LETTER OPINION
2001-L-08

March 19, 2001

Honorable Ben Tollefson
State Senator
Senate Chambers
600 East Boulevard Avenue
Bismarck, ND 58505-0360

Dear Senator Tollefson:

Thank you for your letter raising questions about redistricting Indian reservations. You asked whether the North Dakota Indian reservations could be organized into a single legislative district.

Article IV, Section 2 of the North Dakota Constitution provides, in part, as follows:

> The legislative assembly shall fix the number of senators and representatives and divide the state into as many senatorial districts of compact and contiguous territory as there are senators. . . . The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates. A senator and at least two representatives must be apportioned to each senatorial district and be elected at large or from subdistricts from those districts.

(Emphasis supplied.)

Similarly, N.D.C.C. § 54-03-01.5, dealing with the legislative apportionment requirements, provides:

> 2. . . . one senator and two representatives must be apportioned to each senatorial district. Representatives may be elected at large or from subdistricts.
>
> . . . .
>
> 4. Legislative districts and subdistricts must be compact and of contiguous territory.

> 5. Legislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum. . . .

(Emphasis supplied.)

Thus, under North Dakota law, senatorial and legislative districts must be compact and contiguous. These terms are not specifically defined in either the Constitution or state statutes. One court has defined "compactness" as used in the constitutional sense related to reapportionment as concerning "a geographic area whose boundaries are as nearly equidistant as possible from the geographic center of the area being considered, allowing for variances caused by population density and distribution, census enumeration districts, and reasonable variations necessitated by natural boundaries and by county lines." Acker v. Love, 496 P.2d 75, 76 (Colo. 1972). The term "compact" has also been defined as "[c]losely or firmly united or packed . . . also, lying in a narrow compass or arranged so as to economize space; having a small surface or border in proportion to contents or bulk. . . ." Black's Law Dictionary at 281 (6th ed. 1990). While it might reasonably be said that each of the North Dakota Indian reservations may be compact in and of themselves, if combined into a single district, the single district could not reasonably be said to comprise a compact legislative district.

The term "contiguous" has been defined by the North Dakota Supreme Court, in another context, as meaning "immediately successive; in actual or close contact. Likewise, 'contiguously' means in contact with; joining; touching; touching along a considerable part or the whole of one side; touching or joining at the edge or boundary." Williams Elec. Co-op, Inc. v. Montana-Dakota Utilities Co., 79 N.W.2d 508, 512 (N.D. 1956). The court further defined "contiguous territory" to mean "territory touching, adjoining and connected, as distinguished from territory separated by other territory." Id.

The term "contiguous" has similarly been defined as being "[i]n close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by." Black's Law Dictionary at 320 (6th ed. 1990).

None of the North Dakota Indian reservations adjoins or connects any other reservation. Furthermore, redistricting plans which appear to ignore traditional neutral principles of compactness and contiguity and which create bizarre, irregular, or elongated shaped districts may violate the equal protection clause of the Fourteenth Amendment to the United States Constitution. See Shaw v. Reno, 509 U.S. 630 (1993).

Based on the foregoing, it is my opinion that the North Dakota Indian reservations could not be organized into a single district for legislative purposes since the district would not be compact and contiguous.

You also indicated that legislative subdistricts may be utilized when redistricting occurs. You then asked about the legality of creating separate subdistricts of each of the North Dakota Indian reservations. To the extent it is contemplated that legislative subdistricting would occur only in those districts containing Indian reservations, such subdistricting would be constitutionally impermissible and should not be considered.[1] The remainder of this letter discusses your question but assumes that legislative subdistricting would be utilized generally throughout the state.

Subdistricts are permitted under state law. Article IV, Section 2 of the North Dakota Constitution and N.D.C.C. § 54-03-01.5(2) provide that a senator and at least two representatives must be apportioned to each legislative district and be elected at large or from subdistricts in those districts. However, the North Dakota Constitution requires that "[t]he legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates." N.D. Const. art. IV, § 2. Likewise, "[l]egislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum. The total population variance of all districts, and subdistricts if created, from the average district population may not exceed recognized constitutional limitations." N.D.C.C. § 54-03-01.5(5). These are the North Dakota embodiments of the "one person-one vote" rule enunciated by the United States Supreme Court in Reynolds v. Sims, 377 U.S. 533 (1964), applicable for state legislative districting and based on the Equal Protection Clause of the United States Constitution.

