VOTING RIGHTS IN ALASKA
1982-2006

A REPORT OF RENEWTHEVRA.ORG
PREPARED BY NATALIE LANDRETH AND MOIRA SMITH

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EXECUTIVE SUMMARY

The 1965 Voting Rights Act (VRA) is arguably one of the most important pieces of legislation ever adopted by Congress. The state of Alaska, which has the single largest indigenous population in the United States, is covered by section 5 (the preclearance provision) and sections 4(f)4 and 203 (the language assistance provisions) of the VRA. Yet, little is known about the impact of the VRA in Alaska over the past 40 years, including whether state voting practices or procedures discriminate against minority voters, or how well the state is complying with the minority language assistance provisions. This report is a beginning point to a better understanding of the status of the VRA in Alaska. Its primary focus is the study, documentation, and analysis of the experiences of Alaska Native voters through the lens of the VRA.

Rural Alaska and the Status of Alaska Natives

"Rural" Alaska is a term of art, qualitatively distinct from rural Nebraska or rural Montana. As the state with the largest land area and with the lowest population density of any state in the United States, rural Alaska includes nearly 200 Native villages and communities that are not accessible by road. They are only accessible by small propeller plane. The fewer than 300 Alaska Natives who reside in each of these villages still practice their traditional way of life – living off the land through subsistence fishing, hunting and gathering. Alaska Natives are by far the largest minority population in Alaska, currently making up 19 percent of the total state population, with numbers growing in both urban and rural Alaska. Despite certain gains, Alaska Natives are still the largest group of the total Alaskan population to live in poverty, with the highest unemployment and the lowest level of education.

Voting in rural Alaska can be a very different experience than voting elsewhere in the country. Voting can involve crossing a river, or asking your grandchildren to translate for you and explain what is on the ballot. One example is Kasigluk, a Yup'ik village fifteen minutes from Bethel by air. There, the local election official announces through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. At 11:30, she promptly collects the election materials, packs up the single ballot machine, drives it down to the river by four-wheeler and loads it onto a boat (there is no bridge) to cross over to the other side of the river to the old village site where she sets up the ballot machine again at the school. The principal then announces on the radio that the poll is open. The State Division of Elections says there are about 150 communities like Kasigluk. It is also important to note that 24 Native villages did not even have polling places in 2004.

Alaska Natives not only inhabit a unique geographical place, they also possess a unique political status in the landscape of Alaska. Following the adoption of the 1971 Alaska Natives Claims Settlement Act (ANSCA) terminating aboriginal title to lands in Alaska, three different types of Native groups or organizations emerged in co-existence: (1) 231 federally recognized Indian tribes; (2) 13 for-profit Native corporations; and (3) 12 regional non-profit corporations. These Native groups intersect with the internal political structure of Alaska, which is divided into 16 boroughs and one large area referred to as the unorganized borough (an area encompassing most of the rural Native villages). Those who reside in the 16 boroughs generally receive their services through their organized and state-funded regional governments, while those who reside

in the unorganized borough must generally rely on the local Native village tribal government for services.

A History of Discrimination and Section 5 Preclearance

In the early years of the twentieth century, the burgeoning Alaska Territory passed laws limiting the ability of Alaska Natives to be citizens, to participate in the political process, and to enter certain public establishments. In 1924, when the U.S. Congress conferred citizenship on "all noncitizen Indians born within the territorial limits of the United States," the Territorial Legislature responded by enacting a literacy law the next year requiring that "voters in territorial elections be able to read and write the English language." Alaska's Constitution, which became operative with the Formal Declaration of Statehood on January 3, 1959, also included an English literacy requirement as a qualification for voting which was not repealed until 1970.

During World War II, the Aleuts were forcibly relocated from their island homelands and interned in overcrowded "duration villages" with no electricity, plumbing, clean water or medical care. After the war, there were still signs in stores and restaurants that read "No Natives Allowed" and "No Dogs or Indians." This history of discrimination is indicative of why Alaska is a covered jurisdiction under Section 5 of the VRA.

But continuing attempts by the state to dilute the Alaska Native vote speak to the need for reauthorization of Section 5 of the VRA. Following the 1990 census, the state adopted a legislative redistricting plan that was harshly criticized on the grounds that it diluted Native votes, disregarded the differences between Alaska Native groups, and was prepared in secret under the influence of some questionable dealings. A coalition of Native interests appealed to the U.S. Department of Justice (DOJ) imploring DOJ not to preclear the plan under Section 5 of the VRA and identified some of the discriminatory components of the proposed "anti-Native" plan. DOJ requested more information and ultimately declared the plan legally unenforceable because of its negative effects on Alaska Native voters. Thus, throughout the redistricting process and litigation, the VRA and DOJ stood as the last lines of defense. Without Section 5 preclearance, retrogressive practices would have been implemented with the approval of the Alaska courts.

As a general matter, the 2000 redistricting proceeded without significant problems. However, three aspects of the 2000 redistricting are relevant to our inquiry regarding the need for reauthorization: (1) compliance with the VRA was clearly the driving force behind several of the State's new districts; (2) the redistricting board hired a national voting rights expert whose report revealed that certain areas in Alaska still have racially polarized voting; and (3) in the litigation following the 2000 redistricting, the Alaska Supreme Court set forth a new standard of deviation that will require future monitoring by the DOJ.

Finally, in both the 2000 and 2004 elections, the state made significant changes to its elections laws shortly before the election, including changing absentee ballot requirements, acceptable forms of identification and polling places. None of these changes were "precleared" prior to the election and the state later withdrew some of these changes. While the change of a polling place may not raise a red flag in most jurisdictions, in rural Alaska it can have a significant impact on

the ability of Native voters to get to the right poll. In short, the Section 5 preclearance provision has resulted in some important changes in Alaska's districts and election laws.

Native Languages and Sections 4(f)(4) and 203 Language Assistance

There are 20 different languages still spoken in Alaska. The largest groups of language speakers are Iñupiaq (more than 3,000 speakers), Siberian Yup'ik (about 1,100 speakers), and Central Yup'ik (about 10,000 speakers). Siberian Yup'ik and Central Yup'ik are particularly important here because they are still the primary language of many of the villages and the first language that children learn at home. Maintaining and preserving these languages is critically important to the Native population because language expresses a culture's worldview, and is, according to the Alaska Native Languages Center, "the glue that sticks everything together."

There is and has always been a significant disparity in educational opportunities for Alaska Natives, resulting in many Native language speakers having limited English proficiency ("LEP"). Beginning in the early territorial days, official government policy established a segregated school system, ultimately leading to a boarding school policy that resulted in the State of Alaska not building high schools in rural villages. Native students had to travel hundreds of miles, sometimes out of state, to obtain a high school education. At the time the VRA was extended in 1975, only a total of 2,400 Alaska Natives had graduated from high school. As a result of litigation, educational opportunities and graduation rates have improved for Alaska Native students. But further litigation has revealed that the state still discriminates, providing inadequate funding to rural Alaska schools.

Although Congress amended the VRA in 1975 to remedy the discrimination faced by language minorities in voting, there is little evidence of compliance with sections 4(f)(4) and 203 by the State of Alaska in the past 30 years. While voter registration and turnout appear to be relatively high in Alaska, Alaska Native turnout is difficult to discern because the State chooses not to collect racial data.

Although there are no formal barriers to registration such as literacy tests, there are still barriers. Alaska continues its practice of English-only elections, adversely impacting the ability of Alaska Natives to exercise their right to vote. Alaska only provides registration materials printed in English and many Alaska Natives find the English-only ballot language confusing. Further, Alaska has a re-registration requirement that disproportionately affects Alaska Natives, who are the most mobile segment of the population.
In short, Alaska appears to have not complied with its obligations to provide minority language assistance to Alaska Native voters. The state offers intermittent oral language assistance and no written assistance for Alaska Natives. While Alaska seems to provide translators upon request in many places, this reflects a commitment to fulfill its obligations under state law to assist qualified voters needing assistance in voting. By contrast, Alaska does provide written election materials for the 2 percent of the Alaska population that is Filipino.

Thus, Alaska is arguably out of compliance with the VRA and has been since the mandate was imposed on the state 30 years ago. As Congress contemplates reauthorization of the language provisions, it should take into account this non-compliance and the ongoing need for some

assistance demonstrated in this report. Alaska Native voters still experience what the VRA was meant to eradicate 30 years ago.

INTRODUCTION TO THE VOTING RIGHTS ACT

As the expiration date of the Voting Rights Act's minority language assistance provisions – Sections 203[3] and 4(f)(4) – and preclearance provision- Section 5[4]- approaches, Congress will consider the current state of discrimination in voting and will determine whether these provisions are still needed.[5] The Voting Rights Act (VRA) was passed in 1975 with a ten-year sunset provision; it was renewed in 1982. Section 203 was renewed in 1992 for fifteen years in the Voting Rights Language Assistance Act of 1992. The Act's temporary provisions are set to expire on August 6, 2007, unless reauthorized by Congress. This report will address Alaska's experience under the minority language and preclearance provisions.

Alaska is covered in its entirety by Sections 5, and 4(f)(4) and is partially covered by Section 203 of the VRA. Alaska has the single largest indigenous population in the United States, yet its compliance with the VRA has never been thoroughly studied. More broadly, the minority voting experience in Alaska has not been comprehensively reviewed. While this report does not answer all questions or provide complete information about Alaska's experience under the VRA, it does fill some longstanding gaps and lay some groundwork for further study. In addition, this report details the sometimes awkward "fit" between the VRA and rural Alaska and suggests some changes that may increase the effectiveness of the VRA in Alaska.

The methodology used in this report is fairly simple. The authors collected a broad range of information from numerous sources such as the State Department of Elections (DOE), the Federal Election Commission, the Census Bureau, the United States Department of Justice (DOJ), the Native Vote 2004 project, the Institute for Social and Economic Research (ISER) at the University of Alaska, the Native corporations, the Alaska Native Languages Center, and the Lawyers' Committee for Civil Rights, among others. In addition, this primary and secondary research was supplemented by interviews with elders at the 2005 Convention of the Alaska Federation of Natives, surveys completed by tribes detailing their voting experiences in remote areas, as well as interviews with the State Director of the DOE, the election directors in the covered jurisdictions in the State, and the attorneys involved in the most recent redistricting litigation.[6]

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[3] Voting Rights Act: Bilingual election requirements, 42 U.S.C. § 1973aa-1a (2005).
[4] 42 U.S.C. § 1973c
[5] The House Judiciary Committee's Subcommittee on the Constitution held hearings on October 18, 20, and 25 and November 1, 8, 9, and 15, 2005; more are anticipated in early 2006.
[6] There were several challenges to preparing this report. First, there are no previous reports on the impact of the VRA in Alaska and therefore no baseline data against which to compare, and no guiding methodology. In addition, there remain gaps in the available information. First, the state of Alaska, Department of Elections (DOE) does not collect racially identifying data on its voters. Letter to Natalie Landreth from Whitney Brewster, Director of the DOE, January 5, 2006, on file with the authors. (It should be pointed out that only seven states do collect racial data, and only one – South Carolina – requires that it be included on the voter registration form. In order to measure actual compliance with the VRA, covered states might be directed to collect such data. In fact, the Federal Election Commission website states that some states do collect such data for the specific purpose of administering the VRA,

This report is organized to contextualize the Alaska Native and general minority voting experience in Alaska under the Voting Rights Act. The second section provides some background on Alaska, explains its unique demography, and illustrates some of the difficulties faced by Alaska Natives, not only in voting but in everyday life. The third section outlines the history of racial discrimination against Alaska Natives in Alaska. The fourth section describes the 1975 extension of the VRA to language minorities and how Alaska came to be covered by the Act. The fifth section discusses how preclearance has made a difference in Alaska but finds that, as a result of the state's non-compliance, the language minority provisions have had little impact. Finally, the sixth section summarizes the conclusions of this report.

This report concludes and recommends that Alaska should remain covered by both the minority language provisions in Sections 203 and 4(f)(4) and the preclearance provisions of Section 5. The language assistance provisions have had no chance to improve the situation of language minorities in Alaska because the state has apparently not complied with them. This may be the result of lack of clarity in the statute or lack of guidance from Congress or the Justice Department. For whatever reason, the state has not increased assistance to minority voters as a result of the VRA. The only language assistance provided is help upon request, which Alaska has supplied for more than 30 years. It provides no written assistance and inconsistent oral guidance for the significant Alaska Native population. Yet Alaska Natives continue to require language assistance, continue to receive a lesser education than non-Natives in Alaska, and continue to suffer under "English-only" policies and services. Moreover, Alaska Natives are poorer and have lower rates of literacy and English proficiency. Thus, this report recommends that Alaska continue as a covered jurisdiction under Sections 203 and 4(f)(4). The report also details Alaska's experience under the preclearance procedures and notes that it has resulted in some important changes in Alaska's voting districts. Accordingly, the report also recommends that Alaska continue to be subject to preclearance.

I. Alaska Demography

Alaska Natives are the only group of sufficient size and geographic concentration to be relevant to the VRA in Alaska.[7] This section provides an overview of the demography of Alaska and the place of Alaska Natives within that framework.

Before detailing the changing demography, it is critical to explain Alaska's geography and what exactly is meant by "rural" in Alaska throughout this report.

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http://www.fec.gov/votregis/vr.shtml.) Thus, it was difficult to measure Alaska Native participation in the electoral process. This is further complicated by the fact that not all Alaska Natives are shareholders in a Native corporation or enrolled tribal members and thus there is no one clear place from which to draw data. Second, Alaska is one of the states that have more registered voters than the actual voting age population (VAP). This makes statistical precision difficult. Third – and this may be true of many states – DOE districts, Native regional corporations, and census districts all have different boundaries, making it difficult to compare data sets.

[7] Although Alaska Natives are the only group of concern statewide, the Filipino population is apparently of sufficient size and concentration to be covered under the VRA on Kodiak Island only. 67 Fed. Reg. 48871, *Voting Rights Act Amendments of 1992, Determinations Under Section 203.*

A. "Rural" has a unique meaning in Alaska

What is now known as Alaska was purchased by the United States from Russia in 1867, but it did not become a state until 1959. At the time of statehood, its population was 226,167. Alaska has the largest land area of any state in the United States and if it were its own country, it would be the 19th largest nation in the world. Alaska also has the distinction of having the lowest population density in the United States at 1.1 people per square mile.[8] Rural Alaska is an entirely different animal than, for example, rural Nebraska or rural Montana. In Alaska, there are almost 200 Native villages and communities that are not accessible by road. They are accessible only by small propeller planes that also bring the mail and supplies. Most villages consist only of houses, a school, a church, and an office for the tribal council or municipality if there is one. There are no hotels or services of any kind, except for maybe a small store in someone's home. The populations are generally small, fewer than 300, and they still practice an ancient way of life in that they literally live off the land – fishing, hunting, and berry picking. Thus, "rural" in Alaska carries a unique meaning that provides important context for the voting issues detailed here.

Naturally, voting can be a very different experience in this kind of environment. In 2004, the local NBC affiliate KTUU aired a series of stories about voting in rural Alaska. One of these stories described an election in Kasigluk, a Yup'ik village fifteen minutes from Bethel by air. Kasigluk still does not have running water, so people pull what they need from the wells. The local election officer makes an announcement through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. because that is when she is taking the single polling machine to the other side of the river. At 11:30, the local election official collects the materials, packs up the ballot machine, and drives it by four-wheeler down to the river. The old village site, where some tribe members still reside, is on the other side of the river but there is no bridge, so the election officer loads the ballot machine and materials onto a boat and crosses over. When the weather is bad, this is no mean feat. The ballot machine is set up again at the school on the other side where the children recite the pledge of allegiance in Yup'ik. The principal makes an announcement on the radio that the ballot machine has arrived and the poll in Kasigluk is open. The DOE says there are about 150 communities like this one.[9]

B. The unusual settlement of Natives' land claims in 1971 impacts the political landscape

Not only do many Alaska Natives inhabit a unique geographic place in Alaska, they also have a unique place in the political landscape. In 1971, the Alaska Native Claims Settlement Act (ANCSA) terminated aboriginal title to lands throughout Alaska in exchange for a lump sum settlement of $1 billion and forty-four million acres of land.[10] That sum went mostly to thirteen newly established Native corporations – one for each of twelve regions in Alaska, and a

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[8] United States Census Bureau 2000.
[9] State of Alaska, *Help America Vote Act (HAVA) Plan*, 2005 Updated at 3.
[10] 43 U.S.C. § 1601 *et seq*.

thirteenth corporation for Native Alaskans who reside outside the state.[11] The entire State is divided into these twelve regional corporations, which correspond roughly to the different language and culture groups of Alaska Natives.[12] These Native corporations are state-chartered corporations whose shareholders are Alaska Natives who resided within that corporation's region as of the date of passage of ANCSA in 1971.[13] Because shareholders were limited to those alive at the time of ANCSA's passage, most Alaskans born after that date are not shareholders and have little relationship to their regional corporations.

The Native Tribes also continued to exist. Thus, ANCSA did not shift Alaska Natives into a corporate structure wholesale, but merely separated the Tribes from their land base (and the resulting settlement). Today, there are three different types of Native groups or organizations: (1) the 231 federally recognized Tribes; (2) the thirteen for-profit Native corporations created under ANCSA; and (3) twelve regional non-profit corporations created under ANCSA.

The boundaries of the twelve regional ANCSA corporations are not formal political boundaries, but serve more as boundaries for the provision of services and dividends from one's Native corporation. Alaska's internal political boundaries and regional governments are boroughs. Unlike most states, Alaska does not have counties. This resulted from Alaska's constitutional drafters' perception that the county system prevalent in "lower 48" states was flawed.[14] Thus, Alaska is divided into sixteen boroughs and a large area referred to as the unorganized borough.[15] Most of those who reside in boroughs receive services through the borough or

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[11] Scholars and Native leaders still debate the policy and economic effects and rationale of ANCSA. *See, e.g.*, Shannon D. Work, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, 66 Or. L. Rev. 195 ("the act has the potential to destroy the remaining vestiges of an entire culture"); *Holding Our Ground*, a radio documentary series featuring Alaska Natives (Perry Eaton of Kodiak: "I think that the passage of the land claims settlement act was a hallmark in American History. The uniqueness of the act perhaps is its own worst problem. And that, being the imposition of the corporate structure on a culturally different people." ALASKA NATIVE MAGAZINE, Nov/Dec 1985, *See* Steve Colt, *Alaska Natives and the "New Harpoon": Economic Performance of the ANCSA Regional Corporations*, INST. OF SOC. AND ECON. RESEARCH, 2001, at http://www.iser.uaa.alaska.edu/Publications/colt_newharpoon2.pdf (last visited December 12, 2005). (Colt concludes there was a "large variation in economic performance among Alaska Native corporations. […] The average performance of the group was poor, but several relative success stories stand out against the backdrop of several hundred million dollars in business losses.") Colt's study concentrates on the twenty years following establishment of the Native corporations. (http://www.ankn.uaf.edu/curriculum/ANCSA/HoldingOurGround/ (last visited Jan. 2, 2006)).

