

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION**

TURTLE MOUNTAIN BAND OF CHIPPEWA
INDIANS, *et al.*

Plaintiffs,

v.

ALVIN JAEGER, in his official capacity as Secretary
of State of North Dakota,

Defendant.

Case No. 3:22-cv-00022-PDW-ARS

**PLAINTIFFS' UNOPPOSED MOTION FOR LEAVE TO FILE A SUPPLEMENTAL
COMPLAINT**

Pursuant to Fed. R. Civ. P. 15(d), Plaintiffs respectfully request leave to file the attached Supplemental Complaint. Defendant has indicated he does not oppose the motion, and the parties agreed that Defendant should be provided 30 days to file a responsive pleading.

Rule 15(d) provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any . . . event that happened after the date of the pleading to be supplemented. . . . The court may order that the opposing party plead to the supplemental pleading within a specified time.” Fed. R. Civ. P. 15(d). In the time since Plaintiffs filed their Complaint, the November 8, 2022 elections were conducted using the state legislative redistricting map that Plaintiffs challenge as a violation of Section 2 of the Voting Rights Act. Those election results make clear that the enacted redistricting plan not only dilutes Native American voting strength with respect to the state house districts in northeastern North Dakota but also with respect to their opportunity to elect a candidate of choice to the state senate.

As Plaintiffs explain in the attached Supplemental Complaint, the 2022 election results confirm that the configuration of districts in northeastern North Dakota, specifically District 9, state house subdistricts 9A and 9B, and District 15 fail to provide Native American voters an equal opportunity to elect their candidates of choice to the state senate and state house. In the redrawn District 9, which now extends from Rolette County into overwhelmingly white portions of Towner and Cavalier Counties, incumbent Native American state senator Richard Marcellais lost his reelection bid. Senator Marcellais, who held the seat since 2006, was the overwhelming choice of Native American voters, but white voters cast their ballots sufficiently as a bloc to defeat his reelection in the redrawn district. An enrolled member of the Tribe has served as District 9 state senator since Daniel Jerome was elected as the first ever Native American to serve in the state senate in 1990. But now, for the first time in 32 years, no member of a North Dakota Native American tribe will serve in the North Dakota state senate as a result of the 2021 redistricting plan.

In subdistrict 9A, which Plaintiffs contend is unlawfully packed with Native American voters, the Native American candidate for state house soared to victory with nearly 70% of the vote. But in subdistrict 9B, which is predominantly white but contains a sizeable Native American population cracked from the population in subdistrict 9B, the incumbent Representative Marvin Nelson—the candidate of choice of Native American voters—was soundly defeated as a result of white bloc voting. While the prior configuration of District 9 allowed Native American voters to elect their candidate of choice to two state house seats, the enacted redistricting plan reduces that opportunity to a single state house district.

Likewise, the candidates of choice of Spirit Lake Native American voters in adjacent District 15 were defeated as a result of white bloc voting. Plaintiff Collette Brown, an enrolled member of the Spirit Lake Tribe, was the candidate of choice for Native American voters for state

senate in District 15 and was defeated by her white opponent. In the state house election in District 15, Native American candidate Heather Lawrence-Skadsem, who was the overwhelming candidate of choice of Native American voters, was defeated by her two white opponents.

As Plaintiffs explain in the attached Supplemental Complaint, Native American voters' candidates of choice for state senate and state house would have prevailed in an alternatively configured district that joins the Turtle Mountain and Spirit Lake reservations. But instead the enacted plan reduced from three to one the number of state legislative races in which Native American voters were able to elect their candidates of choice in the November 2022 election.

In addition to these supplemental factual allegations regarding the November 2022 election, Plaintiffs also clarify that they seek for elections to be held in a remedial district in November 2024 to ensure that Native American voters are not required to wait until 2026 to cast ballots under a map that complies with the Voting Rights Act.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion should be granted and Defendant should be provided 30 days in which to file a responsive pleading.

December 6, 2022

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CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
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SUPPLEMENTAL COMPLAINT

Pursuant to Fed. R. Civ. P. 15(d), Plaintiffs file this Supplemental Complaint setting forth events that have occurred after the filing of the initial Complaint in this manner, ECF No. 1. On November 8, 2022, a general election was held under the redistricting plan challenged in this case—the first such election. That election result demonstrates that the configuration of state legislative districts in northeastern North Dakota—particularly District 9, subdistricts 9A and 9B, and District 15—prevent Native American voters from having an equal opportunity to elect candidates of their choice in violation of Section 2 of the Voting Rights Act.