While legislative districts must be as nearly equal in population as practicable, some deviation is permissible. N.D.C.C. § 54-03-01.5(5). See, e.g., Voinovich v. Quilter, 507 U.S. 146 (1993). In Voinovich, the Court quoted the following with approval:

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification

[1] See Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900, 916 (1995) (race may not be "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. . . . [T]he legislature [may not subordinate] traditional race-neutral districting principles . . . to racial considerations."); Bush v. Vera, 517 U.S. 952 (1996).

> by the State. Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State."

Id. at 161 (quoting Brown v. Thomson, 462 U.S. 835 (1983)).

Some deviations in excess of 10% may be justifiable for the purpose of preserving the integrity, for example, of political subdivision lines. Id. Total deviation of over 16% was justified for that purpose in at least one instance. Id. at 161-62 (citing Mahan v. Howell, 410 U.S. 315 (1973)).

It is my understanding that the pertinent census data for the 2000 census which are to be used by the Legislative Assembly in redistricting may not yet be available. Therefore, it is not yet possible to analyze whether North Dakota Indian reservations could be organized into separate subdistricts while preserving the legal requirements of substantially equal population. Consequently, it is also premature for this office to issue an opinion on the general legal validity of creating separate subdistricts of each of the North Dakota Indian reservations.

Nevertheless, there are some principles which should be kept in mind if the Legislative Assembly considers the general use of subdistricts during upcoming redistricting. Assuming that the one person-one vote principle is complied with when the new census data are analyzed, the next most important consideration is that the traditional districting principles, including compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, guide the Legislature in creating these separate subdistricts. See, e.g., Miller v. Johnson, 515 U.S. 900, 916 (1995).

Generally, single-member districts are preferable to multimember districts or at-large voting. As the United States Supreme Court noted in Growe v. Emison, 507 U.S. 25, 40 (1993):

> We have, however, stated on many occasions that multimember districting plans, as well as at-large plans, generally pose greater threats to minority-voter participation in the political process than do single-member districts . . . which is why we have strongly preferred single-member districts for federal-court-ordered reapportionment.

However, even single-member district redistricting has been subject to court challenges, for example, on constitutional equal protection grounds as well as vote dilution claims under Section 2 of the federal Voting Rights Act (42 U.S.C. § 1973).[2] The problem with these type of districts has been explained by the United States Supreme Court in Voinovich v. Quilter, 507 U.S. 146 (1993):

---

[2] J. Gerald Hebert, et al., "The Realists' Guide to Redistricting - Avoiding the Legal Pitfalls" at 18 (2000). The authors explain:

> Section 2 of the Voting Rights Act, unlike Section 5, applies nationwide. Congress passed Section 2 to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged . . . on account of race, color, or previous condition of servitude." Section 2 prohibits what is referred to as "minority vote dilution" -- the minimization or canceling out of minority voting strength. Since 1982, when it was last amended, Section 2 has figured prominently in voting rights litigation.
>
> Section 2(a) of the Act prohibits any electoral practice or procedure that
>
> > results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color [or membership in a language minority group].
>
> Section 2(b) specifies that the right to vote has been abridged or denied if,
>
> > based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.
>
> Section 2 thus prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a racial minority to elect its candidates of choice on an equal basis with other voters. (Footnotes omitted.)

> This case focuses . . . on the concentration of minority voters within a district. How such concentration or "packing" may dilute minority voting strength is not difficult to conceptualize. A minority group, for example, might have sufficient numbers to constitute a majority in three districts. So apportioned, the group inevitably will elect three candidates of its choice, assuming the group is sufficiently cohesive. But if the group is packed into two districts in which it constitutes a super-majority, it will be assured only two candidates. As a result, we have recognized that "[d]ilution of racial minority group voting strength may be caused" either "by the dispersal of [minority group members] into districts in which they constitute an ineffective minority of voters or from the concentration of [minority group members] into districts where they constitute an excessive majority."

