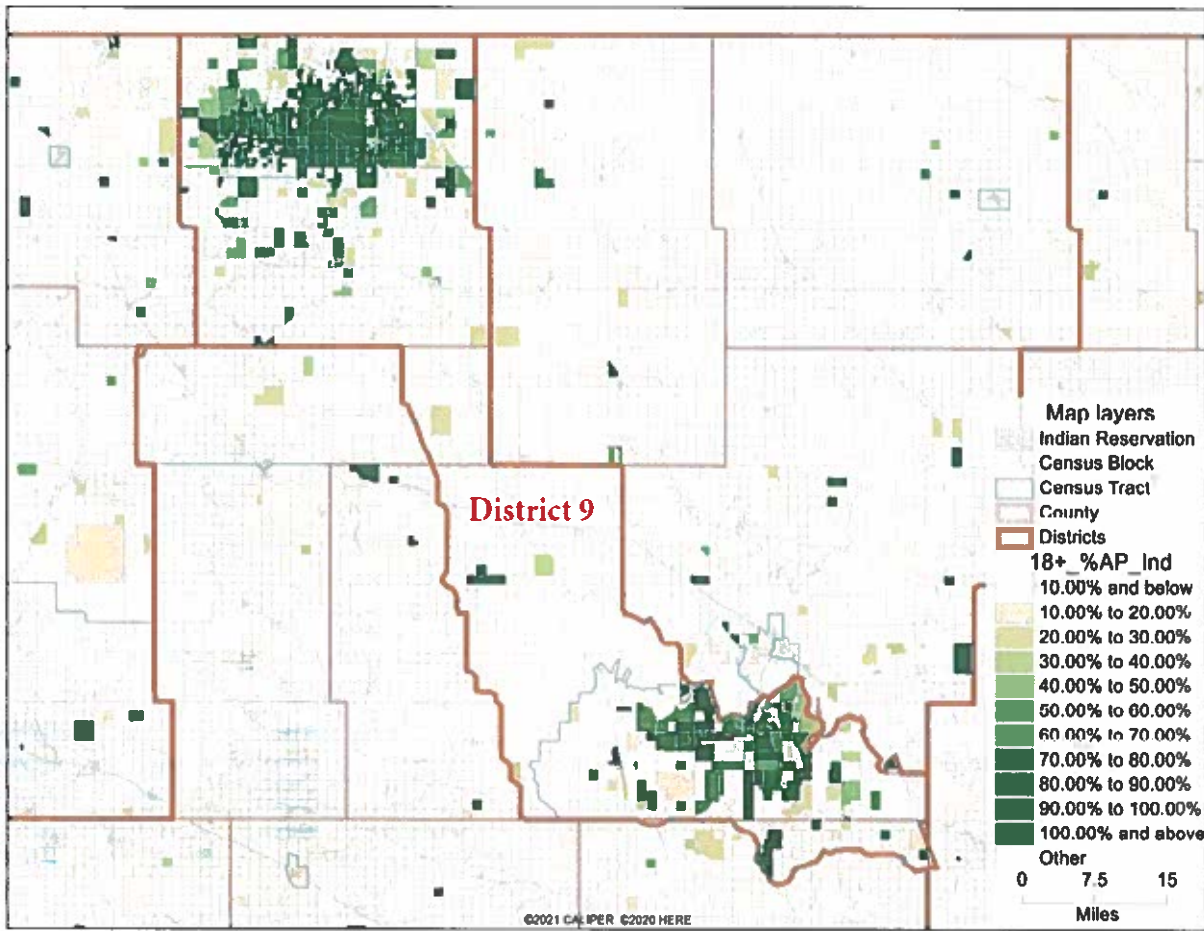


Jamie Azure
Chairman
Turtle Mountain Band of Chippewa Indians



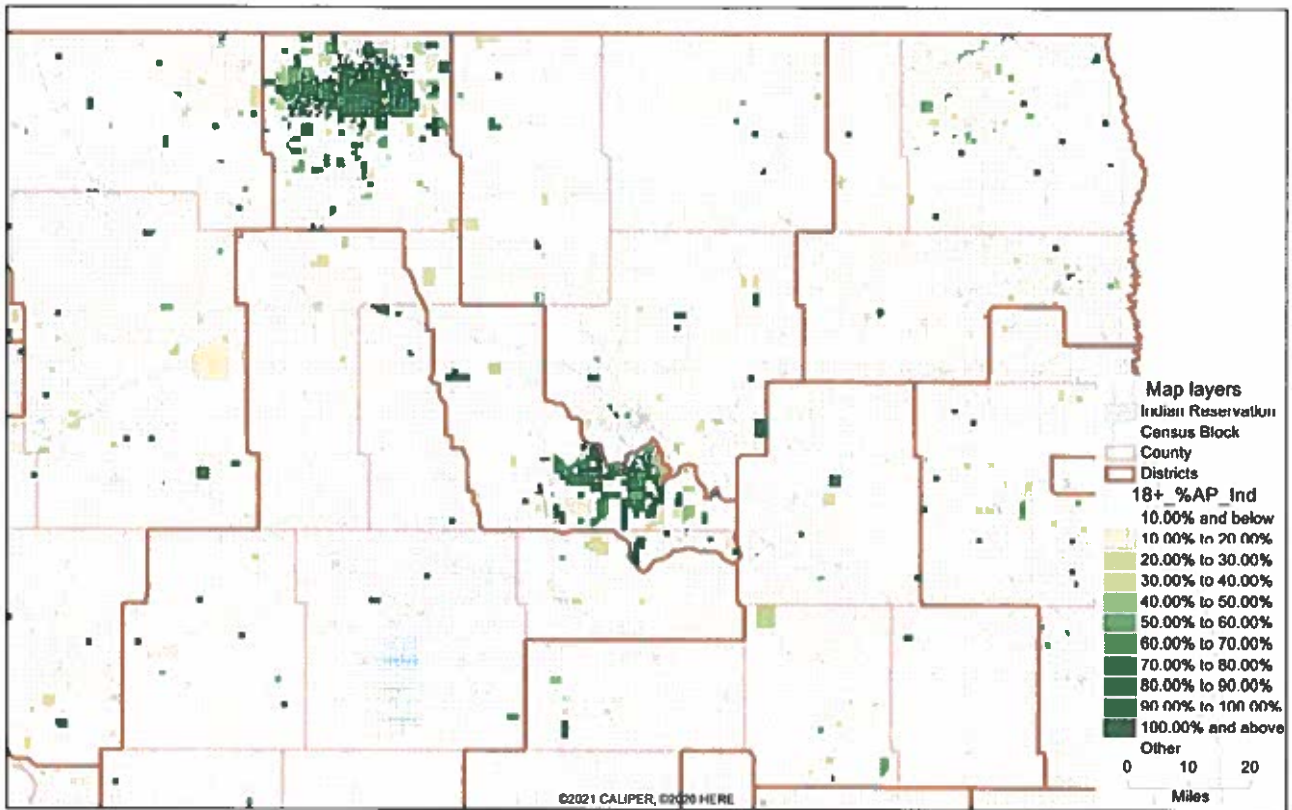
Douglas Yankton, Sr.
Chairman
Spirit Lake Nation

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



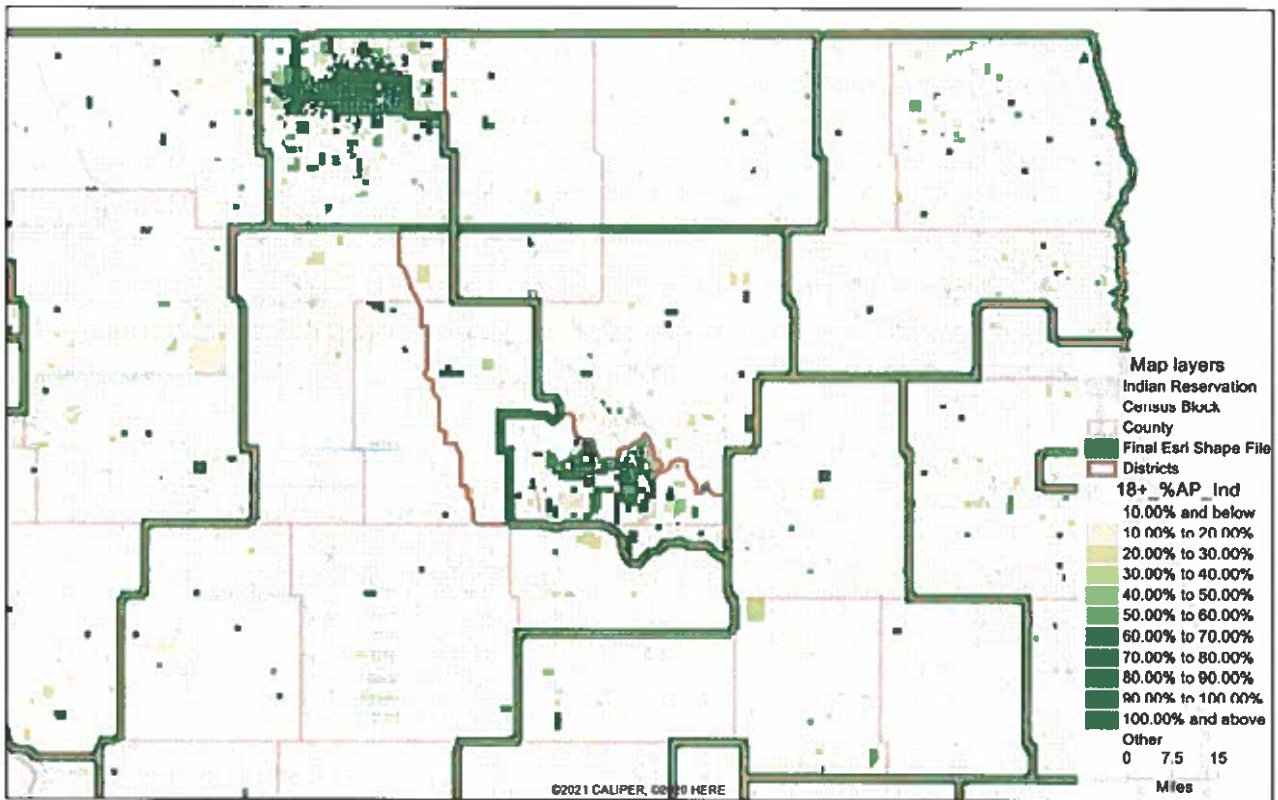
| District | Population | Deviation | %Deviation | 18+ Native American Population | % 18+Native American Population |
|----------|------------|-----------|------------|--------------------------------|---------------------------------|
| 9 | 17,341 | 765 | 4.62% | 7,887 | 69.06% |

