

**FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO**

BRIAN F. EGOLF JR., et al.,

Plaintiffs,

v.

**No. D-101-CV-2011-02942
(Consolidated)**

DIANNA J. DURAN, et al.,

Defendants,

**NAVAJO INTERVENORS' PRE-TRIAL BRIEF
FOR THE NEW MEXICO PRC REDISTRICTING TRIAL**

Plaintiffs in Intervention, the Navajo Nation, a federally recognized Indian tribe, Lorenzo Bates, Duane H. Yazzie, Rodger Martinez, Kimmeth Yazzie, and Angela Barney Nez (collectively “Navajo Intervenors”) hereby submit this pre-trial brief for the New Mexico PRC redistricting Trial (“Trial”).

FACTUAL BACKGROUND

Every ten years, the Census Bureau conducts a census to measure the total population of the United States and each state of the union. The most recent census was conducted in 2010, and established the population of New Mexico is 2,059,179, an increase of 240,133 residents from the 2000 census. The 2010 census establishes that the ideal population for each of New Mexico's PRC districts is 411,836, which represents the total population (2,059,179) divided by the number of districts (5). Between 2000 and 2010, some areas of the state have lost population, while others have gained population. Given these changes, the current PRC districts, which are based on the 2000 census, must be adjusted to take account of the population growth, decline and shifts that have occurred over the last ten years.

After the results of the 2010 census were released, a bi-partisan Interim Legislative Redistricting Committee was formed to study the issue of redistricting, take public testimony, and make recommendations to the full Legislature. Public comment was solicited on a series of redistricting plans developed as starting points in the process. Comments were received at meetings in Acoma, Gallup, Farmington and Las Vegas from representatives of the Navajo Nation. The Legislative Council Service adopted Redistricting Guidelines, which set forth the ground rules for the 2011 redistricting process.

A special legislative session was called from September 6 through September 24, 2011 to consider how to redraw the state's political districts based on the 2010 census data. During the special legislative session, the legislature passed a PRC redistricting plan—Senate Bill 24 (“Legislative Defendants’ PRC Plan”). Governor Martinez vetoed the Legislative Defendants’ PRC Plan on October 7, 2011 and issued Special Session Senate Executive Message No. 13 to the Honorable Timothy Z. Jennings, President Pro Tempore, and Members of the Senate, which communicated her veto and the reasons for the veto.

When redistricting of the New Mexico PRC is not accomplished by the state legislature, a lawsuit may be filed to request that the Court determine the proper apportionment of those districts. Several lawsuits were filed in late 2011 seeking judicial apportionment of the New Mexico PRC districts. The lawsuits were consolidated and proceeded before the Court under a single caption—Egolf v. Duran. In the litigation, several different plans were submitted for redistricting of New Mexico’s PRC districts. The Navajo Intervenors submitted a plan for New Mexico’s PRC districts, referred to herein as “the Navajo Plan.”

SUMMARY

In the New Mexico PRC Redistricting trial, the Navajo Intervenors will establish that the current PRC districts are unconstitutionally apportioned, that Native Americans in New Mexico have historically been and continue to be deprived of equal access to New Mexico's electoral process, and that the Navajo Plan provides the best plan for addressing this issue, while respecting communities of Native American interest and tribal self-determination.

ANALYSIS

I. THE PARTIES AGREE THAT THE EXISTING PRC DISTRICTS ARE UNCONSTITUTIONALLY APPORTIONED.

Given the regional changes and shifts in New Mexico's population over the last ten years, the existing PRC Districts are no longer evenly apportioned and are unconstitutional under both the United States Constitution Amendment XIV and the New Mexico Constitution, Art. II § 18. Each of the parties to this litigation have stipulated that the current PRC districts, which are based on the 2000 census, are unconstitutionally apportioned. In this litigation, therefore, the districts must be adjusted to take account of the population growth, decline, and shifts that have occurred over the last ten years.

II. THE NAVAJO INTERVENORS WILL ESTABLISH THAT NATIVE AMERICANS CONTINUE TO BE DEPRIVED OF EQUAL ACCESS TO NEW MEXICO'S ELECTORAL PROCESS.

In the redistricting litigation concerning the New Mexico State House of Representatives, this Court found a violation of Section 2 of the Voting Rights Act. Specifically, this Court found that in statewide legislative elections, Native Americans vote as a politically cohesive group, voting in Native American districts is racially polarized, and non-Native voters vote sufficiently as a bloc in

primary elections to veto more often than not the election of the preferred candidate of Native American voters. House Findings and Conclusions ¶¶50-52. In the House litigation, these findings justified the creation of six Native American majority minority districts.

Native Americans in New Mexico, and Native Americans residing on the Navajo Nation in particular, continue to suffer the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. The evidence will establish that unemployment on the Navajo Nation, when last officially measured by the United States Department of the Interior Bureau of Indian Affairs, was in excess of 52%. 2005 American Indian Population and Labor Force Report, United States Department of the Interior, Bureau of Indian Affairs, Office of Indian Services, p. 10.