[12] A map of the state as divided into the twelve regional corporations is attached as Exhibit 1.

[13] The fact that those born after 1971 are mostly non-shareholders (unless they received shares by inheritance) has resulted in a youth population of non-shareholder Natives who receive no dividends and have little loyalty to the corporation from their region. Some estimates suggest that the number of non-shareholder Natives will surpass the shareholders within the next ten years.

[14] *See* L. Cotton, *Regional Government Options Study Delta-Ft. Greely Regional Education Attendance Area* at http://www.ci.delta-junction.ak.us/pdf_documents/11.2003 percent20burough percent20study.pdf (last visited December 12, 2005) ("A major drawback of other sub-state systems was the proliferation of government units with overlapping jurisdiction which too often resulted in confusion, inefficiency, and duplication of services. To avoid this problem, the writers of the state constitution hoped to devise a sub-state level of government which would '...provide for maximum local self-government with a minimum of local government units and to prevent duplication of tax-levying jurisdictions...' (Alaska State Constitution, Article X, Section One). The system was to have only two local governing bodies, cities and boroughs.")

[15] http://en.wikipedia.org/wiki/List_of_Alaska_boroughs_and_census_areas (visited Feb. 18, 2006).

municipal government or the regional non-profit corporations. Those who reside in the unorganized borough, which encompasses most of the Native areas, receive their services from their tribes or non-profit corporations. Because the State has withdrawn a lot of funding that used to be allocated to rural municipalities, an increasing number of municipalities have simply collapsed into the tribal governments; thus, the only government for hundreds of miles is sometimes the local Indian tribe.

C. Census data since 1980 show a growing but still disproportionately poor and undereducated alaska native population

The Census data reveals that Alaska's population, including the Alaska Native population, is increasing, but that Alaska Natives still lag behind non-Natives in many ways.

	1980	1990	2000
Total population	401,851[16]	550,043[17]	626,932.[18]
percent male / female	54 / 46	53 / 47	52 / 48
percent over 55	8	9	12.9
percent Alaska Native	16	15.6	19
percent who speak a language other than English	unavailable	17	14.3
percent that had lived in Alaska for at least 5 years	69	75	81

The 1990 Census also revealed that, although Alaska Natives resided in all areas of the State, they were fairly concentrated and comprised over half the population in eight areas: Bethel census area (84 percent), Dillingham census area (73 percent), Lake and Peninsula Borough (76 percent), Nome census area (74 percent), North Slope Borough (73 percent), Northwest Arctic Borough (85 percent), Wade Hampton census area (93 percent), and the Yukon-Koyukuk census area (56 percent).[19] Alaska Natives also continued to earn a lower annual income than all other groups, and less than half of what Whites earned in 1990.[20] Thus, in 1990, Alaska Natives had the lowest per-capita income of any group and constituted "the largest group of the total Alaskan population to live in poverty"; 21 percent of Alaska Natives lived in poverty.[21] Alaska Natives in the eight census areas listed above also had the highest unemployment rate in the state and the

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[16] Thomas A. Morehouse, *Alaska's Elections 1958-1984*, ISER Occasional Paper No. 17 (Anchorage 1985) p. 6.
[17] *Alaska Natives Commission Report Volume I*, available at http://www.alaskool.org/resources/anc/anc07.htm#top (visited January 18, 2006).
[18] The Census estimates that the 2004 population is 655,435.
[19] *Id.* at Demographic and Geographic Sketches of Alaska Natives; a map of the current Native concentrations is attached as Exhibit 7.
[20] *Id.*
[21] *Id.*

lowest level of education.[22] In the Wade Hampton census area for example, only 58 percent of the Native population had graduated from high school. At the time, 61 percent of Alaska Natives lived in "village Alaska," and only 32 percent lived in the major urban areas.[23]

The 2000 Census revealed that little had changed in the Alaska Native population. The Alaska Native population is now 19 percent, making it by far the largest minority population in the State, followed by African-Americans at 4.3 percent and Filipinos at 2 percent. Still a young population, Alaska's median age is 32.4 years.

The ISER recently concluded a very important study called "Status of Alaska Natives 2004." Based on Census 2000 data, it makes several important observations that show improvement in the status of Alaska Natives, but it also concludes that Alaska Natives still lag far behind the non-Natives in many areas. The report noted first that the Alaska Native population is growing. In 1990, there were approximately 95,000 Alaska Natives, but by 2000, that number had reached 120,000.[24] Although the Native population grew in both urban and rural areas, it grew faster in urban areas as the population seems to shift toward the cities.[25] At the time of statehood, in 1959, 70percent of the indigenous population resided in approximately 178 rural Native villages and towns.[26] Now, however, 43percent of Alaska Natives live in urban areas such as Anchorage, Fairbanks, or Juneau.[27] However, the populations of rural villages are also continuing to grow. Alaska Natives are also a very young people, as 44 percent are age 19 and under.

The statistics show improvements in some areas and stagnation in others. The number of unemployed Natives increased by 35 percent since the 1990 Census (less than half now have jobs) and their incomes remain at just 50–60 percent those of non-Natives. As a result, Alaska Natives are three times as likely as other Alaskans to be poor. Although the situation was much worse in 1990, still only 75 percent of rural homes have sanitation systems. Thirty-two communities in interior and western Alaska still do not have public sanitation systems at all, and a further twenty-three communities have sanitation that serves only 70 percent or less of that community. The good news in rural Alaska was the dramatic improvement in access to health care and the significant increase in the availability of quality housing. On the other hand, Alaska Natives' rate of Fetal Alcohol Spectrum Disorder doubled in the 1990s and the number of Alaska Native prisoners jumped by 50 percent; Alaska Natives now make up more than one-third of the prisoners but only one-fifth of the population.

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[22] *Id.*
[23] *Id.*
[24] Scott Goldsmith, Jane Angvik, Lance Howe, Alexandra Hill, and Linda Leask, *The Status of Alaska Natives Report 2004*, Volume I, ISER (Anchorage 2004) at 2.
[25] *Id.*
[26] Gordon Scott Harrison, *Electoral Behavior of Alaska Native Villages*, ISER Research Note G1 (Fairbanks 1970) at 2, n.3
[27] *Status of Alaska Natives, supra* note 24, at 2.

D. A significant number of Alaska Natives still speak their Native language and many have limited proficiency in English

There are 20 different languages still spoken in Alaska: Aleut, Alutiiq, Iñupiaq, Central Yup'ik, Siberian Yup'ik, Tsimshian, Haida, Tlingit, Eyak, Ahtna, Dena'ina, Deg Hit'an, Holikachuk, Upper Kuskokwim, Koyukon, Tanana, Tanacross, Upper Tanana, Gwich'in, and Han.[28] Some of these also have regional dialects. The largest groups of language speakers are Iñupiaq (more than 3,000 speakers), Siberian Yup'ik (about 1,100 speakers), and Central Yup'ik (about 10,000 speakers). Siberian Yup'ik and Central Yup'ik are particularly important here because they are still the primary language of many of the villages and the first language that children learn at home.[29] There are also Yup'ik and Iñupiaq immersion schools in Bethel, Barrow and Kotzebue.[30] In addition, at least three state school districts have bilingual or immersion programs.[31] Thus, there are many children and adults who still speak their native languages and even use them as their primary language. Moreover, maintaining and preserving these languages is critically important to the Native population because language expresses a culture's worldview, and is, according to the Alaska Native Languages Center, "the glue that sticks everything together."[32] The Lower Kuskokwim School District perhaps sums it up best in the title of its Yup'ik First Language Program: "Our language, our souls."[33]

Many of these Native language speakers also have limited English proficiency ("LEP"). For example, in the Bethel census area, which is a Yup'ik speaking area, the percentage of the Alaska Native VAP who are LEP is 21 percent. In the Wade Hampton census area, 12 percent of the Alaska Native VAP is LEP. In the North Slope Borough, an Inupiaq speaking area, 13 percent of the Alaska Native VAP is LEP.

II. History of Discrimination in Alaska

While the Alaska Native experience with the U.S. government, its agents, and its westward-migrating citizens differs in several respects from the experiences of Native Americans in the lower forty-eight United States, the effects of these interactions on Alaska Natives are uncannily similar. From the time of European and Euro-Americans' first exploration of Alaska, Alaska Natives suffered from epidemics brought in by fur traders, and one ethnic group, the Aleuts, was reduced to one-tenth its previous size over the course of sixty years[34] due to smallpox and other infections brought by the explorers. The discovery of gold in the 1880s hastened non-Native

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[28] http://www.uaf.edu/anlc/ (visited Jan.25, 2006). A map of the areas where these languages are spoken is attached as Exhibit 2.
[29] http://www.uaf.edu/anlc/langs/cy.html (visited Jan. 25, 2006).
[30] The Iñupiaq immersion school in Kotzebue is called Nikaitchuat Ilisagviat, and the Yup'ik immersion school in Bethel is called Ayaprun Elitnaurvik (www.yupik.org).
[31] Lower Kuskokwim School District (Yup'ik), Northwest Arctic Borough School District (Iñupiaq) and the North Slope Borough District (Iñupiaq).
[32] Interview with Larry Kaplan, Alaska Native Languages Center (Jan. 24, 2006).
[33] http://www.ankn.uaf.edu/Curriculum/Yupiaq/DelenaNorrisTull/ (visited Jan. 25, 2006).
[34] Aleutian Pribilof Islands Ass'n, *History & Culture – History* at http://www.apiai.com/history.asp?page=history (last visited December 11, 2005). Researchers estimate the population of Aleuts to have been 12,000-15,000 when Vitus Bering (employed by Russia) first sighted the Aleutian Islands in 1741. In 1800, the Aleut population was estimated to be 1,200.

settlement and accordingly increased conflict between Natives and the newcomers. In the early years of the twentieth century, the burgeoning territory passed laws limiting the ability of Alaska Natives to be citizens, participate in the political process, and even enter certain public establishments. During World War II, the Aleuts were forcibly relocated from their island homelands on Attu to Southeast Alaska where they were held in overcrowded "duration villages" with no electricity, plumbing, clean water or medical care.[35] Even after the war, they were never allowed to return, and the government permanently relocated them to the villages of Unalaska, Atka, and Nikolski.[36] Even post-war, there were still signs in stores and restaurants that read "No Natives Allowed" and "No Dogs or Indians."

In the early 1940s, a husband and wife pair, Roy and Elizabeth Peratrovich,[37] protested persistent discrimination in public places like restaurants, movie theaters, playgrounds, and swimming pools.[38] As a result of three years of lobbying, a trying day of testimony,[39] and a powerful speech by Elizabeth Peratrovich,[40] the Alaska Territorial Legislature considered and passed the Alaska Equal Rights Act of 1945. This was a first step to reverse the attitude characterized by territorial governor John G. Brady, who lamented that "for too many whites *Indian* was synonymous with *nigger*."[41]

The discrimination experienced by Alaska Natives extended into voting. The earliest voting laws applicable to Alaska Natives in Alaska imposed a burdensome and discriminatory pre-registration process on Natives seeking citizenship. Under the 1915 Act, "to define and establish the political status of certain Native Indians within the Territory of Alaska," Alaska Natives were rewarded with citizenship (and thus the right to vote) only after: (1) submitting an application to a U.S. government, territorial, or municipal school; (2) enduring an examination by a majority of the teachers of the school about the qualifications of the applicant "as to an intelligent exercise of

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[35] http://www.nps.gov/aleu/AleutInternmentAndRestitution.htm.
[36] *Id.*
[37] Grand President of the Alaska Native Brotherhood and Grand Vice President of the Alaska Native Sisterhood, respectively. The Alaska Native Brotherhood, established in 1912, was "an association that evolved into the first significant Native political organization in Alaska." Terence Cole, *Jim Crow in Alaska*: *the Passage of the Alaska Equal Rights Act of 1965,* Western Historical Quarterly 23 (November 1992) at 429-449.
[38] The discrimination included, *inter alia*, being barred from the Douglas Inn, a restaurant in Juneau, Alaska. In response to this discrimination, on December 30, 1941, Roy Peratrovich wrote then-territorial Governor of Alaska, Ernest Gruening, alluding to World War II and asking "in view of the present emergency, when unity is being stressed don't you think that it is very Un-American?" He continued by stressing that "all freedom loving people in our country were horrified" by German discrimination against Jews. Peratrovich also referred to Alaska Native servicemen: "In the present emergency our Native boys are being called upon to defend our beloved country, just as the White boys. There is no distinction being made there but yet when we try to patronize [some restaurants] we are told in most cases that Natives are not allowed." Central Council of Tlingit and Haida Indian Tribes of Alaska (CCTHITA), *A Recollection of Civil Rights Leader Elizabeth Peratrovich, 1911-1958*, August 1991, at 16.
[39] Senator Allen Shattuck vehemently opposed passage of the bill, claiming "who are these people, barely out of savagery, who want to associate with us whites with 5,000 years of recorded civilization behind us?"
[40] After a series of comments similar in tone to Sen. Shattuck's, thirty-four-year-old Elizabeth Peratrovich stood and gave a short but poignant and ultimately effective speech. As a result of her speech, the Senate passed the bill 11-5. Governor Gruening recalled "Had it not been for that beautiful Tlingit woman, Elizabeth Peratrovich, being on hand every day in the hallways, it (the anti-discrimination bill) would never have passed." CCTHITA, *A Recollection of Civil Rights Leader Elizabeth Peratrovich, supra* note 38, at 23.
[41] T. Hinckley, *Alaskan John G. Brady: Missionary, Businessman, Judge, and Governor, 1878-1918* (Columbus, 1982) at 136.

the obligations of suffrage, a total abandonment of any tribal customs or relationship, and the facts regarding the applicant's adoption of the habits of a civilized life"; (3) obtaining an endorsement by at least five white U.S. citizens "to the effect that such citizens have been personally acquainted with the life and habits of such Indian for a period of at least one year and that in their best judgement [*sic*] such Indian has abandoned all tribal customs and relationship, has adopted the ways and habits of a civilized life, and is duly qualified to exercise the rights, privileges, and obligations of citizenship"; (4) applying to the U.S. District Court for a certification that "such applicant forever renounces all tribal customs and relationships"; (5) receiving a notice of hearing issued by the district court judge; (6) posting the hearing notice and application in the post office nearest to his or her residence; and (7) obtaining a certificate of citizenship from the district court judge.

This law was ostensibly rendered obsolete nine years later, in 1924, when Congress conferred citizenship on "all noncitizen Indians born within the territorial limits of the United States."[42] However, the Territorial Legislature responded by enacting a literacy law the next year.[43] The measure required that "voters in territorial elections be able to read and write the English language."[44] This literacy test and its intended restriction of Native suffrage likely reflected the opinion of many whites at the time. The *Fairbanks Daily News-Miner*, a daily paper, published an editorial in 1926 entitled "Alaska–A White Man's Country" in which the editors insisted "notwithstanding the fact that the Indians outnumber us, this is a white man's country, and it must remain such."[45]

Alaska's constitution, which became operative with the Formal Declaration of Statehood on January 3, 1959, also included an English literacy requirement as a qualification for voting.[46] Alaska finally voted to repeal this provision of the constitution in 1970, five years prior to the enactment of Sections 203 and 4(f)(4). State Senator Gravel linked the repeal of the literacy requirement to the federal pressure associated with the enactment of the VRA of 1965: "We have seen that a measure of national leadership was required to guarantee the Constitutional right to vote of individuals who happened to be members of ethnic or racial groups traditionally

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[42] Indian Citizenship Act of June 2, 1924, 68 Cong. Ch. 233, 43 Stat. 253.

[43] One commentator described this law as "designed to limit Native voting." Cole, *Jim Crow in Alaska, supra* note 37 at 429-49.

[44] Stephen Haycox, *William Paul, Sr. and the Alaska Voters' Literacy Act of 1925*, Alaska History, Vol. 2, No. 1 (Winter 1986/87): 17-38 at http://www.alaskool.org/native_ed/articles/literacy_act/LiteracyTxt.html (last visited Dec. 12, 2005).

[45] Cole, *Jim Crow in Alaska,* note 37 at 429-49.

[46] AK. CONST. art V, § 1 currently reads: "Every citizen of the United States who is at least eighteen years of age, who meets registration residency requirements which may be prescribed by law, and who is qualified to vote under this article, may vote in any state or local election. A voter shall have been, immediately preceding the election, a thirty day resident of the election district in which he seeks to vote, except that for purposes of voting for President and Vice President of the United States other residency requirements may be prescribed by law. Additional voting qualifications may be prescribed by law for bond issue elections of political subdivisions. (Amended 1966, 1970 & 1972)." The original version included a provision requiring that "a person otherwise qualified to vote in state or local elections be able to read or speak the English language as a prerequisite for voting." This measure was repealed with a vote of 34,079 to 32, 578 on August 25, 1970, after HJR 51, introduced by Rep. Chancy Croft, placed Constitutional Amendment 2 on the 1970 ballot.

powerless within the state and federal political processes."[47] The repeal of the literacy requirement removed the final formal barrier to registration faced by Alaska Natives.

Alaska Natives also experienced discrimination in education. From the beginning of Alaska's history as a U.S. territory, the education of Alaska Natives was unequal. Steeped in the Social Darwinism of the turn of the twentieth century, the Bureau of Education of the Department of the Interior (DOI) established a segregated school system[48] that was later codified by Congress in the Nelson Act[49] of 1905. The Act divided responsibility for provision of public education between the territorial government, responsible for white children and children of "mixed blood who live a civilized life," and the federal government, which retained responsibility for educating Indian and Eskimo children. In schools for Alaska Native students, the Bureau advocated "English as the language of instruction, since it can […] advance national solidarity and provide the best conditions for individual and national progress."[50]

The state's first legal challenge to segregated public education took place in 1929, after two Native girls were expelled from the white public school in Ketchikan and ordered to attend the Native school in Saxman, a Native village four miles south of Ketchikan. The court reaffirmed the right of mixed-blood children to attend the school of their choice.[51] The segregation continued, however, with various reports throughout the 1930s and 1940s that Native students were denied access to public schools.

In the early twentieth century, a boarding school policy was instituted in Alaska. The DOI's Bureau of Education hoped to concentrate Alaska Natives into larger villages so that Natives' school-aged children could attend larger schools.[52] As a result of the official boarding school policy,[53] the state of Alaska did not build high schools in rural villages, which meant that Alaska

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[47] *Hearings* at 529.

[48] Stephen E. Cotton, *Alaska's "Molly Hootch Case": High Schools and the Village Voice*, Educational Research Quarterly, Volume 8 1984 number 4, p. 30 at http://www.alaskool.org/native_ed/law/mhootch_erq.html (last visited Jan. 2, 2006).