Figure 2 – Proposed District as Incorporated Into State-Wide District Map



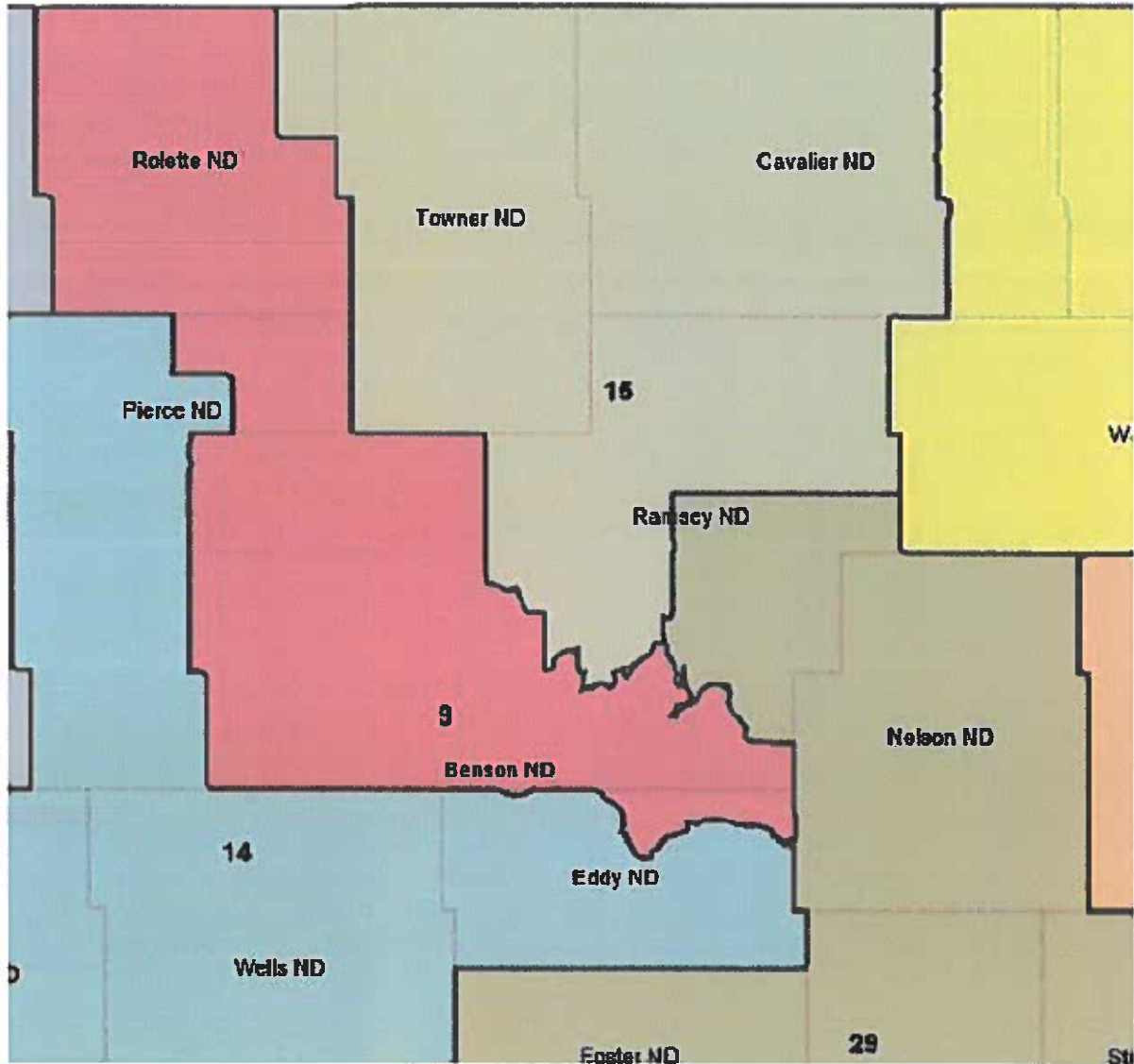
Appellate Case: 23-3697 Page: 21 Date Filed: 12/20/2023 Entry ID: 5346611

Figure 3 – Our Proposed District as Incorporated into State-Wide Map (Dark Brown Lines), Overlaid with and the Redistricting Committee’s Map (Green Lines)



ATTACHMENT 2

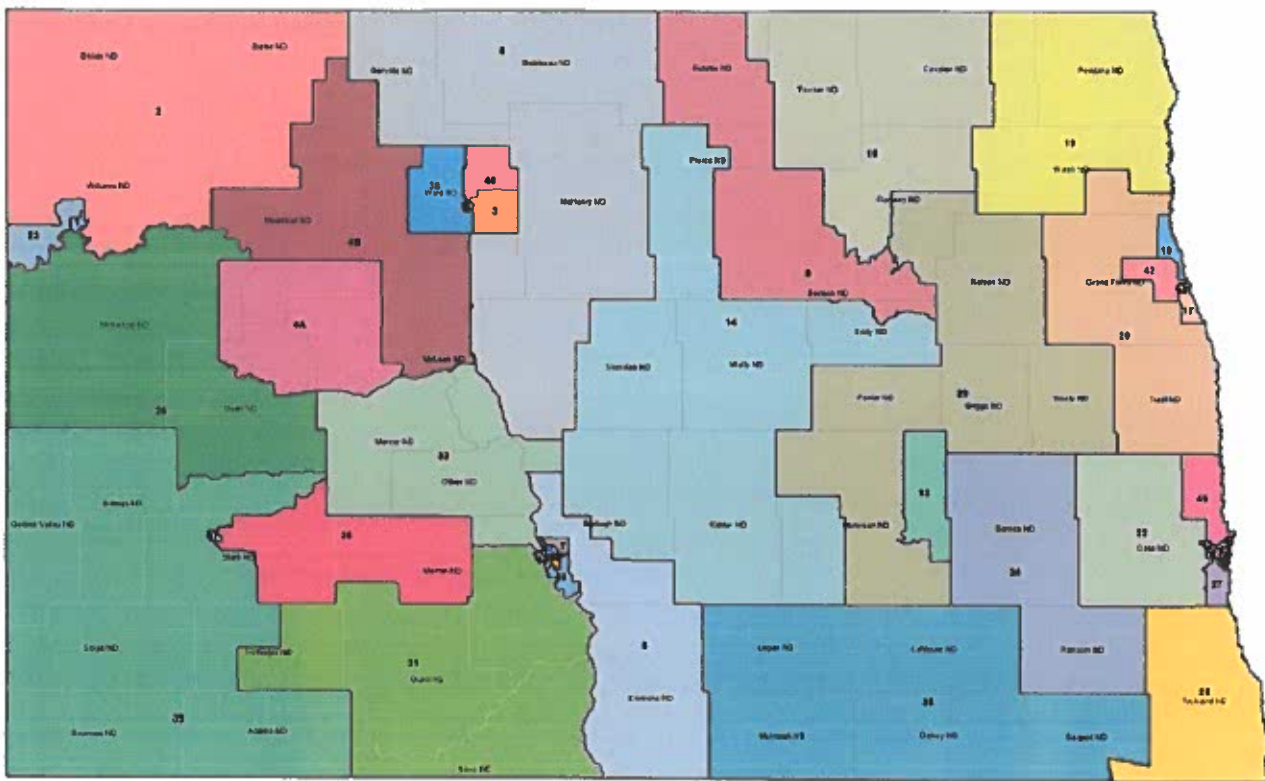
ALTERNATIVE MAP PROPOSED
BY THE TRIBES IN DISTRICT COURT
District 9 Regional Map



Appellate Case: 23-3697 Page: 24 Date Filed: 12/20/2023 Entry ID: 5346611

ALTERNATIVE MAP PROPOSED BY THE TRIBES IN DISTRICT COURT

Statewide Map



Attachment 2

Appellate Case: 23-3697 Page: 25 Date Filed: 12/20/2023 Entry ID: 5346611

Subject: FW: Redistricting Committee Testimony
Attachments: 2023.12.05 Joint Testimony of Chairman Azure and Chairwoman Street.pdf

From: Michael Carter
Sent: Tuesday, December 12, 2023 6:07 PM
To: rsorvaag@ndlegis.gov; mlefor@ndlegis.gov; jboschee@ndlegis.gov; cheadland@ndlegis.gov; mrnathe@ndlegis.gov; aschauer@ndlegis.gov; bbekkedahl@ndlegis.gov; ddever@ndlegis.gov; rerbele@ndlegis.gov; khogan@ndlegis.gov
Subject: Redistricting Committee Testimony

Chairman Sorvaag and Members of the Redistricting Committee:

Please find the attached written testimony for tomorrow's Redistricting Committee meeting from Spirit Lake Nation Chairwoman Lonna Street and Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure. This testimony was originally submitted to the Legislative Management Committee for that committee's December 5, 2023 meeting. Thank you.

