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TO: MOUNTRAIL COUNTY REDISTRICTING BOARD

FROM: WADE G. ENGET, Mountrail County State's Attorney

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¶1. It should be noted that at-large elections are not *per se* violative of minority voter's rights. Thornburg v. Gingles, 478 U.S. 30, 47-48, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986).

¶2. This Committee has been presented with oral and written testimony asserting that the redistricting plans being considered by the Mountrail County Redistricting Committee dilute Indian voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973(b). To establish a Section 2 violation, the plaintiffs must prove by a preponderance of the evidence three elements stated in Thornburg v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 35 (1986), which are often referred to as the "*Gingles* preconditions":

> (1) [T]he racial group is sufficiently large and geographically compact to constitute a majority in a single-member district;
>
> (2) the racial group is politically cohesive; and
>
> (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

League of United Latin Am. Citizens, 548 U.S. 399, 425, 126 S.Ct. 2594, 163 L.Ed.2d 609 (2006).

¶3. Failure to prove each of the preconditions defeats a Section 2 claim. Clay v. Bd. of Educ., 90 F.3d 1357, 1362 (8th Cir.1996). If the three preconditions are met, the court proceeds to consider the totality of the circumstances. Cottier v. City of Martin, 445 F.3d 1113, 1117 (8th Cir. 2006).

¶4. **First *Gingles* Precondition: Sufficiently Numerous and Geographically Compact**

¶5. A redistricting plan violates the equal protection clause only if race is the predominant factor in placing voters within or outside of a particular district. Easley v. Cromartie, 532 U.S. 234, 241, 121 S.Ct. 1452, 149 L.Ed.2d 430 (2001). Strict scrutiny does not apply where, as here, race was merely a factor in redistricting. Bush v. Vera, 517 U.S. 952, 958, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

¶5. In this case, the borders proposed in the plans being put forth by the County Redistricting Board easily pass muster, as each of the plans are compact and respect traditional boundaries. This is consistent with traditional districting criteria, including respect for political and administrative boundaries, geographic considerations, and communities of interest. See N.D.C.C. §11-07-03(1) and 11-07-03(2); Abrams v. Johnson, 521 U.S. 74, 91–92, 117 S.Ct. 1925, 138 L.Ed.2d 285 (1997). The redistricting plan submitted by North Dakota Native Vote is irregularly shaped and does not follow political and administrative boundaries. Thus, the plans being put forth by the Board are not based solely on race, and survives constitutional scrutiny.

¶6. **Second *Gingles* Precondition: Minority Political Cohesion**

¶7. The second *Gingles* precondition requires a showing that the Native–American minority is politically cohesive. Proving this factor typically requires a statistical and non-statistical evaluation of the relevant elections, and should include endogenous elections (election results for the elected positions within Mountrail County government) and interracial elections, as they are the best indicators of whether the white majority usually defeats the minority candidate. Cottier v. City of Martin, 445 F.3d 113, 1118, 1121 (8th Cir. 2006). Evidence of political cohesiveness is shown by minority voting preferences, distinct from the majority, demonstrated in actual elections, and can be established with the same evidence plaintiffs must offer to establish racially polarized voting, because "political cohesiveness is implicit in racially polarized voting." Id. at 1118.

¶8. **Third *Gingles* Preconditions: Majority Bloc Voting**

¶9. The third *Gingles* precondition asks whether the white majority typically votes in a bloc to defeat the minority candidate. League of United Latin Am. Citizens, 548 U.S. 399, 425, 126

S.Ct. 2594, 163 L.Ed.2d 609 (2006). This is determined through three inquiries: (1) identifying the minority-preferred candidates; (2) determining whether "the white majority vote as a bloc to defeat the minority preferred candidate;" and (3) determining whether "there [were] special circumstances such as the minority candidate running unopposed present when minority-preferred candidates won." Cottier, 445 F.3d at 1119–20. There is no blanket definition of "minority preferred candidate," and, the plaintiffs must prove, on an election-by-election basis, which candidates are minority-preferred. Clay v. Bd. Of Educ. 90 F.3d 1357, 1362 (8th Cir. 1996). Absent a showing that minority preferred candidates are, for some reason, excluded from the ballot, it is a near tautological principle that the minority preferred candidate "should generally be one able to receive [minority] votes." Id. at 1362.

¶10. Although satisfying the three *Gingles* preconditions takes the plaintiff "a long way towards showing a section 2 violation,", the ***plaintiffs ultimately must prove that the totality of the circumstances indicates minority voters had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,"*** 42 U.S.C. § 1973(b). Harvell v. Blytheville Sch. Dist., 71 F.3d 1382, 1390 (8th Cir. 1995).

¶11. It was noted in Bone Shirt v. Hazeltine, 461 F.3d 1011 (8th Cir. 2006), that the Senate Committee report that accompanied the 1982 amendment to the Voting Rights Act noted the courts should consider the following, inexhaustive, objective factors in determining whether the totality of the circumstances indicate a Section 2 violation:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> (2) the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

(4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

(5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

(6) whether political campaigns have been characterized by overt or subtle racial appeals;

(7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.R. No. 97–417 at 28–29 (1982); Gingles, 478 U.S. at 44–45, 106 S.Ct. 2752.

¶12. Two additional factors are also probative in determining whether Section 2 was violated: (1) was there a significant lack of response from elected officials to the needs of the minority group, and (2) was the policy underlying the jurisdiction's use of the current boundaries tenuous. Gingles, 478 U.S. at 44, 106 S.Ct. 2752.