[49] Nelson Act: Alaska Roads, Schools, and Insane, Jan. 27, 1905, ch. 277, 33 Stat. 616. The full text of the Act is at http://www.alaskool.org/native_ed/law/nelson.html (last visited Dec. 12, 2005).

[50] Department of the Interior, Bureau of Education, *Education in the territories and dependencies* "What the Bureau of Education Stands For," Bulletin No. 12, 1919, at 53. An English-only policy was instituted by the Commissioner of Indian Affairs for all schools on Indian reservations (whether Government or mission schools) as of 1887. R. Spack, *America's Second Tongue: American Indian Education and the Ownership of English, 1860-1900*, University of Nebraska Press, Lincoln and London, 2002, at 33.

[51] Cole, *Jim Crow in Alaska*, *supra* note 37 at 429-449.

[52] "The concentration of the bureau's work on large villages […] will hasten the arrival of the day when the native of Alaska will take his place along with his white brother in the affairs of the Territory." DOI Bureau of Education, *Education in the territories and dependencies* "What the Bureau of Education Stands For," Bulletin No. 12, 1919, at 55. The explicit goal of destroying smaller Alaska Native villages was affirmed forty-seven years later in a report commissioned by the State of Alaska on Native Education. The Virginia-based consultant "concluded that 'movement to the larger centers of population is one essential ingredient in the adjustment and acculturization of the Alaskan native. Residence in urban areas appears to accelerate the breakdown of old village patterns, patterns which may retard the development of rural folk into a disciplined and reliable workforce'." Cited in Cotton, *Alaska's "Molly Hootch Case," supra* note 48 at 30.

[53] The policy was abandoned in 1970, when "officials in the Department of Education concluded that the regional secondary school program was failing to provide all the benefits originally envisaged, and had detrimental effects upon some of the students which outweighed the benefits they were deriving from the program." Agreement of

Native students had to travel hundreds of miles from home, sometimes out of state, to obtain a high school education.

In 1971, the Alaska Legal Services Corporation filed a class-action lawsuit, commonly known as "the Molly Hootch lawsuit" (Molly Hootch, the lead plaintiff, was a Yup'ik schoolgirl), which radically changed the face of educational opportunities for Alaska Natives. The plaintiffs claimed that by failing to build high schools in rural villages, the state of Alaska unconstitutionally discriminated against Alaska Native students in public education.[54] The state settled in 1976 and, per the consent decree, spent $136 million constructing schools in all rural villages with more than ten school-aged students.[55]

At the time the VRA was extended to Alaska in 1975, Alaska had abolished its literacy test but continued to conduct English-only elections. Alaska had made significant progress in reversing the practice and effect of discrimination against Alaska Natives with the passage of the Alaska Equal Rights Act in 1945, by repealing the literacy requirement in the Alaska Constitution, and as a result of passage of ANCSA in 1971. However, in 1975, Alaska Natives still lagged far behind non-Natives in almost all aspects including education, earnings, healthcare, and quality of life.

III. The 1975 Extension of the Voting Rights Act to Language Minorities

In 1975, Congress amended the VRA to remedy the discrimination faced by language minorities in voting. Congress determined whether a test or device had been used that effectively prevented language minorities from voting. The jurisdictions that had used such a test, including Alaska, became subject to new language minority provisions under Section 4(f)(4) of the VRA, as well as preclearance and observer provisions. In addition, Congress developed a second formula based on minority population size or percentage, Section 203, to provide for minority language assistance. Although the coverage formulas of 4(f)(4) and 203 are different, the types of language assistance they require are identical.

While only certain areas are covered by Section 203, *all* of Alaska is covered by Sections 4(f)(4) and 5. [56] The State, on the other hand, may be operating under the assumption that it is only covered by Sections 203 and 5.[57]

Settlement, *Tobeluk v. Lind* No. 72-2450, Superior Court of Alaska, at http://www.alaskool.org/native_ed/law/tobeluk.html (last visited Dec. 11, 2005).

[54] The plaintiffs alleged: (1) a pattern and practice of racial discrimination against Alaska Natives in violation of the Fourteenth Amendment of the U.S. Constitution, 42 U.S.C. §§1981, 3.983, 2000d, and the equal protection clause of the Alaska Constitution; and (2) violation of the plaintiffs' right to a public education, which is not justified by either a rational basis or a compelling state interest. In the consent decree, the parties stipulated that "members of the plaintiff class enrolled in the boarding program have experienced accelerated drop-out rates, psychological and social problems, including disruption of family life and loss of sense of identity, and failure to live up to educational potential." S. REP. NO. 94-295, at 29.

[55] $466,900,000 in 2005 dollars.

[56] The current coverage list can be found at: http://www.usdoj.gov/crt/voting/28cfr/55/28cfr55.htm#anchor55_4f4 (visited Jan. 31, 2006).

[57] Correspondence to Natalie Landreth from Whitney Brewster, Director of the Alaska DOE, dated January 5, 2006, outlined only areas covered by Section 203. Correspondence on file with the author.

Despite total 4(f)(4) coverage and partial 203 coverage , there has been little formal activity under these provisions in Alaska. There have been no reported cases on the minority language provisions. As set forth below, there seems to be little DOJ involvement in general, although it has stepped in at very important times to prevent some potentially unlawful redistricting plans. These are discussed in detail. No federal observers have been deployed to Alaska under Sections 6 or 9.[58] Alaska has suffered from this inattention.

This section explains the findings that prompted Congress to enact the language minority provisions. It then describes the remedy Congress fashioned and what the VRA mandates in covered jurisdictions like Alaska. Finally, this section outlines why Alaska specifically is covered under the language minority provisions.

A. Congress found that language minorities faced significant disadvantages at the polls

Ten years after enacting the VRA, Congress responded to the "systematic pattern of voting discrimination and exclusion against minority group citizens [whose] dominant language is other than English"[59] by amending the VRA to require covered jurisdictions to provide bilingual voting assistance. Congress found that "through the use of various practices and procedures, citizens of language minorities ha[d] been effectively excluded from participation in the electoral process."[60] For Congress, "printing or providing information only in English is *effective as a literacy test* in keeping [language minorities] from registering to vote or casting an effective ballot."[61] Congress concluded that remedial action was necessary to address language minorities' exclusion and alienation from the voting and political processes.

In coming to the conclusion that remedial action was necessary, the Subcommittee on Constitutional Rights of the Senate Judiciary Committee examined four distinct categories of evidence.[62] First, Congress considered evidence of barriers to registration faced by language minority citizens. Second, the Subcommittee examined past "outright exclusion and intimidation at the polls."[63] The U.S. Commission on Civil Rights (UCCR) had documented several instances of such exclusion at the polls: among other discriminatory practices, the Commission highlighted election officials' "failing to locate voters' names on precinct lists, location of polls

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[58] There has, however, been informal USDOJ "attorney coverage" in the 2004 primary, municipal/borough and general elections. This monitoring focused on compliance with Section 203 for the benefit of the Filipino population in Kodiak, Alaska.

[59] S. REP. NO. 94-295, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790.

[60] 42 U.S.C. § 1973aa-1a(a).

[61] B. Weinberg, L. Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL & CIV. RTS. L. Rev. 401, 411 (emphasis added).

[62] The U.S. Commission on Civil Rights' report, *The Voting Rights Act: Ten Years After* (1975), which preceded hearings on the reauthorization of Section 203 and largely guided Congress' work on bilingual voting assistance provisions, was organized into six substantive chapters, which reflect the same general themes as those used by Congress: (1) barriers to registration; (2) barriers to voting (which included the lack of bilingual ballots and other voting materials); (3) barriers to candidacy; (4) physical and economic subordination; (5) fair representation in state legislatures and Congress; and (6) fair representation in local governments.

[63] S. REP. NO. 94-295, at 26.

at places where minority voters feel unwelcome or uncomfortable, […] and the inadequacy of voting facilities."[64] Congress also found that language minority citizens face[d] "acts of physical, economic, and political intimidation"[65] when attempting to exercise their right to vote. The Subcommittee highlighted acts of economic intimidation (fear of job loss, threatened loss of loans, fear of interference with welfare check disbursement) against Mexican Americans, and deduced that "people whose jobs, credit, or housing depend on someone who wishes to keep them politically powerless are not likely to risk retaliation for asserting or acting on their own views."[66]

Third, the Subcommittee evaluated whether past discrimination had produced process failure and whether majority voters had changed election laws to dilute minority voting power. Congress concluded that "because of discrimination and economic dependence, and the fear that these have created, language minority citizens […] have not successfully challenged white political domination."[67] Congress highlighted the disparity in political representation in Texas, where Mexican-Americans comprised 16.4 percent of the population, but held only 2.5 percent of the elective positions.[68] Even if elected, Congress noted, minority representatives often faced changes to election laws intended to dilute minority political power. According to Congress, such changes were "widespread" in Texas "in the wake of recent emergence of minority attempts to exercise the right to vote."[69] After citing other examples, Congress concluded that "if a language minority person is not permitted to register, or if registered not allowed to vote, that person is obviously denied full participation in the political process."[70]

These first three categories of evidence largely mirrored the discriminatory practices against African-Americans that motivated Congress to enact the VRA in 1965. Indeed, in January 1975, the UCCR published "The Voting Rights Act: Ten Years After," a study of "the current status of minority voting rights in jurisdictions covered under the Voting Rights Act of 1965, as amended in 1970."[71] The UCCR concluded that "the problems encountered by Spanish speaking persons and Native Americans in covered jurisdictions are not dissimilar from those encountered by Southern blacks."[72] Given the UCCR's documentation of discriminatory practices against Hispanics and pressure from Texan and Californian representatives in Congress, the pressure to extend the protections of the VRA to Hispanics was significant.

Congress chose to do more than simply extend the VRA protections to Hispanic Americans; the Subcommittee on Constitutional Rights spent considerable time and effort amassing evidence for the fourth category of evidence: that *elections held only in English in itself constituted voting discrimination.* In order to establish that monolingual elections were discriminatory, the

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[64] *Id. See also* UCCR, *The VRA Ten Years After*, *supra* note 62, at 97.
[65] S. REP. NO. 94-295, at 26.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 27.
[69] *Id.*
[70] *Id.*
[71] UCCR, *The VRA Ten Years After*, *supra* note 62 at i, "Letter of Transmittal." The UCCR's staff "visited 54 jurisdictions in 10 States (Alabama, Arizona, California, Georgia, Louisiana, Mississippi, New York, North Carolina, South Carolina, and Virginia) between July and November 1974." *Id.* at v.
[72] *Id.* at 15-16.

Subcommittee focused its inquiry on three contributing factors: (a) the disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language; (b) discrimination faced by language minority citizens as a result of their disparate language skills; and (c) state and local governments' failure to intervene to protect the rights of language minorities.

The Subcommittee found that the widespread *de jure* public school segregation permitted prior to the Supreme Court's ruling in *Brown v. Board of Education*[73] severely hindered language minorities' ability to learn English.[74] According to Congress, the low elementary and high school graduation rates of language minorities[75] and consequent high illiteracy rates were "the product of the failure of state and local officials to afford equal educational opportunities to members of language minority groups."[76] This conclusion mirrored the conclusion of an earlier UCCR report on educational inequality: "the basic finding of this report is that minority students in the Southwest – Mexican Americans, blacks, American Indians – do not obtain the benefits of public education at a rate equal to that of their Anglo classmates."[77] Furthermore, not only had minority language citizens suffered disparate treatment in education and voting, the Subcommittee heard evidence that they had been "the target of discrimination in almost every facet of life."[78]

Finally, Congress found that state and local jurisdictions' recalcitrance in protecting language minorities against discrimination necessitated federal intervention. At the time of the 1975 hearings, state and local governments had been sued in ninety-seven civil and fourteen criminal suits initiated by the U.S. Department of Justice "involving the rights of Spanish-speaking citizens, Asian Americans, and American Indians."[79] Congress found that absent congressional intervention, state and local jurisdictions would "continue to adhere to a uniform language system"[80] and that their failures to accommodate languages other than English in the voting process "undermine[d] the voting rights of non-English speaking citizens and effectively

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[73] 347 U.S. 483 (1954).
[74] S. REP. NO. 94-295, at 28.
[75] The Subcommittee found that in Texas, more than 33 percent of the Mexican-American population had not completed the fifth grade.
[76] The Senate Report cites several examples of *de jure* segregation and/or the disparate treatment of language minority pupils and the court opinions striking them down. *See, e.g.*, *Guey Heung Lee v. Johnson*, 404 U.S. 1215 (1971) (upholding California desegregation plan and citing repealed California statute establishing separate schools for minority students); *Lau v. Nichols*, 414 U.S. 563 (1974) (failure to provide English language assistance to Chinese-American non-English students denies them an opportunity to participate in the public school program); *Natonabah v. Board of Education*, 355 F.Supp. 716 (D.N. Mex. 1973) (Navajo pupils denied equal educational opportunities); *Hootch v. State Operated School System,* 536 P.2d 793 (Alaska 1975) (remanding claim that Alaska school system unconstitutionally discriminated against Alaska Native students; the state of Alaska settled the lawsuit by committing to construct high schools in 126 rural communities.)
[77] S. REP. NO. 94-295, at 29.
[78] *Id.*
[79] *Id.* at 30. These suits, listed by Assistant Attorney General for Civil Rights, J. Stanley Pottinger, during his testimony before Congress, generally sought to "enjoin discrimination against language minorities in public schools, employment, voting rights, and penal institutions." *Hearings on the Extension of the Voting Rights Act of 1965*, 94th Cong. 588-592 (1975) (hereinafter *Hearings*).
[80] S. REP. NO. 94-295, at 30.

exclude[d] otherwise qualified voters from participating in elections."[81] Congress concluded that this evidence of discrimination against language minorities warranted federal intervention; and enacted Sections 203 and 4(f)(4) on August 6, 1975.

B. As a result of this discrimination, Congress enacted the language minority provisions

There are two different provisions that require assistance for language minorities: Sections 4(f)(4) and 203. Both mandate that the jurisdiction covered provide bilingual language assistance. Section 4(f)(4) also triggers coverage under the preclearance provisions described below.

Coverage under Section 4(f)(4) is based on whether the state or political subdivision maintained any "test or device"[82] in the 1964 election, the 1968 election, or the 1972 election, and the director of the Census determines that less than 50 percent of the VAP were registered to vote or that less than 50 percent of such persons did vote.[83] If this threshold is met, the state or political subdivision must provide all voting materials, defined broadly, in the language of the applicable minority group. Furthermore, jurisdictions covered by Section 4(f)(4) must also submit all proposed election law changes to the DOJ for preclearance under Section 5.

Section 203 has a different coverage formula, but the same effect. Jurisdictions are covered by Section 203 if the U.S. Census determines that: (1) more than 5 percent of the citizens of voting age of a given jurisdiction are members of a single language minority and are limited-English proficient (LEP);[84] (2) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are LEP;[85] *or* (3) in jurisdictions containing all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are LEP;[86] *and* (4) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.[87]

The language minority provisions prohibit covered jurisdictions from "providing voting materials only in the English language"[88] and mandate that voting materials be provided "in the language of the applicable minority group."[89] However, they include a curious provision for

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[81] *Id.*
[82] "Test or device" is defined as any requirement that a person (1) demonstrate the ability to read or understand, (2) demonstrate educational achievement or knowledge, (3) have good moral character, or (4) prove qualifications "by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b – (c). The statute also defines English-only elections as a test or device where more than 5 percent of the population is a member of a single language minority. 42 U.S.C. § 1973b – (f)(3).
[83] 42 U.S.C. § 1973b - (b)
[84] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I).
[85] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).
[86] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III).
[87] 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii). Per 42 U.S.C. § 1973aa-1a(b)(3)(E), "illiteracy means the failure to complete the 5th primary grade."
[88] 42 U.S.C. § 1973aa-1a(b)(1).
[89] 42 U.S.C. § 1973aa-1a(c).

unwritten languages: "*Provided,* That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives [sic] and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting." This clause becomes very important because, as explained below, Alaska claims it does not have to provide written materials because the Native languages are not written. Voting materials that have to be translated are broadly defined as "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots."[90]

C. Why Alaska was included in the language minority provisions

The congressional record reflects remarkably little debate on whether or why to include Alaska under the language minority provisions. Indeed, the more than 1000 pages of Senate hearings on the extension of the VRA include fewer than eleven pages on the voting rights of Alaska Natives.[91] This consisted of testimony by Alaska's two U.S. senators and its lieutenant governor, all of whom advocated against a federal bilingual voting assistance mandate. While Alaska's senior Senator Mike Gravel generally supported extension of the VRA, he declared a mandate to provide bilingual voting materials "a very specious attack on human nature."[92] Senator Gravel recognized the extent to which Alaska Native languages were spoken in Alaska, commenting that he "probably ha[d] to use an interpreter more than probably anybody else in the Congress"; however, he argued that "language is not a barrier for [Alaska Natives'] recognizing what is in their interest in voting"[93] and questioned Alaska's ability to comply with a bilingual voting assistance requirement because "there are some Native languages which are not written languages."[94] Alaska's then-junior senator, Ted Stevens, similarly protested the inclusion of Alaska Native languages in the extension of the VRA. In a personal letter to Senator Tunney, Chair of the Judiciary Subcommittee on Constitutional Rights, Senator Stevens wrote:

> John, there are twenty different Eskimo and Aleut dialects in the State of Alaska. A knowledge of one dialect is no assurance of an understanding of any one of the other 19. […] Writing systems for only a few of these languages have ever been developed, and those only recently. In some of the languages, there is no word for "Vote" and "Ballot." Most Natives are unable to read their language if it is written.
>
> Inclusion of Alaska under this legislation would be extremely burdensome. More importantly, there is no justification for such inclusion. No "test" or "device" is applied in Alaska as a prerequisite for voting. By Alaskan statute, assistance is provided to any voter with either a language or a physical disability. Plain and simple, Alaska does not discriminate against Alaska Natives in voting.[95]

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[90] 42 U.S.C. § 1973aa-1a(b)(3)(A).
[91] *Hearings* at 525-34; 942-43. There is a similar dearth of commentary on the language minority rights of Native Americans.
[92] *Id.* at 526.
[93] *Id*.
[94] *Id.* at 530.
[95] *Id.* at 942-43.

Finally, the Subcommittee heard from Lieutenant Governor Lowell Thomas, Jr., who requested that Alaska be exempted from inclusion in the prospective language assistance mandate because, per Alaska Statute 15.15.240, "Alaska provides assistance to any voter who desires help in reading or marking the ballot."[96] According to Lieutenant Governor Thomas, "many voters do ask for and receive assistance as provided in this section of the Alaska Statutes."[97]

Although the State's representatives denied that discrimination existed in voting in Alaska, in fact, Alaska Natives had experienced significant discrimination in almost every facet of life.