Michael Carter
Senior Staff Attorney
Native American Rights Fund
250 Arapahoe Ave.
Boulder, CO 80302
carter@narf.org
P:303-447-8760
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**Testimony of Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure
and Spirit Lake Nation Chairwoman Lonna Street
Before the North Dakota Legislative Assembly Legislative Management
Committee
December 5, 2023**

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December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

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Thank you for your consideration of this request.

ATTACHMENT 1



November 1, 2021

The Honorable Doug Burgum
Governor of the State of North Dakota
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joshua Boschee
Minority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Kim Koppelman
Speaker
North Dakota House of Representatives
600 East Boulevard Ave.
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The Honorable Rich Wardner
Majority Leader
North Dakota State Senate
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The Honorable Chet Pollert
Majority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joan Heckaman
Minority Leader
North Dakota State Senate
600 East Boulevard Ave.
Bismarck, ND 58505

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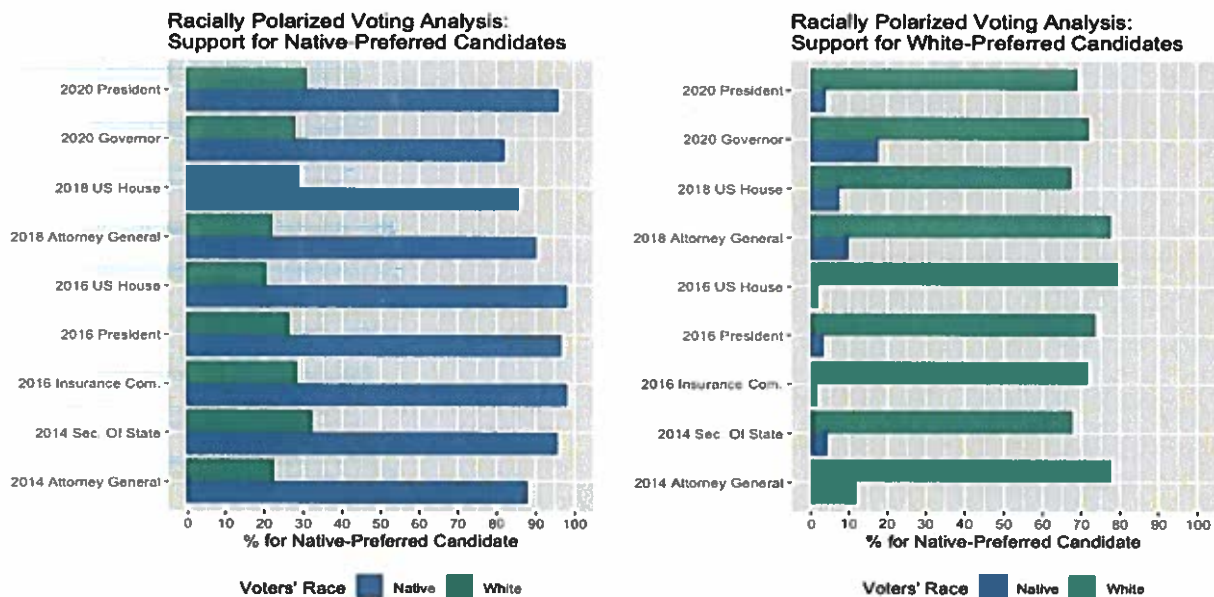
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Redistricting Committee was the e-mailing of a hearing notice to the Tribes with one day’s notice. Of course, given the short notice, not all of the Tribes were able to make it to Bismarck to attend the hearing. Indeed, we as tribal leaders are governing in the middle of a pandemic with limited resources, and so one day’s notice is far from sufficient.

At that redistricting hearing, representatives from the Spirit Lake Nation, Standing Rock Sioux Tribe, and Three Affiliated Tribes advocated for the creation of legislative subdistricts to improve their representation. Of these requests, only a subdistrict for the Three Affiliated Tribes reservation area was approved by the Redistricting Committee. The Committee, however, also decided to create subdistricts in the Turtle Mountain reservation area, even though no subdistricts were ever requested by Turtle Mountain to the Redistricting Committee.

As a result of the poor outreach to our Tribal Nations, despite our repeated requests, the Redistricting Committee’s proposed District 9, containing the Turtle Mountain reservation, is illegally drawn and we believe will be struck down in court if it is adopted by the State Legislature. To remedy this situation, and to also allow the members of Turtle Mountain and Spirit Lake to be able to elect the representatives of their choice in accordance with federal law, we have developed a proposed district containing the Turtle Mountain and Spirit Lake reservations. (**Attached as Figure 1**).

Given that our Tribal communities together would be sufficiently large and geographically compact to form a majority-minority district, and given the racially polarized voting that exists when comparing our communities to the surrounding areas, our proposed district satisfies the Voting Rights Act, and would negate the need for a subdistrict. To illustrate, the below charts show the differences between Native American and non-Native American voting patterns in 2016 and 2020 state-wide elections for the precincts within the district we have proposed. Our Tribal communities have voted cohesively in favor of clearly identified Native American preferred candidates. On the other hand, the non-Native American voters have, without exception, overwhelmingly voted against the Native American candidate of choice.

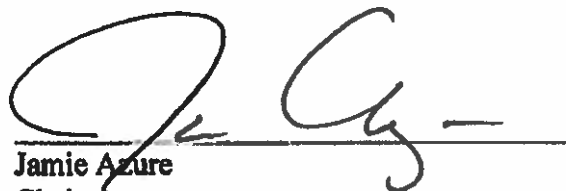


The disparity is even more severe when Native American candidates have run for office. In the 2016 election for the United States House of Representatives, a Native American candidate, Chase Iron Eyes, was preferred by an estimated 98 percent of Native American voters, but received only 21 percent of the vote from white voters. The vast majority of white voters rallied behind the eventual winner of the race, Kevin Cramer, who received only an estimated 2 percent of the Native American vote. A similar pattern is visible in the 2016 race for Insurance Commissioner, where an estimated 98 percent of Native American voters cast a ballot in favor of the Native American candidate, Ruth Buffalo, while being favored by only 28 percent of white voters.

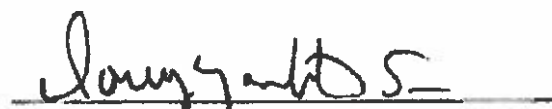
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We respectfully bring this request forward, not only as the leaders of sovereign Tribal Nations, but as fellow citizens of the State of North Dakota. All citizens deserve to have their voices heard and to be treated fairly and equally under the law. Our proposed district accomplishes this, which benefits our Tribes as well as the State of North Dakota and all of its citizens. We appreciate your thorough attention to this matter.