Id. at 153-54 (emphasis added). The Court in Voinovich also recognized another possible claim against concentrated single-member districts:

> Appellees in this case, however, do not allege that Ohio's creation of majority-black districts prevented black voters from constituting a *majority* in additional districts. Instead, they claim that Ohio's plan deprived them of "influence districts" in which they would have constituted an influential *minority*. Black voters in such influence districts, of course, could not dictate electoral outcomes independently. But they could elect their candidate of choice nonetheless if they are numerous enough and their candidate attracts sufficient cross-over votes from white voters. We have not yet decided whether influence-dilution claims such as appellees' are viable under § 2 [of the Voting Rights Act] . . . nor do we decide that question today. Instead, we assume for the purpose of resolving this case that appellees in fact have stated a cognizable § 2 [of the Voting Rights Act] claim.

Id. at 154.

However, the Supreme Court has also indicated that section 2 of the Voting Rights Act is not violated merely because some so-called "majority-minority" districts are created during redistricting or that such districts may only be created to remedy a past statutory violation.

> Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns. Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a

> protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 simply does not speak to the matter. See 42 U.S.C. § 1973(b). Indeed, in *Gingles* we expressly so held: "[E]lectoral devices . . . may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."

Id. at 155.

"Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions. It is well settled that 'reapportionment is primarily the duty and responsibility of the State.' . . . Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests. Although race-based decisionmaking is inherently suspect . . . until a claimant makes a showing sufficient to support that allegation the good faith of a state legislature must be presumed." Miller v. Johnson, 515 U.S. 900, 915 (1995). The Supreme Court in Miller further explained:

> Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process. . . . The distinction between being aware of racial considerations and being motivated by them may be difficult to make. This evidentiary difficulty, together with the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments, requires courts to exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race. The plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can "defeat a claim that a district has been gerrymandered on racial lines."

Id. at 916.

If subdistricts were challenged under Section 2 of the Voting Rights Act, a two-step analysis would likely be involved:

> First, plaintiffs must show three existing threshold conditions (known as the Gingles factors): (1) the population of American Indians "is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) American Indians are "politically cohesive"; and (3) the "white majority votes sufficiently as a bloc to enable it -- in the absence of special circumstances, . . . usually to defeat the minority's preferred candidate." Thornburg v. Gingles, 478 U.S. 30, 50-51 . . . (1986) (multi-member district); see Growe v. Emison, 507 U.S. 25, 40 . . . (1993) (single-member districts).
>
> Second, if all three Gingles factors have been established, the court must decide the ultimate question of vote dilution; it must determine whether, "on the totality of circumstances," American Indians have been denied an equal opportunity to "participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). As part of this inquiry, the court considers a non-exhaustive list of factors set out in the legislative history to the Voting Rights Act as well as cases interpreting it.

Old Person v. Cooney, 230 F.3d 1113, 1120 (9th Cir. 2000).

As one authority observed, the courts also look to "proportionality" in determining such cases:

> Although courts have considered a variety of circumstances in making this evaluation, as a practical matter one factor is particularly important: the "proportionality," or lack thereof, between the number of majority-minority districts and the minority's share of the State's relevant population. It would be very difficult, for example, for a minority group to win a Section 2 case if it constituted 20% of the population but effectively controlled 30% of the State's districts.
>
> The proportionality factor was analyzed by the Supreme Court in 1994 in *Johnson v. De Grandy* [512 U.S. 997 (1994)]. The Court assumed for the purposes of deciding *De Grandy* that all three of the *Gingles* factors were satisfied, yet it rejected the plaintiffs' Section 2 claim. As the Court explained, the totality of circumstances did not support a finding of dilution because the "minority groups constitute effective voting majorities in a

> number of . . . districts substantially proportional to their share in the population." Section 2, in other words, does not mandate that a State create the *maximum* possible number of majority-minority districts. Although rough proportionality does not automatically protect a State from liability under Section 2, it is a strong "indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" As Justice O'Connor explained in a separate opinion, proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive."

J. Gerald Hebert, et al., "The Realists' Guide to Redistricting - Avoiding the Legal Pitfalls" at 20-21 (2000) (footnotes omitted).

I trust this discussion is helpful to you.

Sincerely,

Wayne Stenehjem
Attorney General

jjf/pg