First, a voting test or device was administered in Alaska because it did have a provision in the state constitution that speaking English was a prerequisite to voting until 1970, and it had conducted English-only elections despite its diverse population.[98] Second, there was significant disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language. At the time the VRA was extended in 1975, only 2,400 Alaska Natives total had graduated from high school.[99] Furthermore, Alaska operated a segregated boarding school system for Alaska Natives, who had to choose between staying with their families and forgoing an education or leaving their families behind in order to get a diploma. The Senate Report on the VRA even noted these enormous educational disparities.[100] More broadly, as detailed above in section III, Alaska Natives had endured a long history of discrimination in their everyday lives. Alaska thus has a significant history of discrimination that made it very difficult for Alaska Natives to participate in the electoral process for many years.

IV. The Impact of the Voting Rights Act in Alaska

A. Alaska Natives continue to face discrimination in voting and in other areas

As a result of Alaska's non-compliance, very little has changed for Alaska Natives since the extension of the VRA in 1975. While the actual English language requirement has disappeared from the state constitution, Alaska still conducts English-only elections despite its large Alaska Native population. Further, the large minority language-speaking Alaska Native population also has much higher poverty rates and much less education than their non-Native counterparts. Thus, many of the concerns present in 1975 remain just as salient today.

Because of the ongoing discrimination in many areas, Alaska still meets the criteria for coverage under both formulas in the language minority provisions. With respect to Section 4(f)(4), coverage under 4(f)(4) is based on whether: (1) the state or political subdivision maintained any "test or device"[101] in the 1964 election, the 1968 election or the 1972 election, and (2) the

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[96] *Id.* at 532. *See also* AK. STAT. 15.15.240 (2005).
[97] *Hearings* at 532.
[98] See Section III above.
[99] Goldsmith, *Status of Alaska Natives*, *supra* note 25, at 14.
[100] S. REP. NO. 94-295, at 29.
[101] "Test or device" is defined as any requirement that a person (1) demonstrate the ability to read or understand, (2) demonstrate educational achievement or knowledge, (3) have good moral character, or (4) prove qualifications "by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b – (c). The statute also defines

director of the Census determines that less than 50 percent of the VAP were registered to vote or that less than 50 percent of such persons did vote.[102] As the three benchmark elections in the statute have not changed, Alaska was and remains covered under these criteria. However, if the formula were based instead on more recent elections, the evidence shows that Alaska would still be covered. That is, Alaska still employs a test or device in the form of English-only elections, and only about 50 percent of the VAP were registered to vote or did vote in more recent elections.

With respect to Section 203, the VRA designates jurisdictions as "covered" if the U.S. Census determines that: (1) more than 5 percent of the citizens of voting age of a given jurisdiction are members of a single language minority and are LEP;[103] (2) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are LEP;[104] *or* (3) in jurisdictions containing all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are LEP,[105] *and* (4) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.[106]

The Census Bureau has already made these determinations as set forth in the chart above, and those (unreviewable) determinations appear to be correct. However, some examples derived on that census data will help illustrate the extent of the problem.

In the Bethel Census area, which is a Yup'ik speaking area, the percentage of the Alaska Native VAP who are limited-English proficient, or LEP, is 21 percent and the illiteracy rate of Alaska Natives is more than 10 percent. In the Wade Hampton Census Area, 12 percent of the Alaska Native VAP is LEP and the illiteracy rate among Alaska Natives is 14 percent. In the North Slope Borough, and Inupiaq speaking area, 13 percent of the Alaska Native VAP is LEP and 7 percent is illiterate. Therefore, Alaska still meets, and indeed far exceeds in most places, the requirements of the coverage formula for Section 203.

1. Voter registration and turnout are relatively high in Alaska, but determining turnout specifically among Alaska Natives is difficult

Alaska has a large number of registered voters, and in fact, is one of a few states to have a larger number of registered voters (475,000) than the actual VAP (436,215).[107] The State attributes this to Alaska Statute Title 15 allowing people who are "temporarily out of state" to remain registered to vote if they intend to return.[108] The high registration is also due in part to the fact

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English-only elections as a test or device where more than 5 percent of the population is a member of a single language minority. 42 U.S.C. § 1973b – (f)(3).

[102] 42 U.S.C. § 1973b - (b)

[103] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I).

[104] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).

[105] 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III).

[106] 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii). Per 42 U.S.C. § 1973aa-1a(b)(3)(E), "illiteracy means the failure to complete the 5th primary grade."

[107] State of Alaska, *HAVA State Plan*, 2005 Updated at 1.

[108] State of Alaska, *HAVA State Plan*, 2005 Updated at 1.

that voter registration is one way to establish residency for the purposes of receiving the Alaska Permanent Fund Dividend.[109] Alaska requires that voters register thirty days before an election, with the exception that a voter may register on Election Day and cast a vote only for President. Accordingly, Alaska seems to have always maintained a respectable level of turnout of its VAP. It has fluctuated over the years, but hovers from 50 to 60 percent.[110] Statewide voter turnout was approximately 69 percent of the VAP in the 2004 presidential election, 66 percent in the 2000 election, and 52 percent in 1990.[111] Turnout in the largest urban area of Anchorage averages 54 percent.[112]

Alaska Native turnout is more difficult to discern. Some sources have contended that turnout in rural (Native) Alaska tends to be fairly high, between 9 and 15 percent higher than in Anchorage.[113] Because the State does not collect racial data that would reveal turnout among Native voters both in urban and rural areas, Native turnout instead has been measured by the corporations themselves who have detailed, updated shareholder lists and can crosscheck them against the voter rolls to determine exactly how many shareholders voted. However, because only about half of Natives are shareholders and they also tend to be older (thus more likely to vote), this data may overstate turnout. Nevertheless, the information compiled by the Native corporations reveals that Native turnout in rural areas tends to be about 61 percent, while Native turnout in parts of Anchorage is as low as 36 percent.[114] Although the 61 percent is an average, some areas such as Koyuk and Brevig Mission have voter turnout of above 70 percent, while others such as Napaskiak have a voter turnout of only 37 percent.[115]

Because the turnout compiled by Native corporations only includes about half of the Native population and does not include the young Native population (who are not generally shareholders), there was a concern that this turnout data might be overstated. To get an estimate (a second opinion) of the percentage turnout among Alaska Natives, the authors compared two sets of data. First, they compiled the list of communities in Alaska with ≥ 80 percent all-or part-Native population per the 2000 Census.[116] Second, they calculated the percentage turnout in the

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[109] Alaska distributes a share of its Permanent Fund investment earnings to every qualified Alaska resident each year. The Permanent Fund was created because "[d]uring construction of the Trans-Alaska Pipeline in the 1970's, oil companies flooded state coffers with money paid for leases to explore and secure drilling rights. The Legislature spent all $900 million of that initial lease money within a few years. Alaskans […] voted in 1976 to amend the constitution to put at least 25 percent of the oil money into a dedicated fund: the Permanent Fund. This would save money for future generations, which would no longer have oil as a source of income. The 9th Alaska Legislature […] placed [the Permanent Fund] as a ballot proposition in the 1976 General Election. It passed by a margin of two to one." From the Alaska Permanent Fund Corporation *Frequently Asked Questions* at http://www.apfc.org/theapfc/faq.cfm (last visited Dec. 29, 2005).

[110] Morehouse, *supra* note 16, at 13 (derived from DOE data).

[111] First American Education Project, *Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004 and the Results Achieved,* at 11.

[112] *Id*.

[113] *Id.* at 10.

[114] *Id.* at 10.

[115] *Id.* at 12.

[116] This information is based on data obtained from the Alaska Community Database maintained by the Department of Commerce, Community and Economic Development's Division of Community Advocacy. The disclaimer accompanying the database is as follows: "This department does not intend that the communities listed in the Commerce Alaska Community Database should be construed as a definitive listing of Alaska communities. There is

1992, 1996, 2000, and 2004 elections for those villages with both a ≥ 80 percent all or part Native population and a polling place.[117] (For villages with no polling place, no data is available.) The resulting turnout percentages are somewhat different. Native villages with polling places had a great variation of turnout, but averaged only 50 percent, compared to the statewide average of 66.6 percent. Although the 2004 election featured a hotly contested Senate race, some Native villages had turnout as low as 12 percent. As noted above, however, some Native villages had very high turnout of 70 percent or more. In the 2002 election, which featured a highly charged gubernatorial race, the average turnout among Native villages was 43.39 percent. Thus, it seems that even in 2000, only about 50 percent (or slightly more) of Alaska Natives actually voted.

It is very important to note that twenty-four Native villages did not even have polling places in 2004. The combined VAP of these villages is approximately 1,500; thus, more than 1,500 Alaska Native voters did not even have the opportunity to vote in person. Moreover, Alaska's elections are notoriously close; the Governor's race in 1996, for example, was decided by only 536 votes.

2. Barriers to voting, particularly English-only elections, still exist for Alaska Natives

In addition to the fact that Alaska still falls under the coverage formulas for both language minority provisions, there is strong evidence that many of the concerns that existed in 1975 are still present. When Congress was considering the extension of the VRA to language minorities in 1975, it identified four categories of evidence relevant to its findings that language minorities deserved the protection afforded by Section 203: (1) barriers to registration; (2) "outright exclusion and intimidation at the polls;"[118] (3) process failure and measures designed to dilute the minority vote; and (4) evidence that monolingual elections in themselves constituted discrimination because of: (a) the disparity in educational opportunities for language minorities that had created (or contributed to) a disparate mastery of the English language; (b) discrimination faced by language minority citizens as a result of their disparate language skills, and (c) state and local governments' failure to intervene to protect the rights of language minorities. The first, third, and fourth categories are still highly relevant.

First, although there are no longer formal or direct barriers to registration such as the literacy tests of old, there are still barriers. One obvious issue is that registration materials are still printed only in English, thus placing at a disadvantage all of the Alaska Natives who have limited or no knowledge of English. As noted above, this is a large number of people, especially

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no official definition of the term "community" in Alaska, and this department does not generally make formal determinations regarding whether or not a specific group of persons comprises a community. Communities currently listed in our database include all legally incorporated municipalities (cities and boroughs), all federally-recognized Native villages and all "Census-Designated Places" (recognized by the 2000 U.S. Census). Our list also includes a number of other "communities" that do not come under these preceding classifications. There are numerous "place name" locations, named municipal neighborhoods and historical locales that are not included in the current community list."

[117] This information is available on the lieutenant governor's website, http://ltgov.state.ak.us/elections/returns.php.

[118] S. REP. NO. 94-295, at 26.

Central and Siberian Yup'ik and Inupiaq speakers.[119] Congress noted during the hearings that English-only elections are as effective as a literacy test, and in this regard, Alaska maintains a barrier to registration.

In addition, there is a re-registration requirement that disproportionately affects Alaska Natives. All Alaskans who relocate to a new election district must re-register in their new district at least thirty days prior to a state-run election.[120] While this may not be uncommon, Alaska is unique in that the in-state population moves from the villages (Native) to the urban (non-Native) areas, not the other way around. According to the ISER's "Status of Alaska Natives" report, "[t]he number of 'recent arrivals' in urban areas in 2000 indicates a very mobile Native population in those areas. For example, of the 24,812 Alaska Natives living in Anchorage in 2000, 25 percent reported living elsewhere five years earlier." Thus, while the re-registration requirement does not apply only to Alaska Natives, it disproportionately affects them because they are the most mobile population. On Election Day, individuals who thought they were registered because they had done so in their own village would be surprised to go to their new polling place in Anchorage and discover they could not vote.

With respect to the third category—process failure and dilution of the minority vote—there is less evidence of discrimination. While no Alaska Native has ever held statewide office,[121] the number of Alaska Natives in the Alaska State Legislature appears to be almost proportional to the Alaska Native VAP.[122] The Native population is 19 percent statewide and 12.5 percent of the State House is Alaska Native, as is 15 percent of the State Senate.[123] On the other hand, there have been some attempts to dilute the Native vote since 1982. Fortunately, these measures were discovered by DOJ during the preclearance procedure and, thus, did not take effect or were adjusted to assuage DOJ's concerns. These are discussed more fully below.

Most of the evidence gathered applies to the fourth category, English-only elections. The largely monolingual elections in Alaska clearly have impacted Alaska Natives' ability to exercise their right to vote. In addition to the tribal surveys, evidence of continued use of languages other than English, and self-help measures Alaska Natives resorted to described below, several Alaska

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[119] See Exhibit 2 for a map of these language areas.

[120] AK. STAT. 15.05.020(8): "The address of a voter as it appears on the official voter registration record is presumptive evidence of the person's voting residence. This presumption is negated only if the voter notifies the director in writing of a change of voting residence." A voter who was originally registered outside the district who later moved within the district and never updated his official voter residence address may not vote within the district. *Fischer v. Stout* (Alaska 1987) 741 P.2d 217.

[121] Perhaps the closest an Alaska Native has come to holding statewide office was Emil Notti, a pioneer of the Alaska Native land claims movement, who ran for U.S. House in 1973. In addition, the current Lieutenant Governor, Loren Leman, is of Native ancestry.

[122] The 24th Alaska Legislature includes five Alaska Native representatives (out of forty total, for a representation of 12.5 percent) and three Alaska Native senators (out of twenty total, for a representation of 15 percent). The total Alaska Native population in the 2000 U.S. Census was 119,241 (98,043 of whom self-identified as Alaska Native only, and 21,198 of whom self-identified as Alaska Native and Other Race.) The total estimated population of Alaska in 2000 was 626,932; Alaska Natives make up 19 percent of the total population.

[123] There are three Alaska Native Senators: Al Kookesh (District C); Lyman Hoffman (District S); and Donald Olson (District T). There are five Alaska Native Representatives: Bill Thomas (District 5); Woodie Salmon (District 6); Carl Moses (District 37); Mary Kapsner (District 38); and Reggie Joule (District 40). All of the representatives are in districts where an Alaska Native also holds the Senate seat.

Natives interviewed for this report indicated that they had been confused by initiatives on the ballot over the years.

Nick Jackson, an Elder from Gulkana, and Elmer Marshall from the Native Village of Tazlina, both of which are in the Valdez-Cordova census area, said that the ballot language was confusing. They "make it sound like you vote for it when you're voting against it." Furthermore, Marshall indicated that "Elders vote it wrong because it's confusing." Several other Elders complained that it was hard to understand what they were voting for on ballot initiatives. Many Alaska Natives are clearly at a disadvantage in the English-only elections.

3. English-only elections are discriminatory as long as disparities in educational opportunities for Alaska Natives and non-Natives persist

In considering English-only elections, Congress was interested in evidence that monolingual elections in themselves constituted discrimination because the disparity in educational opportunities for language minorities had created (or contributed to) a disparate mastery of the English language. The educational opportunities afforded to Alaska Natives have dramatically improved since 1975, but there is evidence that there remain disparities in educational opportunities for Alaska Natives and that Alaska Natives still lag behind non-Natives.

Recent research shows significant discrepancies in educational performance on standardized tests between Alaska Natives and non-Natives still remain. In evaluating Alaska Native students' performance on the Alaska Benchmark Examinations,[124] the Alaska Native Policy Center concluded "statewide, significantly lower percentages of Alaska Native students were proficient in each of the three subjects and at each of the three grade levels, when compared to all other students."[125] Only 40–60 percent of Alaska Native students pass the standardized tests in reading, writing and math, compared to 70–80 percent of non-Native students. More specifically, the results of the Statewide Spring 2005 High School Graduation Qualifying Exam (HSGQE) show that only 19.5 percent of Alaska Native graduating seniors were proficient in reading comprehension.[126] *That means 80.5 percent of the new Alaska Native voters may not be able to read and understand the ballot.*

Similarly, although Alaska Natives believe that graduation from high school is "highly important,"[127] graduation rates for Alaska Natives are persistently far lower than for non-Natives. In the early 1970s, only 2,200 Alaska Natives had graduated from high school. This is incredibly important because these people are now the elder citizens in the remotest villages.

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[124] "The Alaska Benchmark Examinations measure whether students are achieving statewide academic standards in reading, writing, and math. Students take the Alaska Benchmark Examinations in three different grades (Grade 3, 6, and 8) during their public school careers." Alaska Native Policy Center, *Alaska K-12 Education Indicators 2004*, Executive Summary, p. 5, at http://www.firstalaskans.org/545.cfm (last visited Jan. 2, 2006).

[125] *Id*.

[126] The full statewide spring 2005 HSGQE results are attached as Exhibit 3.

[127] McDowell Group, *Alaska Native Education Study: A Statewide Survey of Alaska Native Values and Opinions Regarding Education in Alaska*, Section 4 p. 1, at http://www.firstalaskans.org/460.cfm (last visited Jan. 2, 2006) "Virtually all Alaska Natives believe graduation from high school, college, and vocational/technical school is highly important."

This population is still a significant component of the Alaska Native VAP, yet the vast majority did not graduate high school, and they are the most likely to have limited English proficiency. They are at a significant disadvantage voting in English-only elections.

Fortunately, graduation rates have risen dramatically. After the Molly Hootch case, schools were constructed in every rural community with more than ten students, finally giving everyone access to a high school education. According to the 2000 Census, more than 53,000 Alaska Natives have now graduated high school. This amounts to nearly 75 percent of all Alaska Natives over 18, but it is still short of the 90 percent high school graduation rate of other Alaskans. According to the Alaska Native Policy Center:

> In the 2003–2004 school year, the statewide graduation rate for all students was 62.9 percent. Alaska Native students graduated at a rate of 47.5 percent. Across all regions, Alaska Natives consistently have lower graduation rates than all other ethnicities combined.[128]

Drop-out rates among Native students unfortunately increased in the 1990s, and they are double the drop-out rates of other Alaskans. Quite simply, less than half of Alaska Native students meant to graduate in 2004 actually made it to graduation.

In addition to the fact that Alaska Natives exhibit lower academic achievement and have a lower mastery of the English language, a judge recently held that the state still discriminates in its funding of rural schools. In *Kasayulie v. State of Alaska*, Superior Court Judge John Reese held that the Education Clause of the Alaska Constitution[129] "places an affirmative duty on the state to provide public education"[130] and that the discrepancy in funding for school construction in urban and rural Alaska unconstitutionally discriminated against Alaska Natives. While a remedial order has not yet been issued in the *Kasayulie* case, the Alaska State Legislature responded by increasing spending on rural school construction. Furthermore, education advocates have filed a subsequent suit challenging the adequacy and fairness of the state's public school funding. The plaintiffs in *Moore v. State of Alaska* allege that "every Alaskan child receives an inadequate education because the funding of that education is grossly inadequate."[131] *Moore* was filed on August 9, 2004, and is currently pending trial.

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[128] Alaska Native Policy Center, *supra* note 124, at 9.

[129] "The legislature shall by general law establish and maintain a system of public schools open to all children of the state." AK. CONST. art. VII sec. I (1998).