Sincerely,

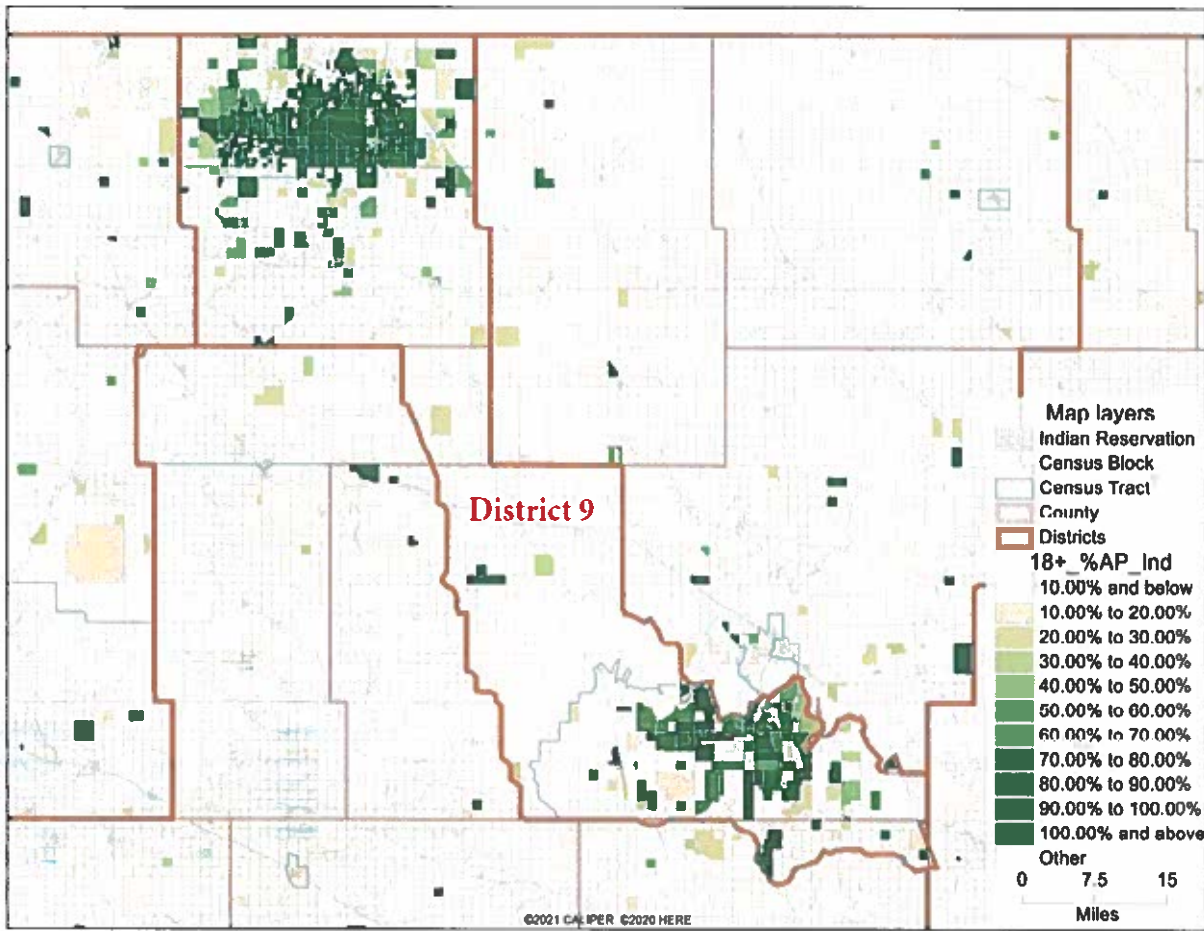


Jamie Azure
Chairman
Turtle Mountain Band of Chippewa Indians



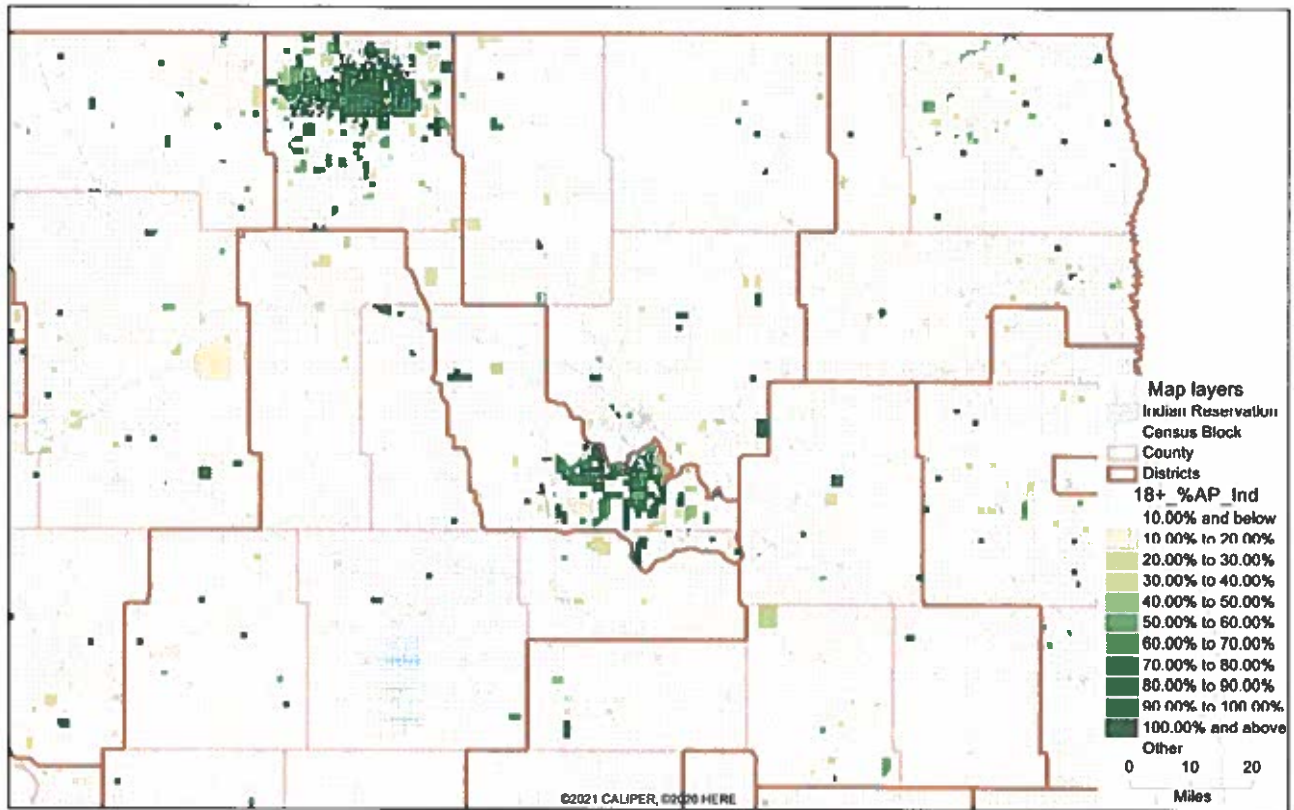
Douglas Yankton, Sr.
Chairman
Spirit Lake Nation

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



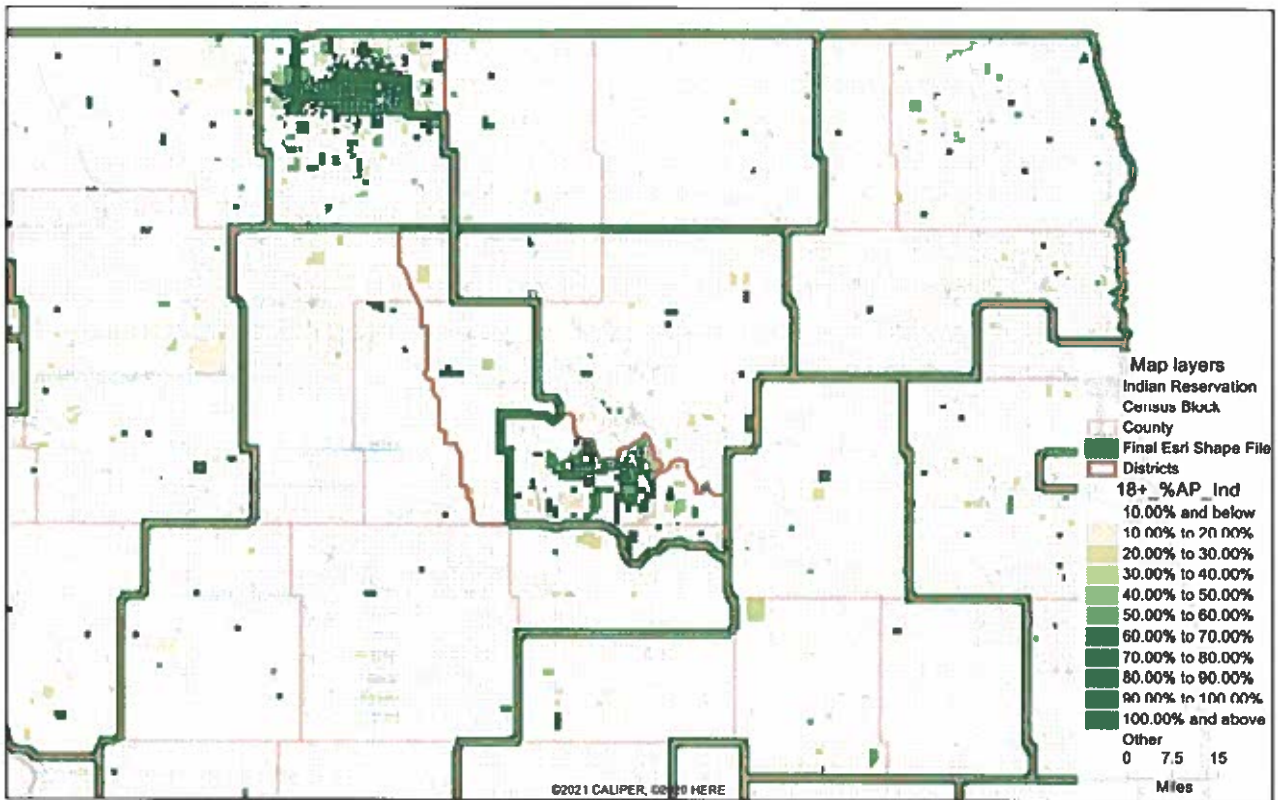
| District | Population | Deviation | %Deviation | 18+ Native American Population | % 18+Native American Population |
|----------|------------|-----------|------------|--------------------------------|---------------------------------|
| 9 | 17,341 | 765 | 4.62% | 7,887 | 69.06% |