SUPPLEMENTAL FACTS

1. On November 8, 2022, North Dakota held a general election—the first such election to take place under the new legislative redistricting plan enacted by the legislature in 2021.

2. The election included races for the newly drawn state senate District 9 (home to the Turtle Mountain Band of Chippewa Indians (“Turtle Mountain”)), state house subdistrict 9A (which is excessively packed with Native American voters), state house subdistrict 9B (in which

a sizeable Native American population is cracked from those in subdistrict 9A), and state senate and house elections in District 15 (home to the Spirit Lake Tribe (“Spirit Lake”)), whose Native American voters are cracked from those in nearby Turtle Mountain.

3. Native American candidates and candidates of choice of Native American voters lost all elections—as a result of opposition white bloc voting—for state senate and state house except in the packed configuration of subdistrict 9A. Among these losses were an incumbent Native American state senator and an incumbent state representative who had previously been elected as the candidate of choice of Native American voters.

2022 District 9 State Senate Election

4. District 9 incumbent State Senator Richard Marcellais ran for reelection in the November 2022 election. Senator Marcellais, an enrolled member of Plaintiff Turtle Mountain, first won election as District 9’s state senator in November 2006, and won reelection in 2010, 2014, and 2018. In these elections, District 9 was wholly contained within Rolette County, which is majority Native American by voting age population and home to Turtle Mountain’s reservation.

5. Senator Marcellais is the candidate of choice of Native American voters in District 9 as he receives the overwhelming majority of Native Americans’ votes.

6. The redistricting plan enacted in 2021 extended District 9 into portions of predominantly white Towner and Cavalier Counties, rather than combining Turtle Mountain with the Spirit Lake Tribe in Benson County, as the chairman of both Tribes had requested that the legislature do.

7. On November 8, 2022, Senator Marcellais lost reelection to Kent Weston, a white man. Mr. Weston received 53.8% of the vote to Senator Marcellais’ 46.0%.

8. Senator Marcellais carried Rolette County with 60% of the vote but won only 19.8% in Cavalier County and 34.5% in Towner County.

9. Senator Marcellais was the overwhelming choice of Native American voters in the district, while Mr. Weston was the overwhelming choice of white voters. Mr. Weston's victory was the result of white voters casting their ballots sufficiently as a bloc to defeat the candidate of choice of Native American voters for the state senate seat.

10. Native American voters' candidates of choice in other statewide elections failed to carry District 9 as well. For example, Melanie Moniz is a Native American—a member of the Mandan, Hidatsa and Arikara Nation (“MHA”)—and was a candidate for Public Service Commissioner. She was the overwhelming choice of Native American voters in District 9, while white voters overwhelmingly supported her white opponent, Julie Fedorchak.

11. Ms. Fedorchak carried District 9. Ms. Moniz carried Rolette County with 58% of the vote but won only 20.9% in Cavalier County and 29.2% in Towner County.

12. The same was true with that Native American candidate of choice for Congress, Cara Mund. She was the overwhelming favorite of Native American voters, but lost District 9 because of white bloc voting for her opponent Congressman Kelly Armstrong. While Ms. Mund carried Rolette County with 56.8%, she received only 27.3% in Cavalier County and 34.2% in Towner County.

13. The 2022 elections reveal that voting is racially polarized in the enacted version of District 9 and white voters vote sufficiently as a bloc to usually defeat Native American voters' candidates of choice.

14. By contrast, Ms. Mund and Ms. Moniz would have carried alternative configurations of District 9 that combine Turtle Mountain and Spirit Lake. Unlike the enacted

version of District 9, the alternative configurations would provide Native American voters an equal opportunity to elect their candidates of choice to the state senate.

15. The enacted plan reduced from one to zero the number of state senate districts in northeastern North Dakota in which Native American voters have an equal opportunity to elect candidates of their choice.

16. When the state senate reconvenes in January, it will be the first time since 1991 that no member of a North Dakota Tribe will serve in the state senate.

2022 Subdistricts 9A and 9B State House Elections

17. In elections conducted before the 2021 redistricting, Native American candidates of choice were elected to both state house seats in District 9, which was wholly contained within Rolette County. The 2021 redistricting legislation added portions of predominantly white Towner and Cavalier Counties to District 9, rather than the nearby Benson County (home to Spirit Lake). Then, the legislature split District 9 into two subdistricts for state house elections—packing Native American voters into subdistrict 9A and cracking others into subdistrict 9B, which is majority white.