[130] *Kasayulie v. State Of Alaska*, No. 3AN-97-3782 CIV, Order Granting Plaintiffs' Motions for Partial Summary Judgment on Facilities Funding, Sept. 1, 1999, at http://www.alaskabar.org/opinions/124.html (last visited Jan. 1, 2006).

[131] *Moore v. State of Alaska*, Case No. 3AN-04-9756 Civ., First Amended Complaint for Declaratory and Injunctive Relief, p. 2, at http://www.neaalaska.org/funding/First percent20amended percent20complaintsep04.pdf (last visited Jan. 1, 2006).

4. Alaska Natives fare worse economically than non-Natives

The signs preventing "Indians and dogs" from entering businesses in Alaska have come down. However, Alaska Natives' economic well-being still "lag[s] behind non-Natives'."[132] According to the ISER, "[t]he share of the Native population working is smaller, they work on average fewer hours and weeks, and their average wages are lower. Those differences are reflected in lower cash incomes and higher poverty rates among Natives than non-Natives."[133] Thus, not only do Alaska Natives have a lower quality education due in part to funding disparities, perform far more poorly than other ethnicities on standardized tests, and graduate far less often than other ethnicities, they also have lower incomes and higher poverty rates. Thus, Congress' concerns about educational opportunity and performance remain highly relevant in the case of Alaska Natives.

Finally, the state seems to have failed to intervene to protect the rights of language minorities. The most compelling illustration of this is the failure to comply fully with the oral and written language assistance mandates in Sections 203 and 4(f)(4) of the VRA, as discussed below.

In addition, the Alaskan electorate has shown itself to be unsympathetic to language minority rights: in 1998, a constitutional amendment passed two to one to require the government to conduct official business in English. Although this initiative was ruled unconstitutional in 2002 because it violated the free speech guarantees of the Alaska Constitution,[134] the state then moved to sever the policy portion of the law from the implementing provisions. In other words, the state asked the court to preserve the policy that English is the official language of the state of Alaska. The Alaska Supreme Court is considering whether the policy alone can be severed and preserved.[135] Such a policy could of course interfere with the State's obligation to provide minority language assistance under the VRA. Indeed, the proponents of the English-only measure specifically opposed printing forms and materials in multiple languages, arguing "millions of taxpayer dollars are wasted on such programs."[136]

B. Alaska has failed to comply with the minority language provisions

Since its inclusion in the VRA in 1975, Alaska appears to have not complied with its obligation to provide voting assistance in Alaska Native languages. While it provides intermittent oral assistance, it does not provide any written materials for the thousands of Alaska Natives. At least part of this failure can be attributed to an unclear mandate in the current laws and regulations.

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[132] Goldsmith, *Status of Alaska Natives, supra* note 25, Chapter 4 at 1.
[133] *Id.*
[134] *Kritz v. State of Alaska*, No. 3DI99-12 CI, (3d Dist. Mar. 22, 2002).
[135] *Alakayak v. State,* Case No. 3AN-99-4488 CI (awaiting a decision).
[136] Susan Fischetti, *Alaskans for a Common Language*, Statement, *POINT COUNTERPOINT, Make English Alaska's Official Language?, Official language practical reins in bureaucracy,* Anchorage Daily News, April 4, 2004.

The decision about which of these languages to include for purposes of the language provisions in the VRA is made by the director of the Census.[137] The last determination was issued on July 26, 2002[138] and listed the jurisdictions in Alaska covered by Section 203. In 2002, the director of the Census designated fourteen census areas, some of which match borough boundaries, as covered areas for the purposes of Section 203.[139] These are listed below:

COVERAGE OF LANGUAGE MINORITIES IN ALASKA UNDER SECTION 203[140]

Census Area	Total Population	Native Population	Percent Native	Group
Aleutian West	5,465	1,232	22.5 percent	Aleut
Bethel	16,006	13,680	85.5 percent	Eskimo, American Indian (tribe not specified), American Indian (Other Tribe specified)
Denali Borough	1,893	162	8.6 percent	Athabascan
Dillingham	4,922	3,753	76.2 percent	Eskimo, American Indian (other tribe specified), Native (other group specified)
Kenai Peninsula Borough	49,691	5,065	10.2 percent	American Indian (tribe not specified), Aleut
Kodiak Island Borough	13,913	2,452	17.6 percent	Filipino[141]
Lake and Peninsula Borough	1,823	1,453	79.7 percent	Athabascan, Aleut, Eskimo
Nome	9,169	7,274	79.1 percent	Eskimo
North Slope Borough	7,385	5,453	73.8 percent	American Indian (tribe not specified), Eskimo
Northwest Arctic Borough	7,208	6,181	85.8 percent	Eskimo, Alaska Native (Other group specified)
Southeast Fairbanks	6,174	980	15.9	Athabascan, Native (Other

[137] 42 U.S.C. § 1973aa-1a(b)(2)(A).
[138] 67 Fed. Reg. 48871, *Voting Rights Act Amendments of 1992, Determinations Under Section 203*.
[139] 67 Fed. Reg. 48872.
[140] The covered jurisdictions and "group" designation is taken from 67 Fed. Reg. at 48872; the data on total population, Native population, and percent Native population is taking from the Institute of Social and Economic Research (ISER), *The Status of Alaska Natives Report 2004* p. 2-33, at http://www.iser.uaa.alaska.edu/Publications/aknativestatusch2.pdf (last visited Dec. 12, 2005).
[141] Kodiak has a disproportionately large Filipino population compared with the rest of Alaska (the population of Kodiak is 16 percent Asian, according to the 2000 Census, as compared with 4 percent in Alaska as a whole.) Filipinos immigrated to Alaska in the first half of the twentieth century to work in the fishing industry; most Filipinos in Kodiak are still employed in this industry. For a history of Filipino-Americans in Alaska, see T. Buchholdt, *Filipinos in Alaska: 1788-1958*, 1996.

			percent	group specified)
Valdez-Cordova	10,195	1,767	17.3 percent	Athabascan
Wade Hampton	7,028	6,673	94.9 percent	Eskimo, American Indian (Chickasaw), American Indian (tribe not specified)
Yukon-Koyukuk	6,551	4,877	74.4 percent	Athabascan, Eskimo, American Indian (Other Tribe specified.)
Total/average	**147,423**	**61,002**	**Average: 52.9 percent**	

1. The Native groups identified by the Census Bureau for purposes of Alaska's compliance with Section 203 do not correspond to Alaska's twenty language groups

The determination specifies that as of July 2002, "those jurisdictions that are listed as covered by Section 203 have a legal obligation to provide the minority language assistance prescribed by Section 203 of the Act."[142] Although this mandate may seem clear to those not familiar with Alaska Natives and their languages, the "group" identifier is somewhat vague. For example, if one compares the above chart to the list of 20 languages spoken in Alaska (see Exhibit 2), "Eskimo" and "Athabascan" are nowhere to be found. Each arguably refers to or includes more than one language, although the DOE could with effort ascertain that the "Eskimo" group included in Section 203 coverage refers to the predominant ethnic group in the region, Central Yup'ik.[143] For the Wade Hampton census area, the bureau lists three "Groups": "Eskimo," "American Indian (Chickasaw)," and "American Indian (Other Tribe specified)." The inclusion of Chickasaw is perplexing as there are next to no Chickasaw in this region; according to the state legislator from that region, the only Chickasaw is the school superintendent and his family.[144] Assuming the number of people self-identifying as Chickasaw did not equal 5 percent of the population of the census area, the bureau may have misapplied the Section 203 formula.

However, it is the state's burden to determine what the census language determinations refer to, and this can be done with little difficulty. The state can, for example, call upon the expertise of the Alaska Native Language Center,[145] as was done for this report, to ascertain what the census determinations refer to and where language assistance would be most helpful. The census data itself also shows where rates of LEP and illiteracy are highest and the State can also rely on this to determine where assistance is needed and in what languages.

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[142] 67 Fed. Reg. 48872.
[143] The term "Eskimo" could refer to Inupiaq or Yup'ik Eskimos, among others.
[144] Personal interview with Rep. Mary Kapsner (Dec. 30, 2005).
[145] http://www.uaf.edu/anlc (visited Jan. 25, 2006)

2. Interviews with Native voters and surveys reveal that even oral assistance is not always available

The State has been continuously covered by the minority language provisions since 1975, yet many residents of rural Alaska indicate that there is no or only intermittent language assistance. In interviews conducted with Alaska Natives in October 2005, several residents located within one of the fourteen 203-covered jurisdictions in Alaska indicated that assistance was not available in their Native language.[146] According to a ninety-one-year-old Elder[147] from Beaver, Alaska,[148] who was raised speaking Gwich'in, "Everybody when I was a child growing up […] talk Gwich'in, nobody talk English." Now, however, the Elder says the poll workers in Beaver speak only English. Similarly, Lillie Tritt, a seventy-four year-old from Venetie, said that no poll workers in her nearby village of Venetie[149] speak Gwich'in. Sidney Huntington, a ninety year-old from Galena,[150] indicated that the poll workers in Galena do not speak the Native language. Nick Jackson and Elmer Marshall indicated that there was no one in Gakona, Glennallen, or Copper Center (the three nearest polling places to their villages) who spoke their Native language. Susanna Horn of St. Michael[151] said the election supervisor in her polling place "doesn't know any Eskimo words" even though he is a Yup'ik Eskimo.

Surveys distributed to tribes throughout Alaska also showed that there is only intermittent language assistance readily available.[152] Nulato reported that none of the poll workers spoke the Native language, Koyukon.[153] Chevak, a Yup'ik community, also reported there were no Native language speakers at their polls. Kotzebue reported that at least one poll worker spoke Iñupiaq, as did Akiak, a Central Yup'ik community, and Hughes and Allakaket, both Koyukon speaking villages. As a result of the inconsistent language assistance, many Alaska Natives resort to self-help. Some local speakers of the Native language provide assistance to friends and family

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[146] Unless otherwise indicated, all quotations of individuals in this report are based on personal interviews conducted October 17-19, 2005, in Fairbanks, Alaska during the Alaska Federation of Natives' (AFNs') Youth and Elder Conference.

[147] The term "Elder" is commonly used in Alaska to refer to Elderly Alaska Natives who, in most Alaska Native cultures, are held in high respect. As the Alaska Native Heritage Center explains, "Within Native culture, children were taught to give their 'first' bird or animal kill, a bucket of berries or something that they made to an Elder. Today in many villages, the first salmon or animal killed is still given to the Elders of the community. […] Elders have shared their values, traditional knowledge and have cared for us." Elders were interviewed for this paper because they are generally more likely to speak Alaska Native languages and, thus, have a greater need for bilingual language assistance.

[148] In the Yukon-Koyukuk Census Area, a covered jurisdiction.

[149] *Id.*

[150] *Id.*

[151] In the Nome Census Area, a covered jurisdiction.

[152] On file with the authors.

[153] Nulato also indicated they did not see a need for a Koyukon-Athabascan speaker at their poll.

members who need help understanding the ballot,[154] and some non-governmental organizations also provide assistance in Native languages.[155]

3. Availability of oral assistance is not advertised; phone hotline is in English only

The state, on the other hand, asserts that it does have oral assistance available at each polling place. In an interview in October 2005, Shelly Growden, the Fairbanks Regional Office Election Supervisor,[156] said that people in Region III generally speak English and that if they need assistance, "they ask for it." Region IV, which covers ninety-eight mostly Native communities from Kaktovik to the end of the Aleutian Chain, reported that at least one person at each polling station spoke the Native language. The Bethel City Clerk also reported there was at least one Yup'ik speaker at each polling station, and if that person was not present, he or she left their phone number where they could be reached in the event someone needed a translator. Dillingham similarly reported that there is a translator at their polls every election. No jurisdiction reported posting any information at polling stations notifying the public that language assistance was available. Rather, they claim everyone just knows it is available.

Alaska also provides an interactive toll-free hotline for voters that tells voters their polling location, and in order to comply with the Help America Vote Act (HAVA), this service will be expanded to provide broader registration and election information.[157] While this service is only available in English, in order to comply with the language provisions, it should, of course, include all the same information in all of the pertinent Alaska Native languages.

4. Alaska provides no written voting materials in any native languages

Oral assistance at the poll may not always be readily available, but the situation for written materials is even more troubling. While Alaska does provide sample ballots and other written materials in Tagalog for the Filipino population in Kodiak,[158] it does not provide written

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[154] Fiona Sawden, an Elder from Port Graham, is a fluent Alutiiq speaker who says she helps others to understand what's on the ballot. "If they have problems I help them translate what the voting was for." When asked how she knew what was on the ballot, Mrs. Sawden said she reads the Official Election Pamphlet, the Division of Elections-issued booklet describing the candidates and issues on the ballot, and tells people based on what she learns from reading the OEP.

[155] For example, the Northwest Arctic Native Association provides assistance in Inupiaq. According to Minnie Gray, an eighty-one year old Elder from Ambler who speaks Inupiaq, the young people who work at the polls in Ambler "speak a little bit Inupiaq"; but she and her eighty-two year old sister Clara Lee receive significant assistance from the NANA employee who, since 2002, "provides a little bit Inupiaq translation" to Elders.

[156] Alaska is split into four regions for elections purposes: Region I includes Southeast Alaska, Region II includes Southcentral Alaska, Region III covers Central Alaska, and Region IV covers Northern and Western Alaska. Regions III and IV include the majority of Alaska's Section 203-covered jurisdictions.

[157] State of Alaska, *HAVA State Plan*, 2005 Updated at 17.

[158] The Division of Elections provides voter registration forms and the Official Election Pamphlet (a voter pamphlet with candidate-related information which is distributed statewide) into Tagalog for voters in Kodiak, Alaska; Filipinos comprise 2 percent of the population of Alaska. The State specifically stated that it provided this translation in order to comply with Section 5 of the VRA. *See HAVA State Plan* at 16. The State also has voting information in Tagalog on its website.

materials for *any* of the 20 Native languages in Alaska.[159] Region IV, and many respondents from the Boroughs and city clerk offices, explained that this was because the Native languages are not written languages and thus, written assistance is not required.

Alaska's position is based on the single clause found in both language provisions that "where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives [sic] and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting."[160] DOJ regulations provide that a language is "unwritten" for purposes of the minority language provisions "if it is not commonly used in written form."[161] However, Alaska's interpretation is incorrect and the facts indicate that it is not well-founded.

Almost all American Indian and Alaska Native languages were at one time historically unwritten and, therefore, the exception would essentially swallow the rule. Moreover, such an interpretation would require translation for all languages other than English spoken in the United States *except* Indian and Native Languages; this would not be permissible under the Equal Protection Clause of the U.S. Constitution. Yet this is currently how Alaska administers the rule. Or, if a line were drawn that, for example, a language had to be written for at least fifty years prior to being entitled to translated election materials, this too would likely violate the Equal Protection Clause.

The clause must therefore refer only to languages currently unwritten, or as the Code of Federal Regulations strongly suggests, languages which have so recently been transcribed by academics or others that its Native speakers would actually not understand the written version. There can be no other reasonable interpretation of this clause. Alaska's position must therefore be incorrect.

Alaska's failure to provide written election materials resulted in one of the few VRA cases brought in Alaska. In 1995, the Native Village of Barrow and 18 individual non-English speaking Alaska Natives sued the City of Barrow for failure to comply with the language minority provisions of the VRA.[162] Specifically, the plaintiffs claimed that the city failed to provide written election materials in Inupiaq in the October 1995 election, and this resulted in poll workers offering incorrect personal explanations, advice and interpretations. The plaintiffs asserted that the personal translations mistakenly led them to vote "yes" to lifting Barrow's ban on the sale of alcohol when they intended to vote "no."[163] The ban was lifted by a slim margin of 76 votes; thus, the plaintiffs claimed if they had received a correct, uniform translation of the ballot measure in Inupiaq as required under the VRA, they would have voted differently and

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[159] In 1995, the Native Village of Barrow had sued the city of Barrow over the repeal of the alcohol importation ban, and one of the issues raised by the village was that the City was in violation of the VRA because ballots and other election materials had not been provided in the Native language, Inupiaq. As part of the settlement, the city agreed to provide ballots in Inupiaq, but it is unclear whether Barrow still does this. Personal communication with Scott Taylor, attorney for city of Barrow, January 30, 2006.
[160] 42 U.S.C. § 1973b (4)(f)(4) and 42 U.S.C § 1973aa – 1a(c).
[161] 28 CFR § 55.12 (c).
[162] *Native Village of Barrow et al. v. City of Barrow et al.,* Case No. 2BA-95-117 CI (Second Judicial District).
[163] First Amended Complaint at 3-4.

defeated this proposal.[164] The case was settled; therefore, the court did not reach a decision and there was no remedial order issued in the case. It remains a powerful example of how important written election materials may be in some communities.

5. Native languages are written languages, and Native speakers would benefit from voting materials in their language

Under the most likely interpretation of the "historically unwritten" clause, Alaska's 20 Native languages are written languages.[165] The facts demonstrate that almost all of Alaska's twenty Native languages are not only written, but well-established and even taught in schools. The two largest language groups, Iñupiaq and Yup'ik, clearly meet this criteria. Yup'ik was written more than 100 years ago by Russian missionaries and it has been taught in the public schools for more than thirty years.[166] The modern orthography for Siberian Yup'ik has been available for more than forty years.[167] Gwich'in has an older orthography, as it has had written literature since at least 1870.[168] The Gwich'in people have even translated most of the Bible into Gwich'in for the church in Arctic Village. The Koyukon writing system developed around 1900, and many of the other fifteen languages have had developed writing systems for at least forty years.[169] As described above in section II. D., there are tens of thousands of speakers of Native languages in Alaska, and there are still villages and communities, particularly Yup'ik, where English is not the primary language at home. This is sufficient basis to conclude that Alaska's Native languages are indeed written languages for the purposes of translating written election materials.

Not only do Alaska's Native languages qualify as written, but there is significant evidence that many Alaska Natives want and need written assistance.[170] As when oral assistance is not available, Alaska Natives resort to self-help. Lillie Tritt indicated that since "we don't know how to vote" on initiatives, she asks her high school-aged relatives to inform her about the ballot measures. She assumes they learn about the elections at school. Tritt also said "some people don't know how to vote and they vote for just anybody because they don't know how to vote. They don't know who's good." Fiona Sawden, an Alutiiq-speaking Elder from Port Graham, indicated that there is no Alutiiq-language information on radio or television about the elections. Susanna Horn indicated that she does obtain information about the elections in her Central Yup'ik language because there is a radio host from Emmonak who "will explain everything in English and in Yup'ik and tell where to go vote, times of voting, and who can help you." Lydia Bergman said she receives no official information in Koyukon and, therefore, asks her husband and his friends how to vote. Myron and Martha Kingeekuk, both from Savoonga, Alaska, say that they receive no information on elections in the Siberian Yup'ik language. When particularly important measures that will affect the lives of Alaska Natives are on the ballot, such as the

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[164] First Amended Complaint at 2-4.
[165] Many Alaska Native languages even have online dictionaries, www.alaskool.org/language/dictionaries (visited Jan. 31, 2006).
[166] http://www.uaf.edu/anlc/langs/cy.html (visited Jan. 25, 2006)
[167] http://www.uaf.edu/anlc/langs/sy.html (visited Jan. 25, 2006).
[168] http://www.uaf.edu/anlc/langs/ga.html (visited Jan. 25, 2006).
[169] http://www.uaf.edu/anlc/languages.html (visited Jan. 25, 2006).
[170] Larry Kaplan of the ANLC indicated that there are at least three languages where voting assistance would be essential: Siberian Yup'ik, Central Yup'ik, and Inupiaq.