Figure 2 – Proposed District as Incorporated Into State-Wide District Map



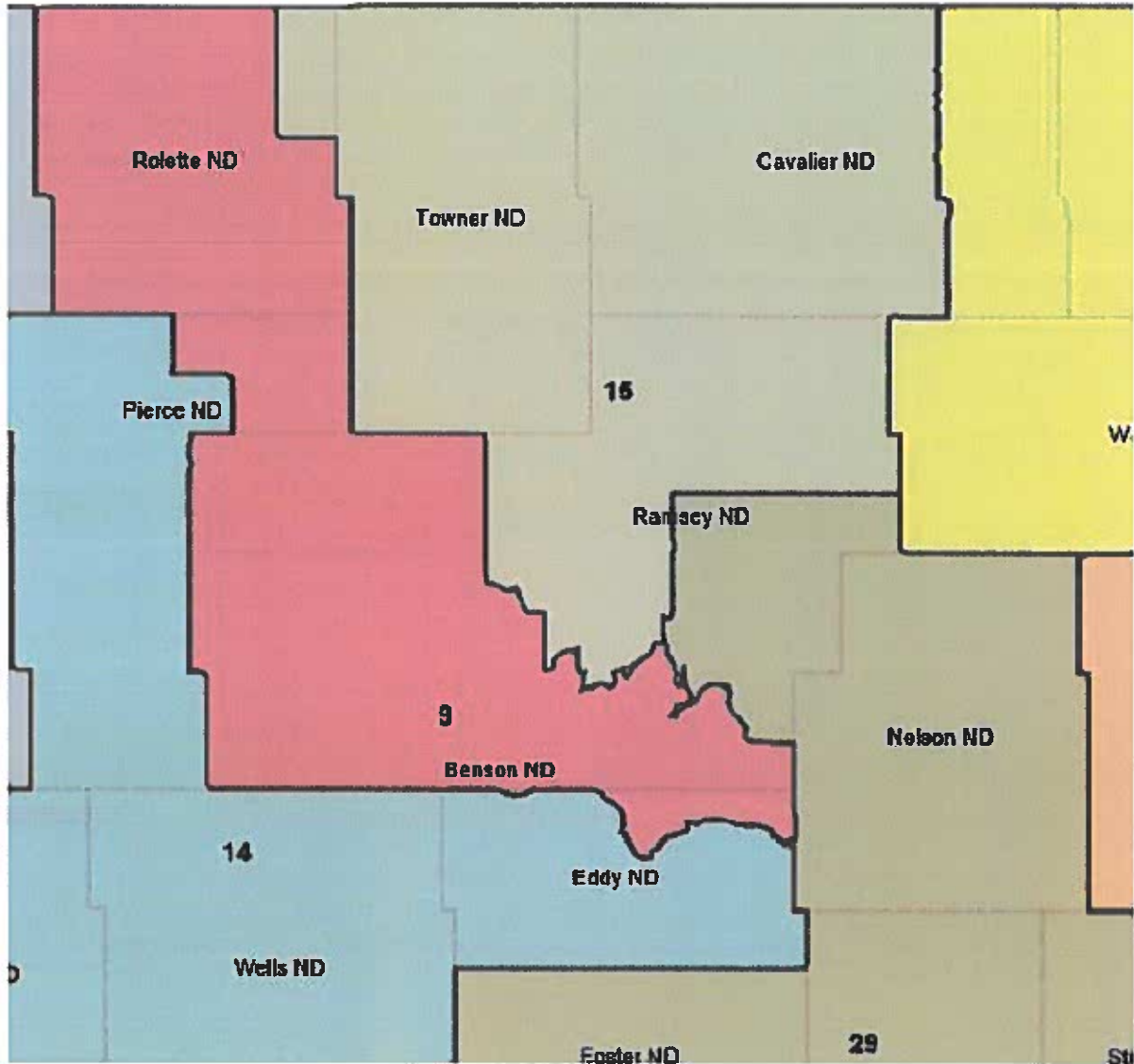
Appellate Case: 23-3697 Page: 36 Date Filed: 12/20/2023 Entry ID: 5346611

Figure 3 – Our Proposed District as Incorporated into State-Wide Map (Dark Brown Lines), Overlaid with and the Redistricting Committee’s Map (Green Lines)



ATTACHMENT 2

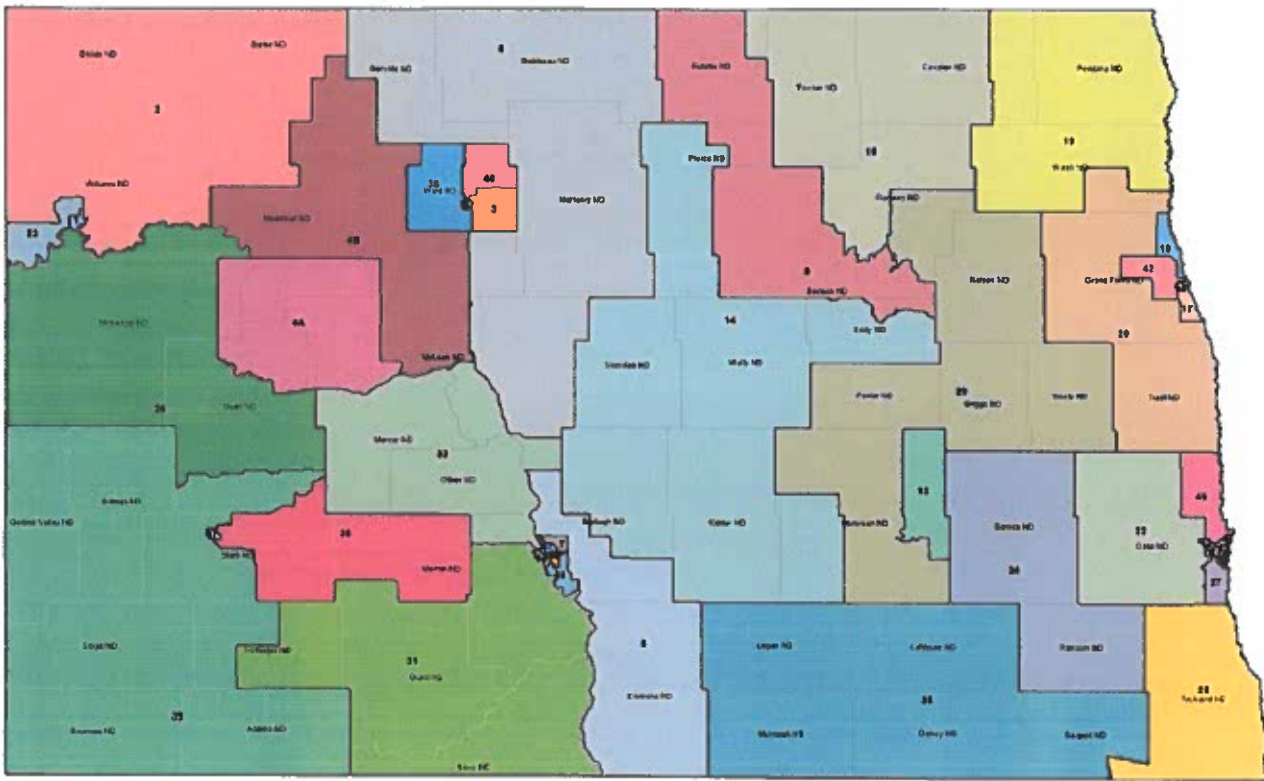
ALTERNATIVE MAP PROPOSED
BY THE TRIBES IN DISTRICT COURT
District 9 Regional Map



Appellate Case: 23-3697 Page: 39 Date Filed: 12/20/2023 Entry ID: 5346611

ALTERNATIVE MAP PROPOSED BY THE TRIBES IN DISTRICT COURT

Statewide Map



Attachment 2

Subject: FW: Redistricting Committee Testimony
Attachments: 2023.12.20 Joint Testimony of Chairman Azure and Chairwoman Street.pdf

From: Michael Carter
Sent: Tuesday, December 19, 2023 4:47 PM
To: rsorvaag@ndlegis.gov; mlefor@ndlegis.gov; jboschee@ndlegis.gov; cheadland@ndlegis.gov; mrnathe@ndlegis.gov; aschauer@ndlegis.gov; bbekkedahl@ndlegis.gov; ddever@ndlegis.gov; rerbele@ndlegis.gov; khogan@ndlegis.gov
Cc: Bjornson, John D. <bjornson@ndlegis.gov>; Fordahl, Liz <lfordahl@ndlegis.gov>; tpurdon <tpurdon@robinskaplan.com>
Subject: Redistricting Committee Testimony

Chairman Sorvaag and Members of the Redistricting Committee:

Please find the attached written testimony for tomorrow's Redistricting Committee meeting from Spirit Lake Nation Chairwoman Lonna Street and Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure. Thank you.

Michael Carter
Senior Staff Attorney
Native American Rights Fund
250 Arapahoe Ave.
Boulder, CO 80302
carter@narf.org
P:303-447-8760
F:303-443-7776



**Testimony of Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure
and Spirit Lake Nation Chairwoman Lonna Street
Before the North Dakota Legislative Assembly Redistricting Committee
December 20, 2023**

Chairman Sorvaag and members of the Redistricting Committee, we are Jamie Azure, Chairman of the Turtle Mountain Band of Chippewa Indians (Turtle Mountain), and Lonna Street, Chairwoman of the Spirit Lake Nation (Spirit Lake). We submit this testimony jointly on behalf of our respective Tribes. We also want to make clear that no other person has been authorized to provide testimony on behalf of our Tribes to the Redistricting Committee. We submitted testimony for the Committee's December 12, 2023 meeting and now for the December 20, 2023 meeting. The written testimony we have submitted to the Committee represents the full and complete official position of our Tribes. Since the 2021 redistricting process and through the ensuing litigation to today, Spirit Lake and Turtle Mountain have advocated for a single unsubdivided legislative district that includes both our reservations.

Our previous testimony discussed how the 2021 Redistricting Committee's failures led to the lawsuit and to the District Court's ruling that the Legislative Assembly's 2021 redistricting plan violates the Voting Rights Act by unlawfully diluting the voting strength of Native American voters who live on and around the Turtle Mountain and Spirit Lake reservations. The Committee's failure to hire a

redistricting expert and refusals to follow the analysis submitted by Turtle Mountain and Spirit Lake led us to where we are today. The Committee is meeting now to hopefully correct these mistakes by adopting a lawful redistricting plan that combines the Spirit Lake and Turtle Mountain reservations in the same legislative district without subdistricts.

In the District Court's November 17, 2023 decision, two proposed maps submitted by the Tribes were evaluated and found to comply with traditional redistricting principles and with the Voting Rights Act. The maps were provided in our prior testimony, which is attached here. Those maps comply with the Voting Rights Act because they restore the ability of Native American voters in the region with a fair opportunity to elect 3 legislators—1 senator and 2 representatives. The current map—enjoined by the district court—provides a fair opportunity for Native American voters to elect just 1 legislator, in District 9A.