In the context of PRC redistricting, creation of a Native American majority minority district to address issues faced by Native American voters is not possible as there are not sufficient numbers of Native Americans in a geographically compact area of the State of New Mexico to create an effective Native American majority-minority PRC district. The same facts which justified creation of Native American majority-minority districts in the House litigation, support creation of a PRC district here which keeps Native American communities of interest together and achieves an influential Native American voting age population in PRC district 4 of 33.5%.

Influence districts, while not mandated by the Voting Rights Act, are recognized as a useful tool for states to utilize to increase the ability of minorities to influence the electoral and legislative processes. See, Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). In an influence district “minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.” Id. When minority groups have sufficient numbers within a district to be

considered “influential,” representatives ultimately elected are expected to be more “sympathetic to the interests of minority voters.” Id. at 483.

The PRC has historically been important to Navajo politicians, many of whom have used the PRC as a stepping stone to enter state politics. In creating PRC districts, this Court should ensure that Native American communities of interests are maintained and honored by placing all Navajo lands as well as other a large proportion of other Native American lands in a single PRC district. Opportunities for Native American politicians to enter statewide politics through the PRC should be maintained and strengthened, by achieving a Native American Voting Age Population in that PRC district sufficient to allow Native American voters to actually influence the election in that district.

III. THE NAVAJO PLAN IS THE BEST PLAN FOR PRC DISTRICT 4.

The Navajo Plan for one Native American influenced district that includes all of the Navajo lands and a great majority of the Native American lands within the northwest quadrant of New Mexico adheres to traditional redistricting principles, provides for the best overall remedy to the current plan’s dilution of Native American voting rights, honors tribal self-determination, and provides the best set of electoral opportunities for Native Americans who have historically been deprived of such opportunities.

The evidence will establish that Native American tribes and their representatives are in the best position to define what communities of interest exist within and around their tribal lands. The evidence will also establish that the Navajo Nation has a right of self-determination, which requires the Court to consider the Nation’s expressed preferences regarding the drawing of PRC districts in the northwest quadrant of the State.

In the last round of redistricting, this court expressly recognized tribal self-determination as a legitimate factor to be considered in drawing legislative districts. Jepsen v. Vigil-Giron, No. D-0202-CV-2001 (N.M. First Judicial District Court, January 24, 2002) at p.13, ¶10 (deferring to plans presented by the Navajo and Jicarilla Apache Nations in part because they “further[ed] significant state polices, such as. . . respect for tribal self-determination.”).

The Navajo Plan is superior to any and all conflicting plans because it respects Native American communities of interest, establishes a Native American influenced district with a strong NA-VAP, and is consistent with tribal sovereignty and self-determination. The plans that conflict with the Navajo Plan fail to simultaneously achieve one or more of these four goals.

IV. THE NAVAJO PLAN CREATES ACCEPTABLE POPULATION DEVIATIONS THAT ARE JUSTIFIED BY NATURAL, POLITICAL, AND TRADITIONAL BOUNDARIES AND THE NEED TO ENSURE EQUAL ACCESS TO NEW MEXICO’S ELECTORAL PROCESS.

Any lawful plan for New Mexico PRC districts must comply with the equal protection clauses of the New Mexico and U.S. Constitutions. The principles of equal protection require that legislative districts provide “opportunity for equal participation by all voters in the election of state legislators.” Reynolds v. Sims, 377 U.S. 533, 566 (1963). This goal is achieved by creating state legislative districts with relative population equality. E.g., Voinovich v. Quilter, 507 U.S. 146 (1993); Jepsen v. Vigil-Giron, No. D-0101-CV-2001-02177, Court’s Findings of Fact and Conclusions of Law Concerning State House of Representatives Redistricting (N.M. First Judicial District Court, Jan. 24, 2002) at p. 12, ¶ 5 (citing White v. Regester, 412 U.S. 755 (1973)).

The population deviation in the Navajo Plan for PRC district 4 comply with principles of equal protection because it is well within the acceptable population deviation range. Indeed, it is less than 1 percent over or under the ideal. In addition, the population deviation in the Navajo Plan is

not motivated by any improper purpose; and is justified by the need to ensure equal access to the state's electoral process; and to honor the significant state policy of respect for tribal self-determination.

CONCLUSION

The Navajo Plan is the best plan for promoting equal electoral access for Native Americans in statewide elections, while also respecting relevant communities of interests and the self-determination of sovereign Indian tribes. Consistent with that plan, therefore, PRC District 4 should be established in the northwest quadrant of the state as follows:

PRC District 4 is composed of Bernalillo county precincts 31 through 38, 40 through 56, 58 through 67, 71 through 77, 88, 90 through 99, 101 through 106, 109, 122 through 124, 132, 133, 135 through 144, 214, 217, 221 and 223 through 226; Cibola county; McKinley county; Rio Arriba county precincts 24 through 27, 29 and 30; San Juan county; Sandoval county precincts 7 through 10, 14 through 27, 78 and 79; Santa Fe county precincts 12 and 72; Socorro county precincts 15 and 26; and Valencia county precinct 13.

Respectfully submitted,

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We hereby certify that a copy of the foregoing was electronically served to counsel of record through the Court's electronic filing system and was e-mailed to all counsel of record and the Honorable James Hall in .pdf format on this 6th day of January, 2012.

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