English-only constitutional amendment in 1998, local leaders such as AFN have resorted to translating the election materials into Alutiiq, Yup'ik, and Tlingit themselves.[171]

The surveys returned by tribes affirmed that there are indeed places where written assistance would be very helpful. When asked "what percentage of people in your village speak English but would benefit from Native language assistance in voting such as instructions for casting ballots or translations of constitutional amendments," the village of Chevak responded "90 percent." Akiak answered the same question also with 90 percent. Both are Yup'ik villages. The Koyukon-speaking village of Hughes responded to the same question with 25 percent. Nulato responded with 0 percent.

6. Conclusion

The state of Alaska offers intermittent oral language assistance and no written assistance for Alaska Natives under the language provisions of the VRA. It does, however, provide written election materials for the two percent of the Alaska population that is Filipino. Alaska's efforts to provide assistance to voters under the minority language provisions fall short of full compliance with the intent of those provisions. While Alaska seems to provide translators upon request in many places, this reflects a commitment to fulfill its obligations under Alaska Statute 15.15.240 to assist qualified voters needing assistance in voting, but does not amount to full compliance with the VRA.

In fact, Alaska has arguably been out of compliance with the VRA since the language provisions were enacted thirty years ago. As Congress contemplates reauthorization of the language provisions, it should take this non-compliance and the ongoing need for some assistance demonstrated here into account. It can be summed up this way: 80.5 percent of high school seniors, the new Alaska Native voters, may have difficulty comprehending the English ballot, yet they will be subject to an English-only election. Therefore, the language provisions should be renewed and Alaska should remain a covered jurisdiction.

C. The preclearance requirement of Section 5 has made a difference in Alaska

Section 5 of the VRA contains the "preclearance" requirement. It requires covered jurisdictions to secure approval from the U.S. Attorney General before implementing any changes in their voting laws. The covered jurisdiction must show that the proposed change in the law is not intended to and would not have the effect of "denying or abridging the right to vote on account of race or color or membership in a language minority."[172]

There has not been an in-depth study into whether Alaska has strictly complied with preclearance requirements. However, there have been a few cases concerning election law changes that

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[171] According to State Senator Albert Kookesh, a Tlingit Indian from the village of Angoon who is co-chair of AFN, the largest Alaska Native advocacy organization, AFN provided voter information in Alutiiq, Yup'ik, and Tlingit in 1998 at the time of the passage of the English-only constitutional amendment.
[172] 42 U.S.C. §1973 (c).

bypassed this process.[173] With respect to objections under preclearance, Alaska's proposed changes have met with only one objection from the DOJ in more than 20 years. However, this should not suggest that Alaska should not be subject to preclearance. As set forth below, the preclearance process has prevented some measures that if enacted would have disfranchised or diluted the voting strength of Alaska Native voters.

The Alaska Redistricting Board and Alaska courts face a complex challenge in meeting all of the separate standards under federal and state law. First, Alaska is unusual in that the governor has authority over redistricting. Second, Article VI, Section 6 of the Alaska Constitution, requires first and foremost that districts be contiguous and compact:

> The governor may redistrict by changing the size and area of election districts, subject to the limitations of this article. Each new district so created shall be formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area. Each area shall contain a population at least equal to the quotient obtained by dividing the total civilian population by forty. Consideration may be given to local government boundaries. Drainage and other geographic features shall be used in describing boundaries wherever possible.

The redistricting board must also comply with the equal protection clauses of the federal[174] and state[175] constitutions. Finally, the board and courts must follow the requirements of the VRA to avoid retrogression or dilution of the minority vote. It can be very difficult to satisfy all of these requirements.[176]

There have not been many lawsuits filed under the VRA in Alaska.[177] Almost all of the litigation has focused on state legislative redistricting and the threat of retrogression or dilution of the Alaska Native vote.

The first of these was *Kenai Peninsula Borough et al. v. State,*[178] where the Alaska Supreme Court considered enhancing "the voting strength of minorities in order to facilitate compliance with the Voting Rights Act."[179] The reapportionment plan created after the 1980 census had been struck down by the Alaska Supreme Court on the grounds that a House District violated Article VI, Section 6 of the Alaska Constitution because of the "lack of any evidence of significant social and economic interaction between Cordova and the rest of the communities

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[173] In *Harrison v. State*, 687 P.2d 332, 345 (Alaska App. 1984), a man was convicted of importing alcohol into the village of St. Mary's in violation of the local option law and the village's prohibition against the sale and importation of alcohol. The defendant argues that his conviction could not stand because the ban had not been precleared by the DOJ as required under the VRA. The court rejected this argument on the grounds that preclearance was "a formality" and that the law was eventually approved anyway.
[174] U.S. Constitution, Amend XIV, Section 1.
[175] Article I, Section 1.
[176] *Hickel v. Southeast Conference*, 846 P.2d 38, 50 (Alaska 1993).
[177] *But see Native Village of Barrow v. City of Barrow, supra* note 162.
[178] 743 P.2d 1352 (Alaska 1987); there may have been earlier VRA cases filed but they did not result in published opinions.
[179] *Id.* at 1361.

comprising the district."[180] The reapportionment board then redrew the district with both that section of the Alaska Constitution and the VRA in mind. The new plan resulted in a District 2 with a 14.8 percent deviation from the ideal district size.[181] Furthermore, it had increased the Native population in the District from 27.5 percent to 41.9 percent.[182] The state argued that the district was created, and the Native population was increased, specifically to facilitate approval under the VRA.[183] The court recognized that this was a legitimate aim under the VRA, but it held that since the state had not shown that retrogression would occur without the increase to 41.9 percent, it had not carried its burden of showing that the district was necessary to comply with the VRA.[184] Despite this failure, the court upheld the district with a deviation of 14.8 percent because it "effectuated other rational and consistent state policies under Article VI, Section 6 of the Alaska Constitution."[185]

There has only been one objection to a proposed change in the law in Alaska and it occurred in relation to the redistricting after the 1990 Census. This lone objection, described below, played a very significant role in shaping Alaska's political landscape, and underscores the need for continued coverage by the preclearance process.

Immediately after the 1990 Census, the parties staked out their various positions. Most prominent among these were the Yup'ik, who claimed they had been "gerrymandered into political oblivion" after the 1970 census.[186] The Yup'ik community consisted of 26,000 people living in almost 75 villages, united by language and culture. They argued that they were entitled to their own district(s) under the VRA.[187] The Yup'ik community, the largest single indigenous group in Alaska, argued that this population justified two House districts and one united Senate district. They got what they wanted, but the proposed redistricting plan would not survive.

Under the redistricting plan, Southeast lost a seat, Fairbanks gained a seat, Matanuska-Susitna Borough was splintered into five pieces, and Yup'iks gained but Inupiats of the North Slope Borough lost.[188] The plan was harshly criticized on the grounds that it diluted Native votes (except the Yup'iks), disregarded the differences between Alaska Native groups, and had allegedly been prepared in secret and under the influence of suspicious dealings.[189] More pointedly, a coalition of Native interests accused the Governor of being "anti-Native."[190] The coalition of Native groups had appealed to the DOJ, imploring them not to preclear the plan and identifying some of the retrogressive components of the proposed plan.

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[180] *Id.* at 1355.
[181] *Id.* at 1361.
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] George Frost, *Yup'ik Call for United Village Vote; Bush Election District Plan Chaotic, Foes Say*, ANCHORAGE DAILY NEWS, March 30, 1991, at p. B1.
[187] *Id.*
[188] George Frost, *Plan Would Cause Changes Statewide*, ANCHORAGE DAILY NEWS, July 14, 1991, at p. A9.
[189] Ralph Thomas, *Verdict on Election Maps Waits; State Must Answer Critics First*, ANCHORAGE DAILY NEWS, January 4, 1992, at p. A1.
[190] *Id.*

DOJ immediately stepped in and sent a letter to the state requesting more information.[191] DOJ asked the state to respond to several specific concerns: (1) the proposed plan reduced the number of Alaska Native majority districts from four to three; (2) Interior Athabascan Indians had been combined unnecessarily with Inupiat Eskimos of the North Slope, diminishing the voting strength of both; (3) one district was retrogressive in that it combined an urban and a rural Native area, decreasing the Native voting strength; (4) the proposed plan had been prepared with "extraordinary treatment" toward incumbent legislators, except that incumbent Native legislators' districts were to be combined; and (5) the redistricting board had prepared the plan in meetings that were not publicized or that were publicized with inaccurate dates and/or locations. This letter alerted the state that its plan was in trouble.

The trial court ultimately rejected the plan as unconstitutional. The trial contained even more details about the development of the proposed plan, one of the most disturbing of which was the testimony of then Representative Georgianna Lincoln, who said that she had been "offered the chance to draw her own House district if she joined a political plot against the House leadership during the last legislative session."[192] Similarly, some of the reapportionment participants and redistricting board members coincidentally found themselves in "open" districts without incumbents that would be easier to run in.[193] Judge Weeks noted that it was indeed possible that these were coincidences.[194] After the proposed plan was declared unconstitutional, the state blamed the VRA, stating that the judge did not understand how hard it was to follow the state constitution and the VRA at the same time.[195]

In May 1992, the Alaska Supreme Court affirmed the trial court's holding that the proposed plan violated the Alaska Constitution, and remanded to the trial court to formulate an interim plan so that the 1992 state elections might proceed. The court then appointed three masters to aid in the development of an interim plan, which was presented to the trial court on June 14. The interim plan was precleared by the DOJ on July 8, 1992.

The interim plan was then challenged, in *Hickel v. Southeast Conference*,[196] under Article VI, Section 6 of the Alaska Constitution, and Section 2 of the VRA.[197] Although the court noted that the board claimed to have created District 3 in order to comply with the VRA,[198] the court only referred to the relevance of the VRA in passing in footnote 22:

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[191] Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division of the USDOJ, to Virginia B. Ragle, Assistant Attorney General of the State of Alaska, of 12/31/91.
[192] George Frost, *Election Districts Rejected; State to Appeal Court's Decision,* ANCHORAGE DAILY NEWS, May 12, 1992, at p. A1.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] 846 P.2d 38
[197] This time the Yup'ik sued claiming that their voting strength had been diluted by being split into four House districts. Sheila Toomey, *Yup'iks Sue State Over New Voting Map*, ANCHORAGE DAILY NEWS, July 22, 1992, at p. B1.
[198] This district would have increased the Native VAP by 2 percent, but it split the Southeast population in unusual ways.

> The Board must first design a reapportionment plan based on the requirements of the Alaska Constitution. That plan must then be tested against the Voting Rights Act. A reapportionment plan may minimize article VI, section 6 requirements when minimization is the only means available to satisfy Voting Rights Act requirements.[199]

The court then reiterated a curious directive from its order for the interim plan: "The [Redistricting] Board shall ensure that the requirements of Article VI, Section 6 are not *unnecessarily compromised* by the Voting Rights Act."[200] The court thus declared that 11 districts in the interim plan violated the compact and contiguous requirement of Article VI, Section 6 of the Alaska Constitution.[201] It did not discuss any of the rather unsavory activities that were alleged to have occurred with respect to the "open" seats and the not-so-open meetings.

Hickel struck down 11 districts, but apparently did not consider the one district DOJ was really interested in, which was District 36. It appears that the court did not approve of districts 1, 2 and 3 in the Southeast; the splitting of the Matanuska-Susitna Borough into five districts (6, 26, 27, 28 and 34); the combining of the North Slope Inupiat and the Interior Athabascan Indians in district 35; and the splitting of the Aleutian Islands into two different districts (37 and 39). However, on September 28, 1993, DOJ objected to the state's plan on the grounds that district 36, and its companion Senate District R, showed evidence of racially polarized voting and that the proposed plan reduced the Alaska Native share of the VAP from 55.7 percent to 50 percent.[202] DOJ acknowledged the state's argument that preservation of the Lake and Peninsula borough boundaries in district 36 was required under state law, but DOJ also noted that the borough did not have to be divided to comply with both the state constitution and the VRA. DOJ thus declared the plan legally unenforceable. The state requested that the DOJ reconsider its decision, but the DOJ declined on February 11, 1994. Thus, it would appear that on this occasion, what was permitted by Alaska state law was not permitted under the VRA, but it took the intervention of DOJ to prevent its implementation. DOJ served as the last line of defense as it were, and without preclearance, what the DOJ considered to be retrogressive practices would have gone into effect in Alaska in 1993.

The redistricting after the 2000 Census did not contain the level of drama and intrigue, nor the DOJ objection, seen in the 1990s redistricting. However, there are several interesting facets of this redistricting, beginning with the state's attempt to make some significant changes to election law before the 2000 census results were even released. The most important proposed change in the law was a requirement that only official census data be used in all plans drawn by the redistricting board.[203] DOJ aptly pointed out that since census data was often criticized on the basis that it tended to undercount racial and language minorities, the state's proposed rule would reduce the "opportunities for minority citizens to elect candidates of their choice."[204] Again, the

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[199] *Hickel*, 846 P.2d at 52 n.22.
[200] *Id.* (emphasis added).
[201] *Id.* at 57.
[202] Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, USDOJ, to Virginia Ragle, Assistant Attorney General, State of Alaska of 9/29/93.
[203] Senate Bill 99 (1999)
[204] Letter from Joseph D. Rich, Acting Chief, Voting Section, USDOJ, to James L. Baldwin, Assistant Attorney General, State of Alaska of 11/19/99.

preclearance process had singled out an issue that could have caused significant problems, especially since here it could have undercut the validity of all the 2000 redistricting.

The 2000 redistricting then proceeded without significant problems and did not prompt the involvement of DOJ. Three aspects of the 2000 redistricting are relevant here, however: (1) the VRA was clearly the driving force behind several of the state's new districts; (2) the expert reports revealed that there are indeed places in Alaska where voting remains polarized; and (3) in the litigation that follows every redistricting plan, the Alaska Supreme Court set forth a new standard for deviation that is unlike any other in the United States.

First, the redistricting board[205] clearly paid careful attention to the requirements of the VRA. The board hired a national voting rights expert to measure the amount of racial bloc voting in Alaska and then evaluate whether the proposed redistricting plans would have any retrogressive effects or dilute the Native vote in any way. The proposed plan maintained six House districts and three Senate districts where Alaska Natives would be effective electing a candidate of their choice.[206] Indeed, the VRA is responsible for House District 5 (the Southeast Islands to Cordova) and Senate District C (Southeast Islands and Interior Rivers House Districts), in that these districts likely would not have withstood scrutiny under the Alaska Constitution but were upheld specifically because they were necessary to preserve Native voting strength under the VRA.[207] The VRA thus had the effect of preserving Alaska Native voting rights where the state constitution would have failed them.

It is worth noting that the expert employed a formula to determine whether a district was an effective minority district, that is, whether Alaska Natives could elect a candidate of their choice, based on the percentage of minority population plus the percentage of the "crossover" votes that could be expected from the non-Native population. She did not base her determination on simple Native majority districts. This formula, which is not without controversy, resulted in a determination that districts with at least 30-35 percent Alaska Native population were effective minority districts and could consistently elect Alaska Natives.[208] Thus, while the State Redistricting Board argued that it maintained six House districts and three Senate districts, some

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[205] The 2000 Redistricting Board consisted of five persons, including two Alaska Natives.

[206] Letter from Philip R. Volland, counsel to the Alaska Redistricting Board, to Chief, Voting Section, Civil Rights Division, USDOJ of 4/25/02. *See also* note 122, *supra,* for a description of the number of Alaska Native legislators. At 15 percent of the legislature but 19 percent of the population, Alaska Natives appear to be slightly underrepresented.

[207] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 2002 WL 437164 (Alaska 2002) at paragraph 6.

[208] Dr. Lisa Handley, *A Voting Rights Act Evaluation of the Proposed Alaska State Legislative Plans: Measuring the Degree of Racial Bloc Voting and Determining the Effectiveness of Proposed Minority Districts*, submitted to the USDOJ with the preclearance submission dated April 25, 2002, at 20 (Unpublished). Compare to 1968, when the rural Native vote dominated seven districts by large percentages: district 12, Aleutian Islands (77 percent); district 13, Bristol Bay (100 percent); district 14, Bethel (100 percent); district 15, Yukon-Kuskokwim (68 percent); district 17, Barrow-Kobuk (100 percent); district 18, Nome (100 percent); and district 19, Wade-Hampton (100 percent). The rural Native vote was similarly concentrated in senate districts: district H, Bristol Bay and Yukon-Kuskokwim (89 percent); district J, Barrow-Kobuk and Nome (100 percent); and district K, Bethel and Wade-Hampton (100 percent). The Native population was at the time highly concentrated in rural areas and the districts appear to have been drawn accordingly, so that the rural Native vote dominated seven representative districts and three senate districts, but was marginal (no more than 25 percent) in all other districts. Harrison, *supra* note 26 at 6-7.

of these contained percentages of Alaska Natives that were only 30-35 percent Native. DOJ did not object to this.

On a related note, the second important aspect of the 2000 redistricting was its revelation that certain areas of Alaska still have polarized voting. The expert stated that overall Alaska did not seem to be particularly polarized, but she then identified certain districts that still seem to experience polarization. In the 2000 primaries, she found that voting may have been polarized in House District 38 and Senate Districts C and S.[209] In the 2000 general election, she found that not only was voting polarized in District 36 (now District 6), but also the minority-preferred candidate lost the election.[210] In the 1998 primaries, she again found that voting may have been polarized in House Districts 36 and 40, and Senate District R.[211] Voting was again polarized in House District 36 and Senate District R in the 1998 general election, and as in 2000, the minority-preferred candidate lost in District 36.[212] In the 1996 general election, voting was again polarized in District 36, but the minority-preferred candidate won that year.[213] Lastly, in the 1994 general election, voting was polarized in District 36 and Senate District T, but the minority-preferred candidates won both contests.[214] In sum, the former House District 36, and the Senate Districts R, S, and T all experienced some polarized voting patterns and in some of these contests the minority candidate did lose. (All of these districts currently have Alaska Native representatives.) House District 36 in particular, which is now District 6, repeatedly experienced polarized voting. This is a rural Native area – in fact, it encompasses about half the land mass of rural Alaska – and, thus, this district in particular should be carefully monitored during the next redistricting after the 2010 census. The pattern of polarized voting and the fragility of this minority district in particular warrant continued preclearance. Maps of the former House and Senate districts are attached as Exhibit 3. The current districts are attached as Exhibit 4. What was District 36 is now District 6. A detailed map of this district is attached as Exhibit 5.