The 2022 election results showed this, with longtime incumbent Senator Richard Marcellais losing because of racial bloc voting in Towner and Cavalier Counties. Any remedy *must* be designed to provide Native American voters in northeastern North Dakota the fair opportunity to elect all 3 positions. A unified district that combines Rolette and Benson Counties—and thus the Turtle Mountain and Spirit Lake reservations—achieves that legal requirement. Other proposals

publicly floated by the Legislative Assembly so far do not comply with the District Court’s directive.

For example, the Legislative Assembly’s litigation counsel has suggested in a court filing the possibility of eliminating the subdistrict in District 9 and adding a subdistrict to District 15. This would worsen the Voting Rights Act violation, because—as the District Court found—the currently configured District 9 dilutes Native American voting strength. This is evidenced by the election defeat of former Senator Marcellais. And as was the Secretary of State’s position at trial, a subdistrict within District 15 would not contain a majority of Native American voters and would not be an effective opportunity district. Simply reading the district court’s opinion reveals this suggested alternative “remedy” to be a nonstarter—it would result in *zero* positions in the legislature in which Native American voters in the region could likely elect.

On December 15, the 8th Circuit Court of Appeals, like the District Court before it, denied the Secretary of State’s request to stay the District Court’s judgment. The time has come for the Legislative Assembly to finally follow the law and adopt one of the Tribes’ proposed maps, drop its appeal, and end this costly litigation.

Thank you for your consideration of this request.

**Testimony of Turtle Mountain Band of Chippewa Indians Chairman Jamie Azure
and Spirit Lake Nation Chairwoman Lonna Street
Before the North Dakota Legislative Assembly Legislative Management
Committee
December 5, 2023**

Chairman Lefor and members of the Legislative Management Committee, we are Jamie Azure, Chairman of the Turtle Mountain Band of Chippewa Indians, and Lonna Street, Chairwoman of the Spirit Lake Nation. We submit this testimony jointly on behalf of our respective Tribes. As you know, the United States District Court for the District of North Dakota recently found that the Legislative Assembly's 2021 redistricting plan violates the federal Voting Rights Act ("VRA") by unlawfully diluting the voting strength of Native American voters who live on and around the Turtle Mountain and Spirit Lake reservations. We submit testimony once again to respectfully request that the Legislature follow the law and fix its map to provide fair representation to the Native American voters living in Legislative Districts 9 and 15.

After conducting a trial, the District Court on November 17, 2023 found that the Legislature's "2021 redistricting plan, as to districts 9 and 15 and subdistricts 9A and 9B, prevents Native American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the VRA." Judgment, 3:22-CV-00022-PDW-APS, ECF No. 126 at 2. The court permanently enjoined the Secretary of State from permitting any elections to take place in Districts 9 and 15

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

until a legal map is in place. The Secretary of State and the Legislative Assembly have been given until December 22, 2023 to adopt a new map.

We were saddened to see that rather than seeking to correct the unlawful vote dilution being suffered by the Native American voters in districts 9 and 15, the Secretary of State announced he will be appealing the District Court's decision. Though seeming to lack a substantive argument that unlawful vote dilution is not occurring, it appears that the appeal will seek to have the case dismissed based on a procedural argument that the tribal member voters, and the Tribes on their behalf, do not have the authority to challenge violations of their own voting rights.

We hope the Secretary of State and the Legislative Assembly have considered that a prior unsuccessful motion to dismiss filed in the case already resolved the plaintiffs' right to sue on grounds that are unaffected by the Eighth Circuit's recent decision, which the Secretary has cited as the basis for his forthcoming appeal; but we hope more that the Legislature will decide to do the right thing for the Native American voters and who have only ever asked for one thing – that the Legislature simply follow the law.

On November 1, 2021, the Legislative Management Redistricting Committee (“Redistricting Committee”) was notified by a letter from the Tribes that the Redistricting Committee's proposed redistricting plan, if enacted, would violate the VRA. A true and correct copy of the letter is attached to this testimony as

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

Attachment 1. The letter included a detailed VRA election analysis and a proposed alternative map that would satisfy the VRA. The VRA analysis submitted by four North Dakota Tribes (Spirit Lake Nation, Turtle Mountain Band of Chippewa Indians, MHA Nation and Standing Rock Sioux Tribe) and tribal members throughout the redistricting process is the only known VRA analysis to have been reviewed by the Redistricting Committee. There is no evidence in the legislative record that the Legislature or the Redistricting Committee engaged a VRA expert to conduct its own analysis, which could have corroborated the Tribes' analysis and perhaps prevented this violation from occurring in the first place.

In fact, in the recent *Walen v. Burgum* case, in which the Mandan, Hidatsa and Arikara ("MHA") Nation intervened to defend Subdistrict 4A, the District Court relied on the abundant analysis and testimony supplied by the tribes in the legislative record in upholding the Subdistrict 4A as reasonably necessary to comply with the VRA.

Besides providing the Redistricting Committee with the VRA analysis and a proposed remedy map, the letter from the Tribes also put the Redistricting Committee on notice that its map "is illegally drawn and we believe will be struck down in court if it is adopted by the State Legislature." The Redistricting Committee and a majority of the Legislature failed to heed this warning. A proposed amendment

December 5, 2023 of Testimony of Chairman Jamie Azure and Chairwoman Lonna Street

to the Redistricting Committee's plan, which would have prevented this foreseeable violation, was voted down by the Redistricting Committee and then by the Senate.

In review of the map proposed by the Tribes to the Legislature, as well as another similar map proposed by the Tribes during the litigation, the District Court found:

The evidence at trial shows that the Tribes' proposed plans comport with traditional redistricting principles, including compactness, contiguity, respect for political boundaries, and keeping together communities of interest . . . Indeed, the evidence at trial demonstrated that the proposed districts did not appear more oddly shaped than other districts, and both proposed districts are reasonably compact. The proposed plans are also comparatively compact when viewed against other districts in the 2021 redistricting plan. (citations omitted).

Findings of Fact and Conclusions of Law, 3:22-CV-00022-PDW-APS, ECF No. 125 at 18-19. A true and correct copy of the map proposed by the Tribes in the District Court is attached to this testimony combined as Attachment 2.

It was not too late to do the right thing when the Tribes brought their VRA analysis to the Redistricting Committee in 2021, and it is not too late now to ensure that the 2024 elections will respect the voting rights of Native Americans. As in 2021, we once again ask that the Legislature adopt a redistricting plan that complies with the VRA and protects the right to vote of all voters.

Thank you for your consideration of this request.

ATTACHMENT 1



November 1, 2021

The Honorable Doug Burgum
Governor of the State of North Dakota
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joshua Boschee
Minority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Kim Koppelman
Speaker
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Rich Wardner
Majority Leader
North Dakota State Senate
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Chet Pollert
Majority Leader
North Dakota House of Representatives
600 East Boulevard Ave.
Bismarck, ND 58505

The Honorable Joan Heckaman
Minority Leader
North Dakota State Senate
600 East Boulevard Ave.
Bismarck, ND 58505

Dear Governor Burgum, Speaker Koppelman, and Leaders Pollert, Boschee, Wardner and Heckaman:

On behalf of the Turtle Mountain Band of Chippewa Indians (“Turtle Mountain”) and the Spirit Lake Nation (“Spirit Lake”), we write to express concerns with the proposed legislative map to be considered for approval by the State Legislature on November 8, and to respectfully request that our Tribal Nations be incorporated into the same legislative district.

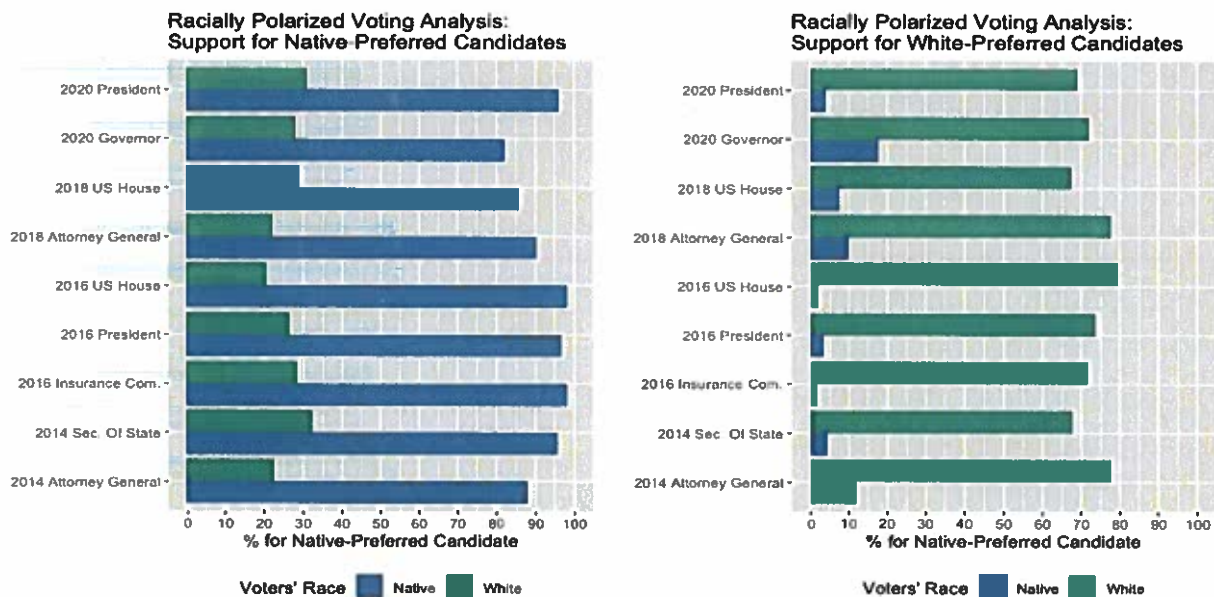
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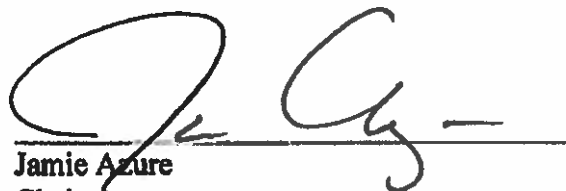


The disparity is even more severe when Native American candidates have run for office. In the 2016 election for the United States House of Representatives, a Native American candidate, Chase Iron Eyes, was preferred by an estimated 98 percent of Native American voters, but received only 21 percent of the vote from white voters. The vast majority of white voters rallied behind the eventual winner of the race, Kevin Cramer, who received only an estimated 2 percent of the Native American vote. A similar pattern is visible in the 2016 race for Insurance Commissioner, where an estimated 98 percent of Native American voters cast a ballot in favor of the Native American candidate, Ruth Buffalo, while being favored by only 28 percent of white voters.

