



North Dakota Legislative Council

Prepared for the Redistricting Committee
LC# 25.9179.01000
December 2023

LEGISLATIVE REDISTRICTING - BACKGROUND MEMORANDUM

INTRODUCTION

On December 5, 2023, the Chairman of the Legislative Management appointed the Redistricting Committee 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.

2021 REDISTRICTING COMMITTEE

Every 10 years, the Legislative Assembly engages in the redistricting process. 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 2021 Legislative Session, which followed the 2020 Census, the Chairman of the Legislative Management appointed a Redistricting Committee, pursuant to [House Bill No. 1397](#) (2021), to develop a legislative redistricting plan to be implemented in time for use in the 2022 primary election.

The 2021 Redistricting Committee reviewed the [background memorandum for the Redistricting Committee](#), which explains the historical and legal requirements related to redistricting and the history of redistricting in North Dakota. The committee held six meetings between July 29, 2021, and September 29, 2021. In an effort to comply with Section 2 of the Voting Rights Act of 1965 (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 committee submitted a [final report](#) and a [proposed map](#) to the Legislative Management for approval on September 29, 2021. The Legislative Management approved the committee's proposed map for introduction as House Bill No. 1504 (2021).

The Governor called a special session "to provide for redistricting of government" pursuant to Section 1 of Article IV of the Constitution of North Dakota. The special session convened on November 8 and adjourned November 12, 2021. The Legislative Assembly approved [House Bill No. 1504](#) (2021) 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 Burgum and Secretary of State, Alvin Jaeger¹, alleging the division of legislative Districts 4 and 9 was the result of unconstitutional racial gerrymandering.

On March 4, 2022, the plaintiffs moved for a preliminary injunction to eliminate the subdistrict lines for the 2022 primary and general elections. On March 30, 2022, Cesario Alvarez, Jr., Lisa DeVille, and the Mandan, Hidatsa, and Arikara Nation moved to intervene and on April 4, 2022, the District Court granted the motion. On May 26, 2022, a panel of judges, Chief Judge Peter D. Welte, Circuit Judge Ralph R. Erickson, and Judge Daniel L. Hovland, denied the plaintiff's motion for preliminary injunction because there was insufficient evidence to find the plaintiffs were likely to succeed on the merits of the case and the plaintiffs were unlikely to overcome the presumption that federal courts should not alter election rules when an election is drawing near. *Walen v. Burgum*, No. 1:22-CV-31, 2023 WL 7216070 (D.N.D. Nov. 2, 2023). In this case, the primary election was 3 weeks away and voting had already begun.

¹ In *Walen v. Burgum* and *Turtle Mountain Band of Chippewa Indians v. Howe*, Alvin Jaeger was sued in his official capacity as the Secretary of State. Michael Howe was elected to the office and began his tenure as Secretary of State January 1, 2023, replacing Alvin Jaeger as defendant in these cases.

On February 28, 2023, the plaintiffs moved for summary judgment. To prevail on their motion, the plaintiffs were required to show (1) race was the predominate factor in the Legislative Assembly's decision to group together a significant number of voters and (2) the Legislative Assembly's actions fail to meet strict scrutiny. To pass strict scrutiny, the actions must be narrowly tailored to meet a compelling interest. According to the relevant case law considered by the panel, complying with the VRA is a compelling interest. Narrow tailoring can be demonstrated if the state had good reasons and a strong basis to believe drawing subdistricts was required by the VRA.

The panel 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 strict scrutiny required when race is a predominate motivating factor. The panel did not determine whether race was a predominate 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 ([Appendix A](#)).

Turtle Mountain Band of Chippewa Indians v. Howe

On February 7, 2022, the Turtle Mountain Band of Chippewa Indians, the Spirit Lake Tribe, Zachery S. King, Wesley Davis, and Collette Brown filed a complaint against Secretary of State, Alvin Jaeger, alleging the redistricting plan dilutes the voting strength of Native Americans on the Turtle Mountain and Spirit Lake Reservations in violation of Section 2 of the VRA. Plaintiffs alleged the plan unlawfully "packed" Subdistrict 9A with a supermajority of Native American voters and cracked the remaining Native American voters into other districts, including District 15. On April 15, 2022, the Secretary of State filed a motion to dismiss for lack of jurisdiction and failure to state a claim which the district court denied on July 7, 2022. A 4-day bench trial was held the week of June 12, 2023, in Fargo, North Dakota.

Leading up to trial, an important evidentiary issue arose relating to whether legislative privilege applies in this case. The plaintiffs subpoenaed six current and former members of the Legislative Assembly and a former Legislative Council staff attorney to produce documents pertaining to the 2021 redistricting legislation, and separately sought to depose former Representative William Devlin.