The final aspect of the 2000 census redistricting that is of importance for this report is that the Alaska Supreme Court set forth a very unusual standard for deviation. Courts had drawn a bright-line rule that population deviations of less than 10 percent were not major and thus required no justification to demonstrate they were not discriminatory. However, the Alaska Supreme Court opined that because the Alaska Constitution had been amended in 1998 to require that districts be "formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area," this 10 percent line no longer applied. The court interpreted the phrase "as nearly as practicable" to mean that basically any deviations required justification.[215] Furthermore, the court noted that technology made lower deviations possible and since places like Anchorage were de facto sufficiently socio-economically integrated, then deviations must be minimized or justified.[216]

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[209] Handley, *supra* note 208, at 5.
[210] *Id.* at 7
[211] *Id.* at 8.
[212] *Id.* at 11.
[213] *Id.* at 14.
[214] *Id.* at 17.
[215] *In Re 2001 Redistricting Cases*, 44 P.3d 141, 2002 WL 437164 (Alaska) at paragraph 11 at page 8.
[216] *Id.* at 8-9.

This is apparently the only court in the nation to have such a rule. Thus, future redistricting submissions to the DOJ may draw unusual lines within single communities to reduce the deviation as closely to zero as possible, and DOJ should carefully monitor these to assure this does not have the effect of interfering with the aims of the VRA.

The final issue to be noted with respect to preclearance is that in both 2000 and 2004, the governing state administrations significantly overhauled election laws right before these important elections. In September 2004, the state submitted many significant changes, including changes to absentee and questioned ballots and acceptable forms of ID, which were implemented in the election just two months later. The state apparently did not obtain preclearance in time, as the DOJ STAPS[217] report shows that these changes were "precleared" on November 9, 2004 – one week after the election. The state had made a similar overhaul of its election laws before the 2000 election, and submitted these changes for preclearance on August 7, 2000; final "preclearance" was obtained on most of these changes on April 2, 2001 – five months after the election. About ten of these changes were withdrawn after the election; thus, with respect to these changes, Section 5 had an impact.

Also in 2000, polling places were changed just one month before the election and not "precleared" until November 29. While the change of a polling place may not raise a flag in most jurisdictions, in rural Alaska, it can have a significant impact on the ability of voters to get to the polls and it should therefore receive a close look.[218] In any event, the preclearance process may not have functioned as intended in the last two elections because the State did not actually get preclearance before the election, but after.

CONCLUSION

Despite the continued language assistance needs of Alaska Natives, the language provisions of the VRA have had little impact in Alaska. This is because Alaska provides only what it was required to provide under state law more than 30 years ago, namely help upon request. Alaska does not uniformly provide oral assistance, nor does it provide any written language assistance to the indigenous population of Alaska, which comprises about 19 percent of the total state population. Yet the 2 percent Filipino population receives the full spectrum of assistance. This is because the state interprets the language provisions not to require written language assistance for Alaska Natives because their languages were historically unwritten. This appears to be an incorrect interpretation and should change.

The preclearance provisions have resulted in some important changes in Alaska's districts and election laws. In addition, there are some fragile minority districts which have consistently experienced polarized voting and these should continue to be monitored to ensure the voting rights of Alaska Natives are protected.

The Alaska Native population is unique even among indigenous people. They retain many important aspects of their ancient way of life, including their languages. More than half live in

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[217] Submission Tracking and Processing System Report
[218] See section II. A. above for a description of conditions and lifeways in rural Alaska.

an environment where voting can involve crossing a river or asking your grandchildren to translate for you and explain what is on the ballot. The Alaska Native population still faces barriers to voting that the VRA was meant to eradicate 30 years ago.

Regional Corporations under ANCSA

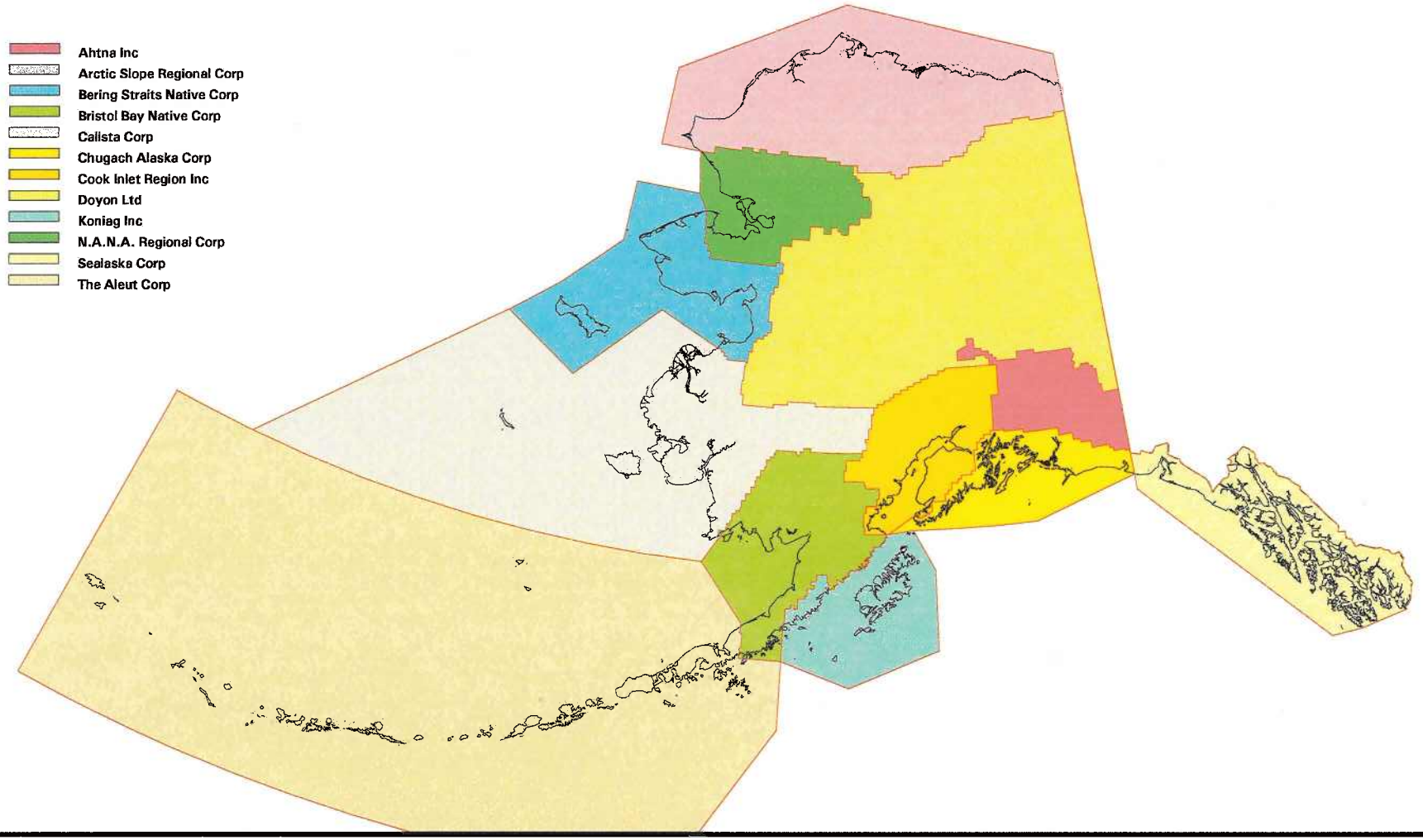


EXHIBIT 1

Alaska Native Languages

Map Created by Alaska Native Language Center at the University of Alaska at Fairbanks

EXHIBIT 2

STATEWIDE SPRING 2005 HSGQE

GRADE 12

Statewide Results by Ethnicity, Gender and Groups

READING	Proficient Count	Proficient Percentage	Not Proficient Count	Not Proficient Percentage
African American	9	17.0%	44	83.0%
Alaska Native	71	19.5%	294	80.5%
American Indian	*	40% or fewer	*	60% or more
Asian/Pacific Islander	16	20.5%	62	79.5%
Caucasian	93	44.7%	115	55.3%
Hispanic	11	34.4%	21	65.6%
Female	95	29.7%	225	70.3%
Male	107	25.3%	316	74.7%
Disabled	42	18.7%	183	81.3%
Non Disabled	160	30.9%	358	69.1%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~
WRITING	**Proficient Count**	**Proficient Percentage**	**Not Proficient Count**	**Not Proficient Percentage**
African American	7	29.2%	17	70.8%
Alaska Native	46	27.2%	123	72.8%
American Indian	*	*	*	*
Asian/Pacific Islander	9	25.0%	27	75.0%
Caucasian	78	60.5%	51	39.5%
Hispanic	8	42.1%	11	57.9%
Female	65	47.8%	71	52.2%
Male	84	34.6%	159	65.4%
Disabled	34	22.4%	118	77.6%
Non Disabled	115	50.7%	112	49.3%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~
MATHEMATICS	**Proficient Count**	**Proficient Percentage**	**Not Proficient Count**	**Not Proficient Percentage**
African American	45	47.9%	49	52.1%
Alaska Native	138	35.7%	249	64.3%
American Indian	9	52.9%	8	47.1%
Asian/Pacific Islander	54	52.4%	49	47.6%
Caucasian	226	63.8%	128	36.2%
Hispanic	28	57.1%	21	42.9%
Female	276	53.3%	242	46.7%
Male	224	46.1%	262	53.9%
Disabled	101	39.9%	152	60.1%
Non Disabled	399	53.2%	351	46.8%
Limited English Proficient	~	~	~	~
Low Income	~	~	~	~
Migrant	~	~	~	~

1 Percent Proficient and Percent Not Proficient rates only include students that participated in the exams.

~ No method of data collection for this information for 2005 school year, data will be collected in 2006 year.