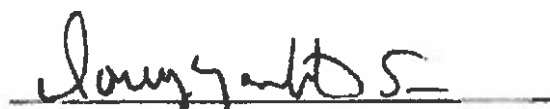
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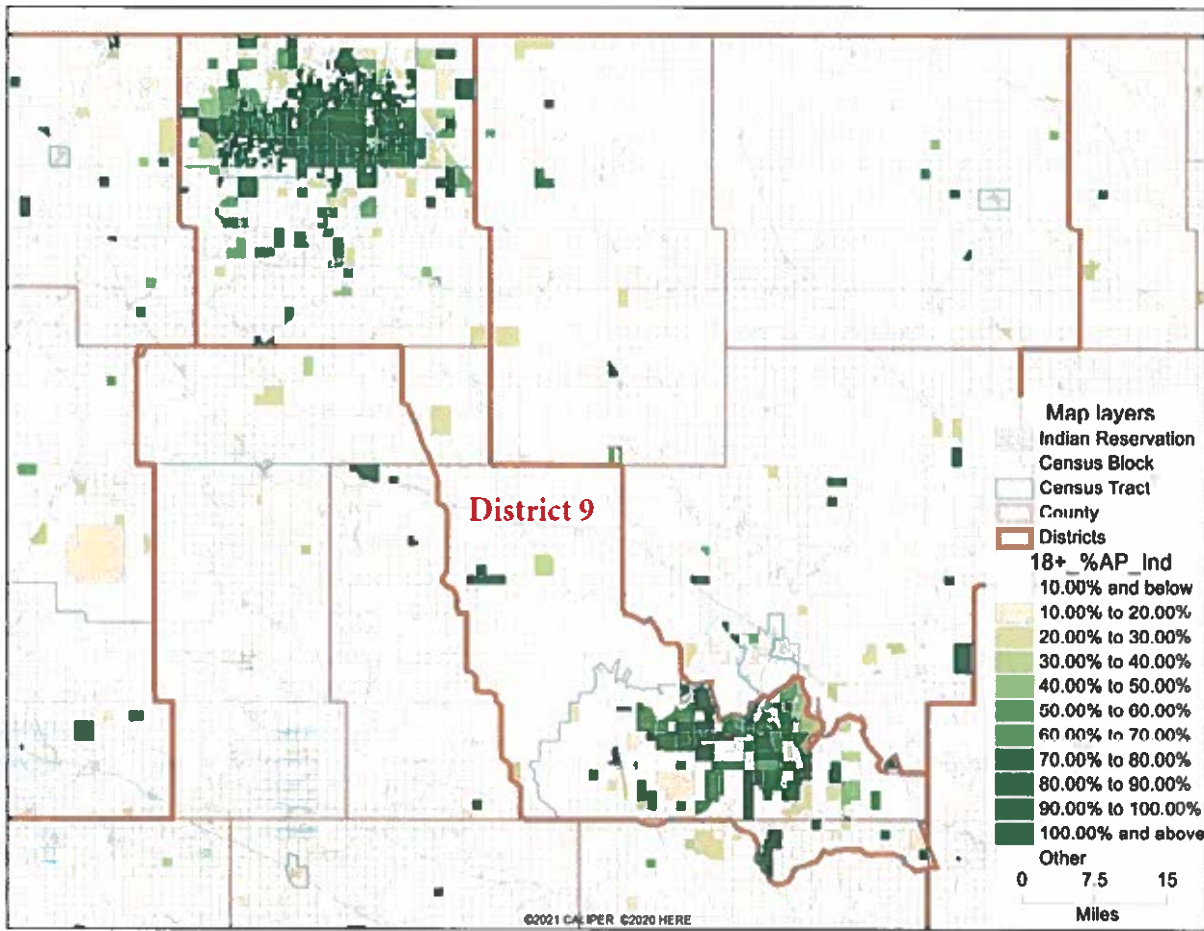


Jamie Azure
Chairman
Turtle Mountain Band of Chippewa Indians



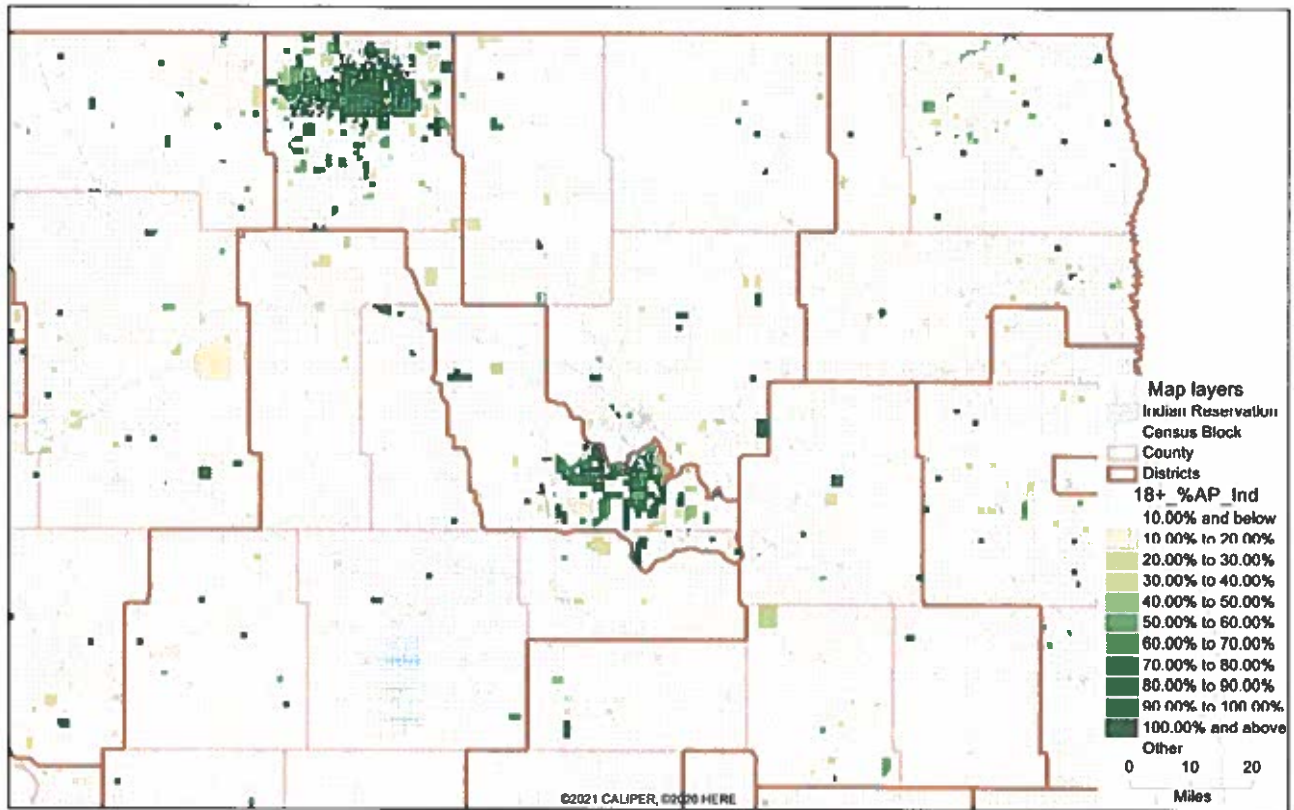
Douglas Yankton, Sr.
Chairman
Spirit Lake Nation