The Legislative Council contracted with outside counsel to object to the discovery requests, asserting state legislative privilege and attorney-client privilege. Former Representative Devlin moved to quash the subpoena requiring his deposition and Magistrate Judge Alice R. Senechal denied the motion on December 22, 2022. The plaintiffs later moved to enforce the third-party subpoenas. Judge Senechal granted the motion on February 10, 2023. The Legislative Assembly appealed both orders and Chief Judge Welte affirmed both of Judge Senechal's orders. The Legislative Assembly appealed again and on September 6, 2023, the Eighth Circuit Court of Appeals found the subpoenas for testimony and the production of documents should have been quashed based on legislative privilege. The circuit court held legislators and staff have an absolute legislative privilege because the documents and testimony sought relating to redistricting are within the sphere of legitimate legislative activity ([Appendix B](#)).

On November 17, 2023, based on the evidence at the June 2023 trial and the relevant law, the district court held the drawing of Districts 9 and 15 and Subdistricts 9A and 9B prevents Native American voters from electing a candidate of their choice, violating Section 2 of the VRA.² The district court 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. Under the order, the Tribes have until January 5, 2024, to file an objection to a remedial plan and the defendants have until January 19, 2024, to file a response to an objection.

² The district court found all three preconditions delineated in *Thornburg v. Gingles*, 478 U.S. 50-51 (1986) which are used to determine whether there is a viable voter dilution claim were met. In *Gingles*, the United States Supreme Court stated a minority group challenging a redistricting plan must prove: (1) The minority is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) The minority is politically cohesive; and (3) In the absence of special circumstances, bloc voting by the majority usually defeats the minority's preferred candidate. To prove that bloc voting by the majority usually defeats the minority group, the use of statistical evidence is necessary. Following the district court's conclusion these preconditions were met, the district court assessed whether, under the totality of the circumstances, members of the minority group have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice. This assessment includes consideration of the Senate Factors from the Senate Committee report to the 1982 amendment to the VRA.

The Secretary of State, Michael Howe, filed an appeal on December 8, 2023. The Legislative Assembly, not yet a party to the suit, filed a motion to intervene and seek a stay on December 8, 2023 ([Appendix C](#)). On December 12, 2023, the Legislative Assembly filed a brief relating to the plaintiff's opposition for a stay of the judgment pending appeal ([Appendix D](#)). On December 12, 2023, the district court issued an order denying the Secretary of State's request for a stay and denying the request of the Legislative Assembly to intervene and stay the November 17, 2023, order. In the order, ([Appendix E](#)), the court indicated the district court no longer had jurisdiction of the case due to the Secretary of State filing notice of appeal.

COMMITTEE'S DIRECTIVE

The district court found the redistricting plan violates Section 2 of the VRA. Federal courts generally have afforded legislative bodies a reasonable opportunity to draw districts that comply with Section 2. To address its constitutional duty to adopt a redistricting plan and attempt to comply with the order of the district court, the committee must further evaluate Districts 9 and 15 and Subdistricts 9A and 9B. The court ordered the Legislative Assembly to adopt a plan to remedy the violation by December 22, 2023.

In response to the district court's order, on December 5, 2023, the Chairman of Legislative Management appointed a Redistricting Committee. The Legislative Management also approved the issuance of a request for proposal to hire a consultant to assist the committee in its objectives. The committee is charged with approving a plan for recommendation to the Legislative Management. The Legislative Management must approve the committee's recommendation for introduction during a special or reconvened legislative session.

The effective date of the remedial plan will depend on whether the map is approved during a special or reconvened session. If the Governor calls a special session, the effective date of legislation will be the date specified in the Act. If the Legislative Assembly reconvenes, the legislation will be effective 90 days after its filing unless the Legislative Assembly declares the Act to be an emergency measure and the measure is passed by a vote of two-thirds of the members elected to each house.

Committee Considerations

To comply with the VRA and remedy a violation of Section 2, a redistricting plan must 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.

Generally, race may not be a predominant factor in the creation of a district unless the plan is narrowly tailored to serve a compelling state interest. A plan in which race is the predominate factor may be held unconstitutional if the plan disregards traditional districting principles. Traditional districting principles include:

- Compactness.
- Contiguity.
- Preservation of political subdivision boundaries.
- Preservation of communities of interest.
- Preservation of cores of prior districts.
- Protection of incumbents.
- Compliance with Section 2 of the VRA.

The ideal district size is 16,576 under a 47 legislative district plan. A voting group exceeding 4,144 voters would be a majority in a subdistrict, or single-member district.

One of the three *Gingles* preconditions requires a Section 2 plaintiff to demonstrate the minority group is sufficiently large and geographically compact to constitute a majority in a potential district. Although the Spirit Lake Reservation, with a population of 3,787, does not have a population sufficient to necessitate a subdistrict within section 15 under the VRA, the district court found the minority group, including voters from Turtle Mountain Reservation, with a population of 5,113, and voters from Spirit Lake Reservation, is sufficiently large and geographically compact to constitute a majority in a *potential* district including the 2 plans submitted by the plaintiffs and included within the district court's findings.

ATTACH:5