Rev. 08/30/05

EXHIBIT 3

1994 House Districts by 2000 Census Population

Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001

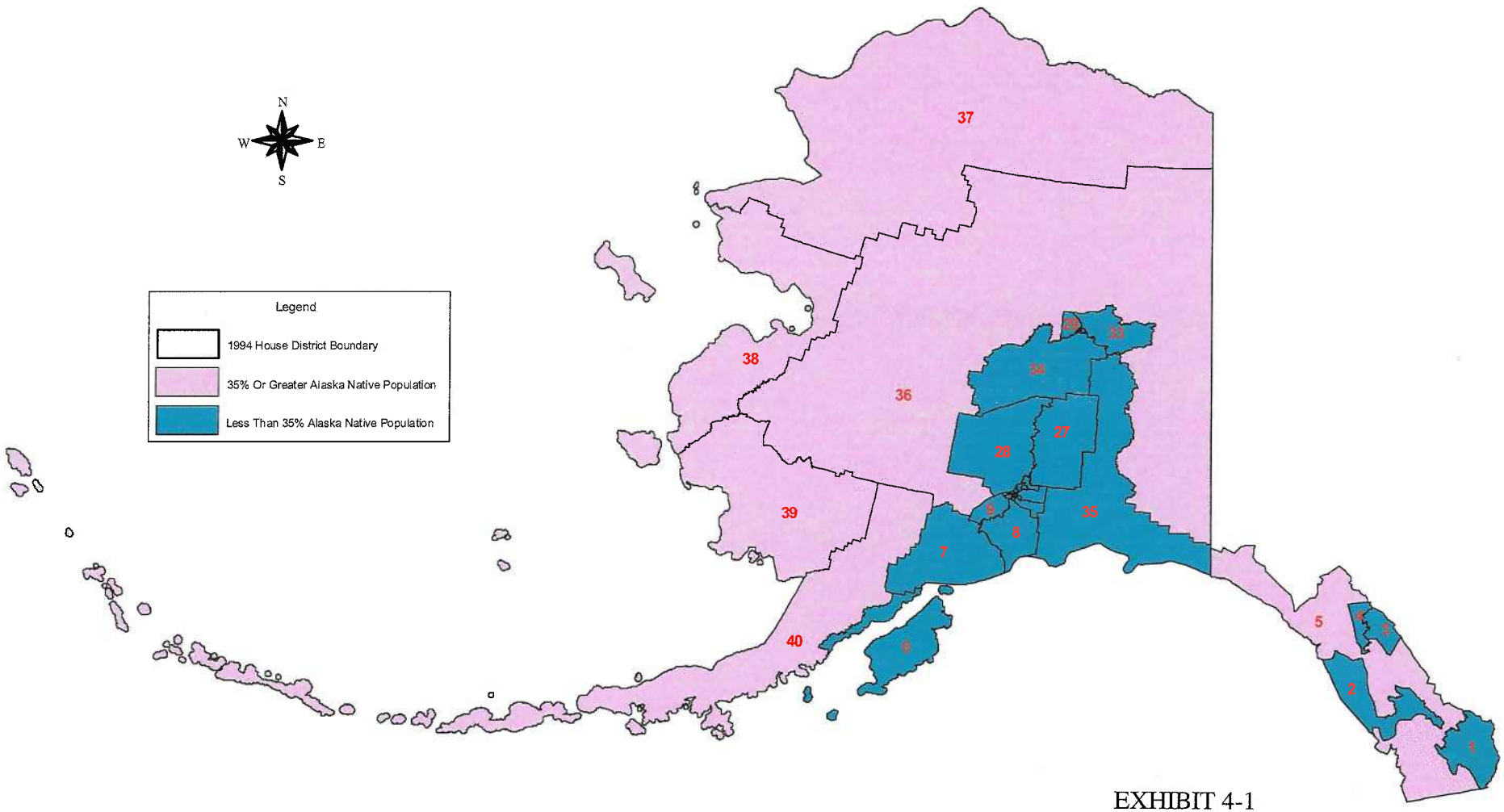


EXHIBIT 4-1

Data Source 2000 Census

1994 Senate Districts by 2000 Census Population

Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001

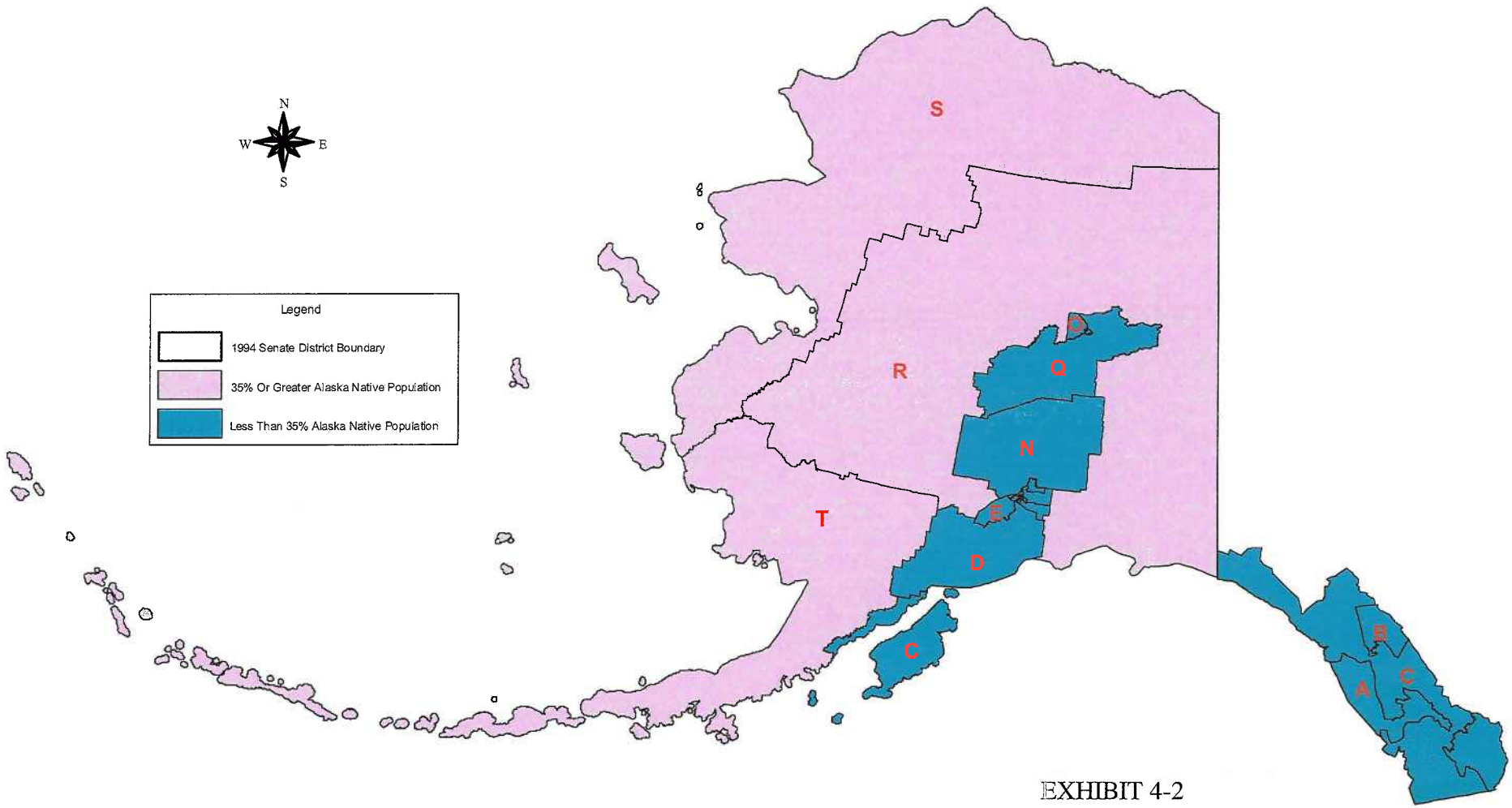


EXHIBIT 4-2

Data Source 2000 Census

Proclamation House Districts by 2000 Census Population

Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001

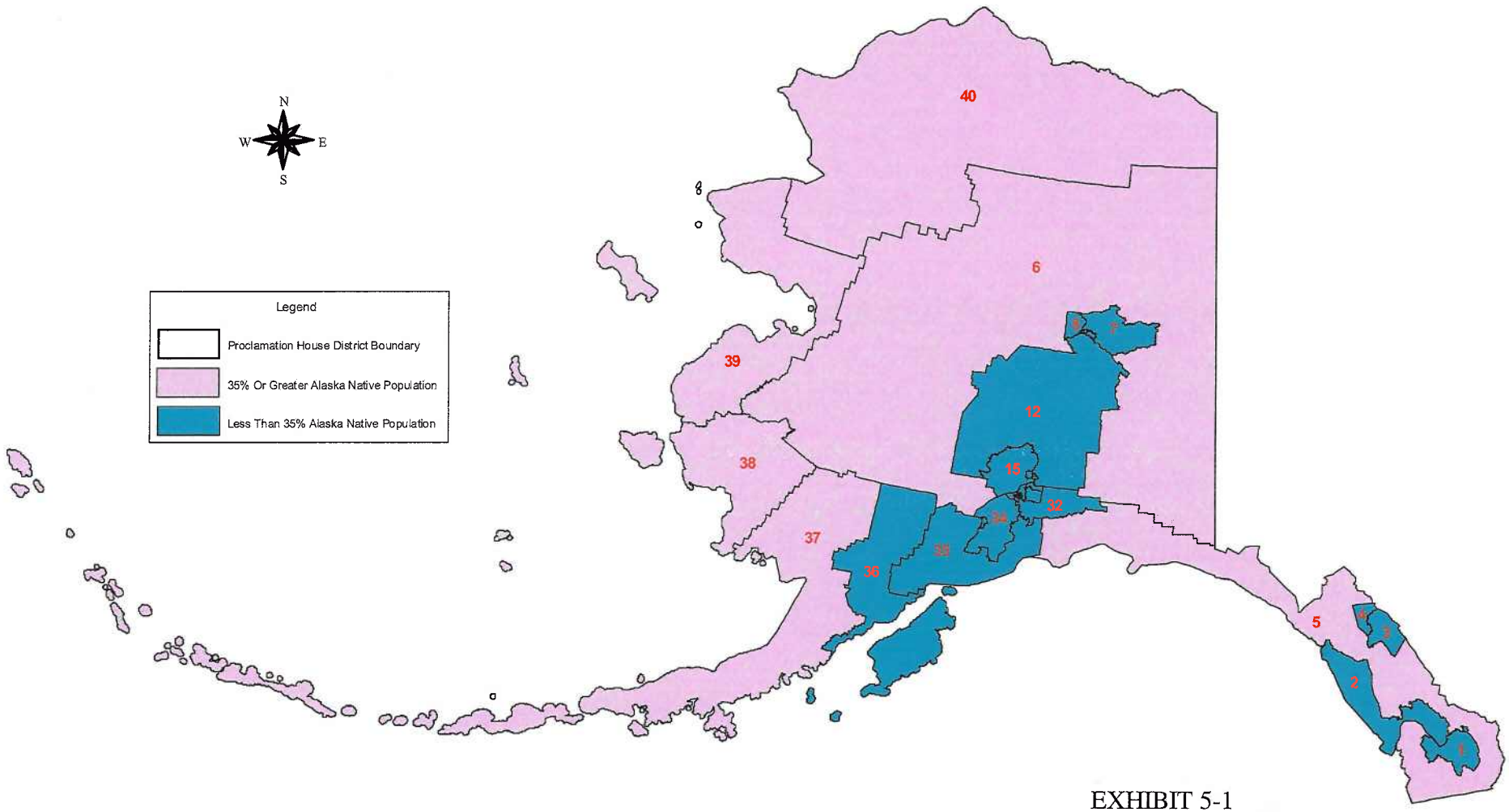


EXHIBIT 5-1

Data Source 2000 Census

Proclamation Senate Districts by 2000 Census Population

Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001

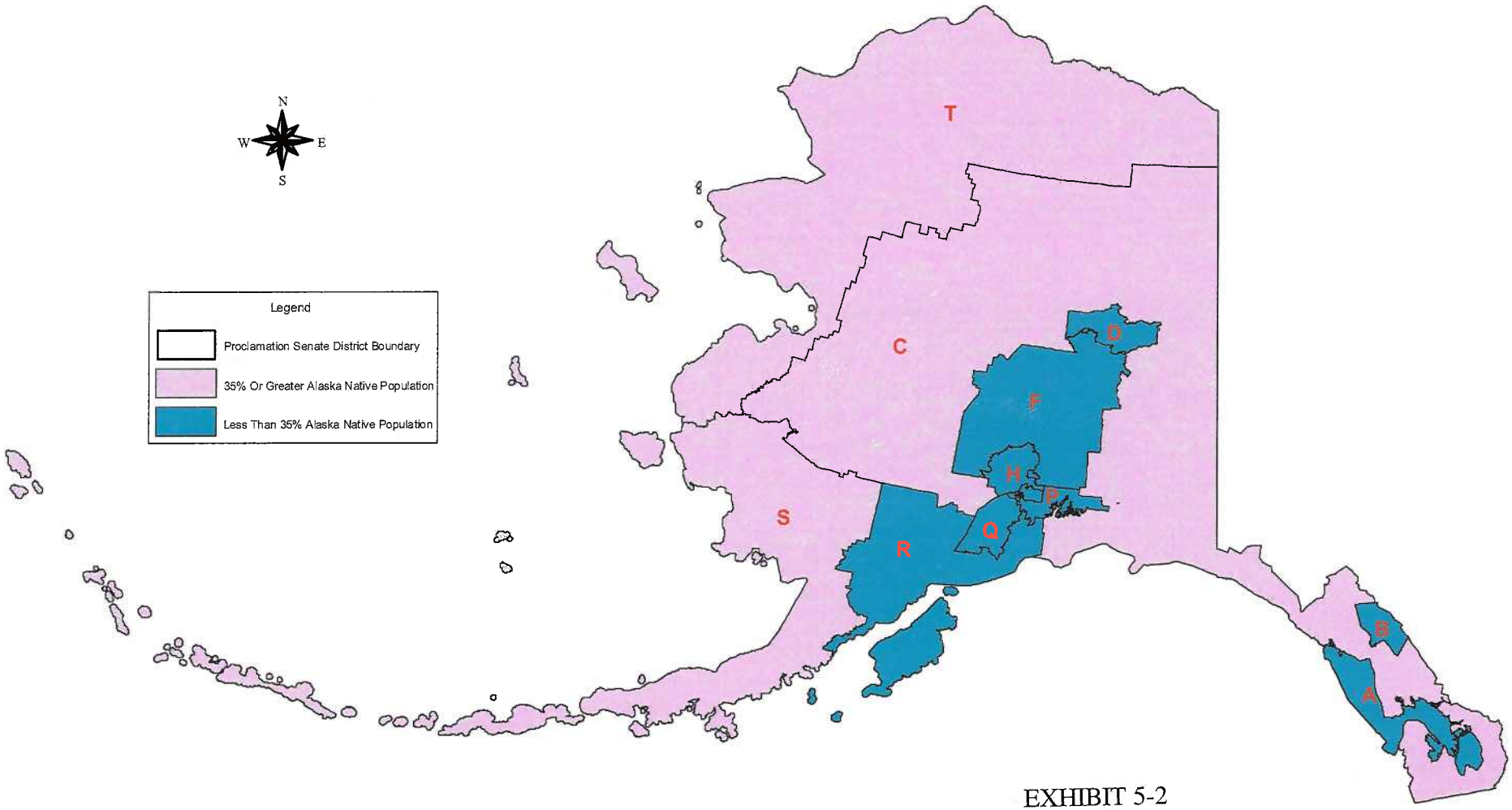
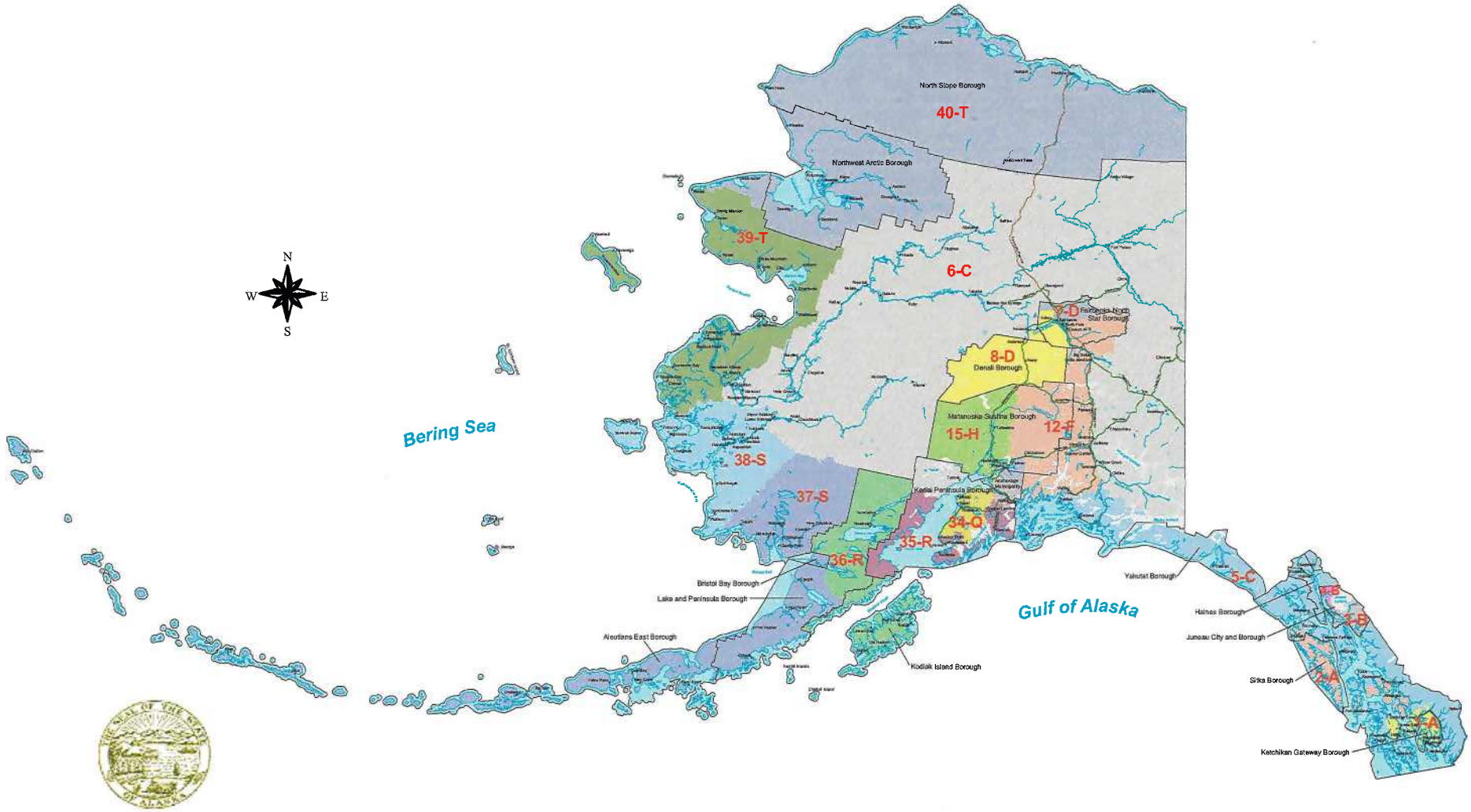


EXHIBIT 5-2

Data Source 2000 Census

Amended Final Redistricting Plan



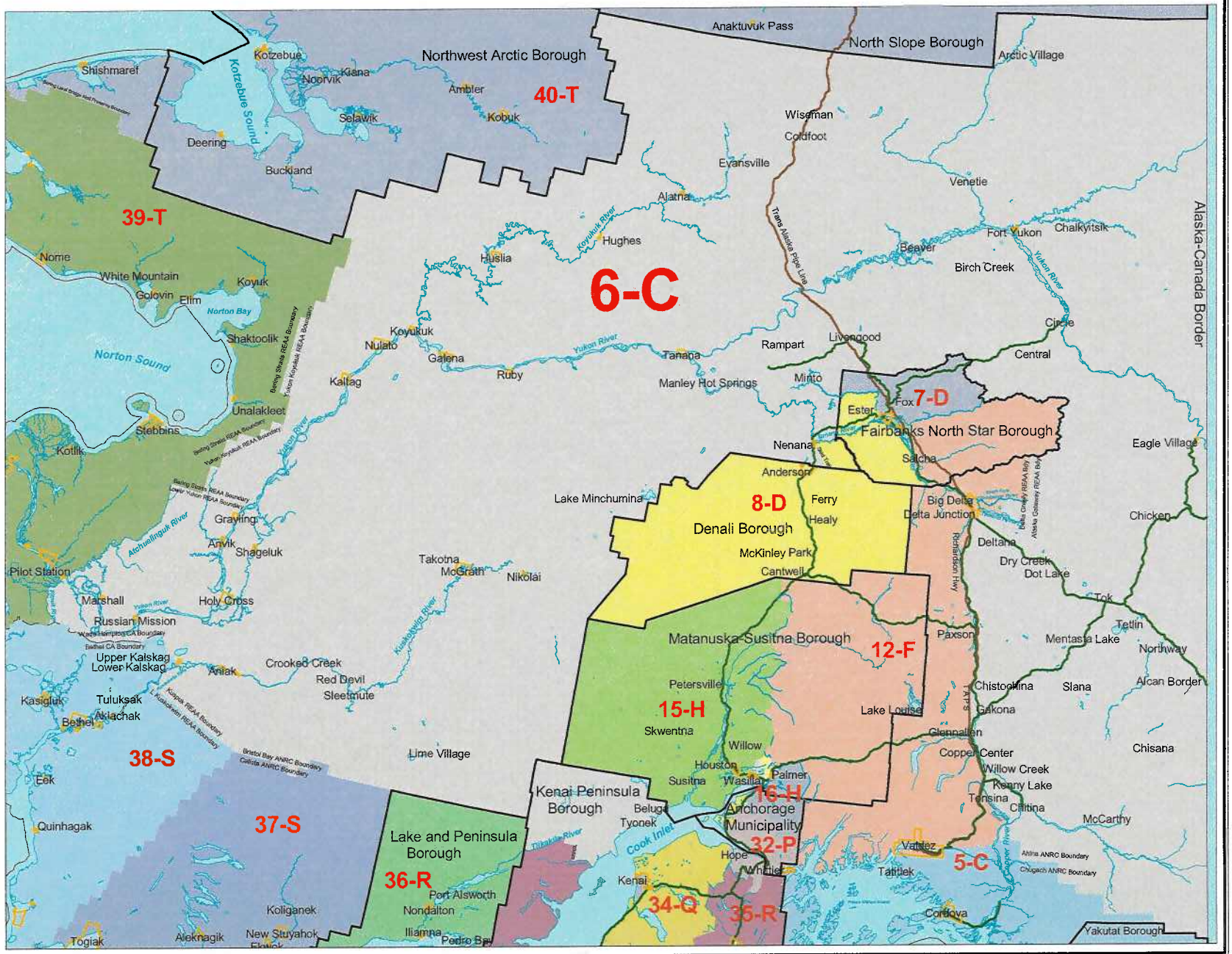
Amendments adopted by Alaska Redistricting Board
April 13 as modified on April 18, 2002

Prepared by Alaska Redistricting Board
April 25, 2002

EXHIBIT 6-1

Amended Final Redistricting Plan

House District 6



Legend

- Borough Boundary
- City Boundary
- Census Area Boundary

Amendments adopted by
Alaska Redistricting Board
April 13 as modified on April 18, 2002

Prepared by
Alaska Redistricting Board
May 4, 2002

EXHIBIT 6-2

Percent Alaska Native by Borough and Census Area

Joseph D. Rich, Acting Chief
Voting Section, Civil Rights Division
U.S. Department of Justice
July 26, 2001

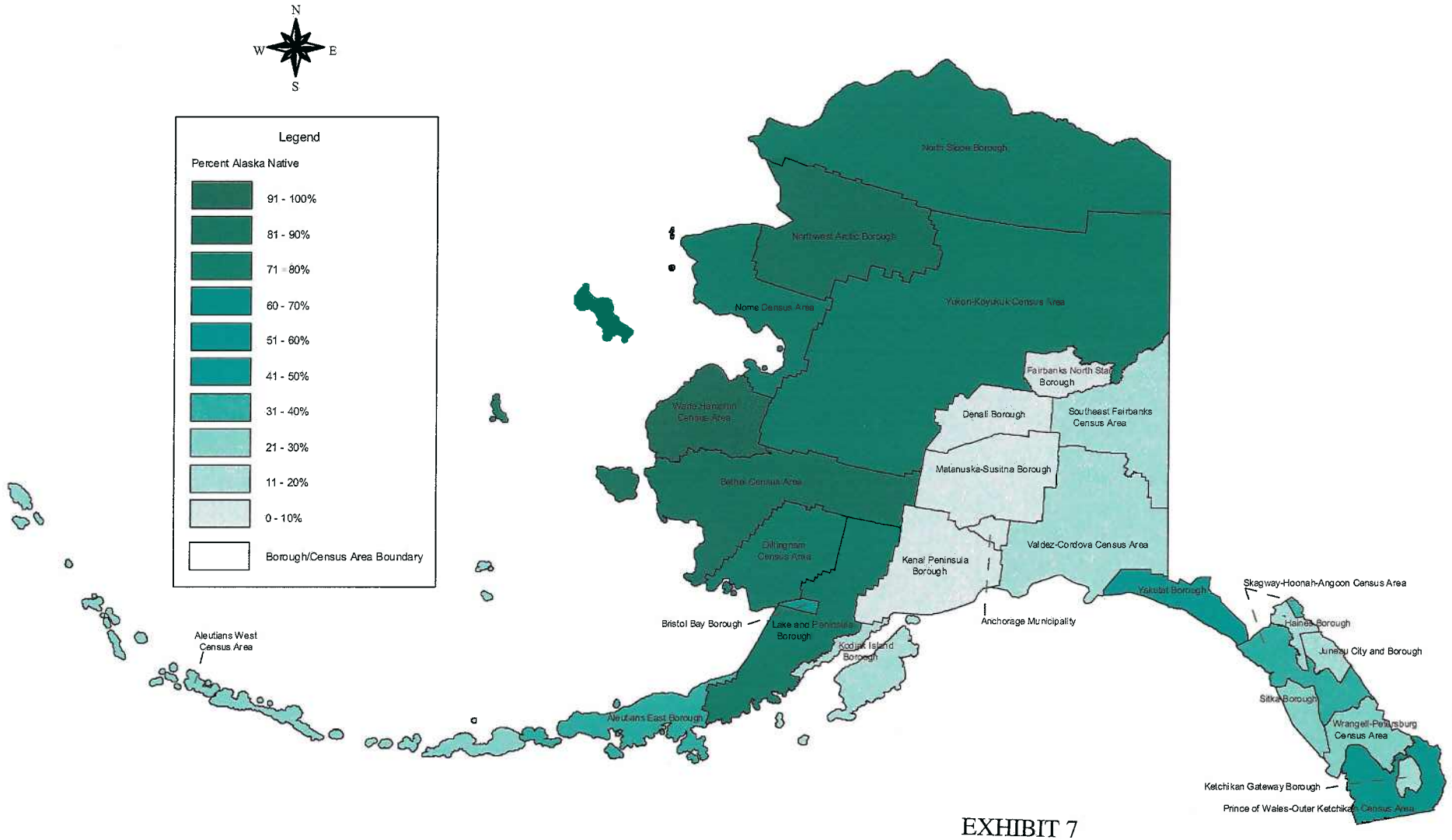


EXHIBIT 7

Data Source 2000 Census