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



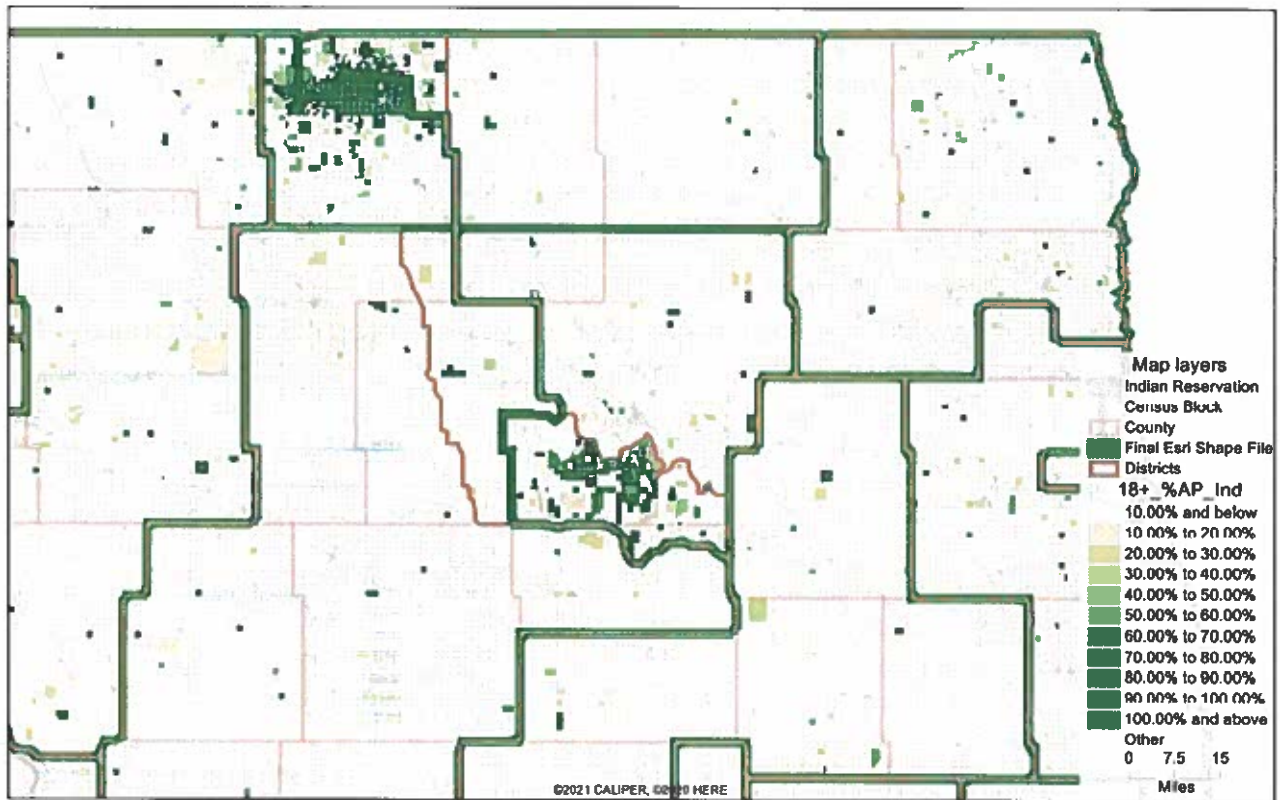
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Figure 2 – Proposed District as Incorporated Into State-Wide District Map



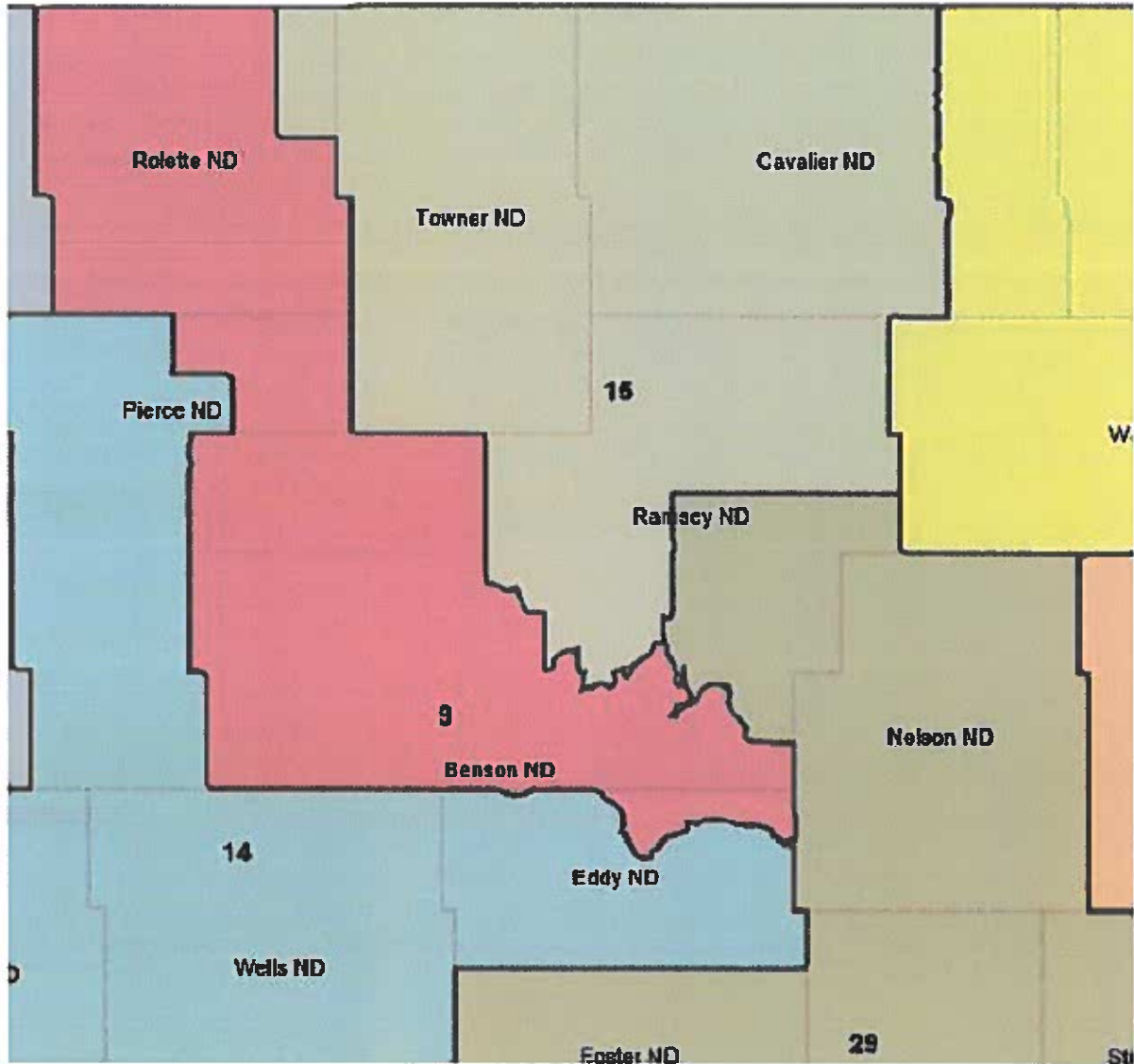
Appellate Case: 23-3697 Page: 54 Date Filed: 12/20/2023 Entry ID: 5346611

Figure 3 – Our Proposed District as Incorporated into State-Wide Map (Dark Brown Lines), Overlaid with and the Redistricting Committee’s Map (Green Lines)



ATTACHMENT 2

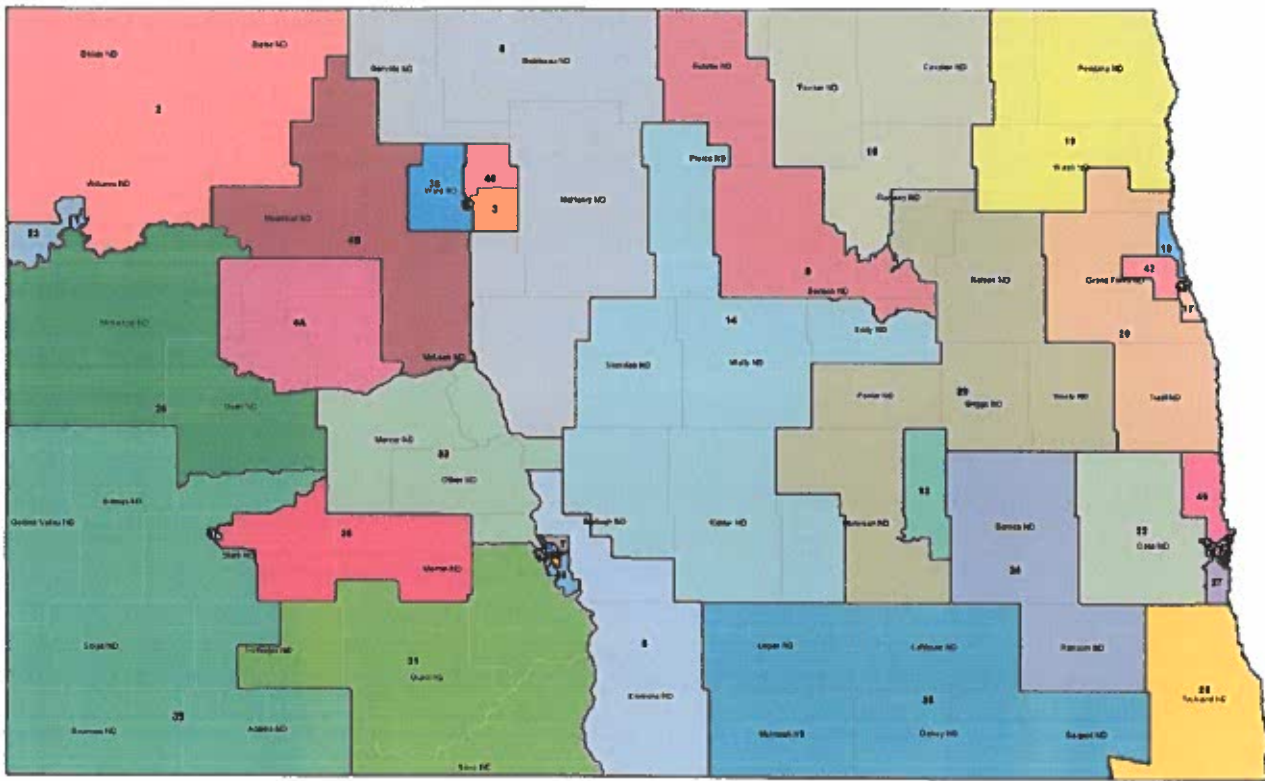
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District 9 Regional Map



Appellate Case: 23-3697 Page: 57 Date Filed: 12/20/2023 Entry ID: 5346611

ALTERNATIVE MAP PROPOSED BY THE TRIBES IN DISTRICT COURT

Statewide Map



Attachment 2

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