18. In the November 8, 2022 election, only one candidate of choice of Native American voters prevailed—Jayme Davis, in subdistrict 9A. Ms. Davis, an enrolled member of Turtle Mountain and the candidate of choice of Native American voters, carried subdistrict 9A with 68.6% of the vote.

19. By contrast, incumbent Representative Marvin Nelson, the candidate of choice of Native American voters, lost reelection in subdistrict 9B, receiving just 37.6% of the vote. Representative Nelson won Rolette County’s portion of subdistrict 9B with 54.7% of the vote, but received 20.4% in Cavalier County and 45.9% in Towner County.

20. The enacted redistricting plan thus resulted in the number of state house seats in northeastern North Dakota in which Native American voters have an equal opportunity to elect their candidates of choice dropping from two to just one.

21. By contrast, an alternatively configured District 9 containing Spirit Lake rather than predominantly white Towner and Cavalier Counties would provide Native American voters an equal opportunity to elect candidates of their choice in two state house seats elected at large from the district.

2022 District 15 State Senate and State House Elections

22. The Spirit Lake reservation is contained within District 15, and Plaintiff Collette Brown, an enrolled member of Spirit Lake ran as a candidate for state senate in the November 8, 2022 election. Ms. Brown lost, receiving 33.8% of the vote. Her white opponent, Judy Estenson, prevailed with 77.1% of the vote.

23. Ms. Brown was the overwhelming candidate of choice of Native American voters in District 15, while Ms. Estenson was the overwhelming candidate of choice of white voters.

24. Ms. Brown carried the Benson County portion of the district—home to the bulk of the Spirit Lake reservation—with 63.4%. In the precinct containing Fort Totten, which has a Native voting age population of 91.8%, Ms. Brown received 83.1% of the vote. But she failed to win in any other county in the district. She received 34.9% in Eddy County, 30.2% in Ramsey County, and 22.7% in Towner County—all predominantly white counties.

25. In the District 15 state house election, two white candidates (Kathy Frelich and Dennis Johnson) ran along with a Native American candidate (Heather Lawrence-Skadsem). Ms. Frelich won a seat with 41.6% and Mr. Johnson won a seat with 38.6%. Ms. Lawrence-Skadsem lost, receiving 19.7%.

26. Ms. Lawrence-Skadsem was the overwhelming candidate of choice among Native American voters, while Ms. Frelich and Mr. Johnson were the overwhelming candidates of choice among white voters.

27. Ms. Lawrence-Skadsem was the top vote-getter in the Benson County portion of District 15, where she received 45.7% to Mr. Johnson's 28.7% and Ms. Frelich's 25.1%. In the precinct containing Fort Totten, Ms. Lawrence-Skadsem received 65.9% to Mr. Johnson's 16.9% and Ms. Frelich's 16.5%. But Ms. Lawrence-Skadsem placed last in every other county, receiving 20.0% in Eddy County, 16.7% in Ramsey County, and 13.9% in Towner County.

28. Native American voters in District 15 are thus blocked from electing any candidate of choice to the state senate or state house because of bloc voting in opposition to their preferred candidates by white voters.

29. In an alternatively configured district that combines Turtle Mountain and Spirit Lake, Native American voters would have an equal opportunity to elect candidates of their choice to the state senate and both at-large state house seats.

SUPPLEMENTAL REQUESTED RELIEF

Plaintiffs incorporate the relief requested in paragraphs A-F of their complaint, and request the following supplemental relief:

G. Order a special election for a newly configured state legislative district in November 2024 to ensure that Native American voters in Turtle Mountain and Spirit Lake are not forced to wait until 2026—six years into the decennial redistricting cycle—in order to be afforded an equal opportunity to elect their candidates of choice to the state senate.

December 6, 2022

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[PROPOSED] ORDER

**[PROPOSED] ORDER GRANTING MOTION TO FILE SUPPLEMENTAL
COMPLAINT**

Upon consideration of Plaintiffs' unopposed Motion to File a Supplemental Complaint, it is hereby ordered that, pursuant to Fed. R. Civ. P. 15(d), the motion is GRANTED. The Clerk is directed to docket the Supplemental Complaint. It is further ORDERED that Defendant file, within 30 days, a responsive pleading.

Dated: December ___, 2022

The Honorable Peter D. Welte, Chief Judge
United States District Court for the District of North Dakota