

**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  
STATE SENATE 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 State Senate redistricting 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. Based on these numbers, the ideal population for each of New Mexico’s Senate districts is 49,028, which represents the total population (2,059,179) divided by the number of seats (42). Between 2000 and 2010, some areas of the state have lost population, while others have gained population. Given these changes, the current Senate 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 Senate redistricting plan—Senate Judiciary Committee Substitute for Senate Rules Committee Substitute for Senate Bill 33 (“Legislature’s Senate Plan”). Governor Martinez vetoed the Legislature’s Senate Plan on October 7, 2011 and issued Senate Executive Message No. 12 to the Honorable President Pro Tempore Jennings and Members of the Senate, which communicated her veto and the reasons therefor.

When redistricting of the New Mexico Senate 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 Senate 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 Senate districts. The Navajo Intervenors, along with the Multi-Tribal Plaintiffs, will submit a single plan for the Northwest quadrant of the State, referred to herein as the Unified Native American Plan.

## **SUMMARY**

In the New Mexico State Senate Redistricting trial, the Navajo Intervenors will establish that the current Senate districts are unconstitutionally apportioned, that the current Senate districting plan violates Section 2 of the Voting Rights Act because it dilutes the voting strength of Native Americans and deprives Native Americans of equal access to New Mexico's electoral process, and that the Unified Native American Plan provides the best remedy for addressing Voting Rights Act violations, while respecting communities of Native American interest and tribal self-determination.

## **ANALYSIS**

### **I. THE PARTIES AGREE THAT THE EXISTING SENATE DISTRICTS ARE UNCONSTITUTIONALLY APPORTIONED.**

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. Between 2000 and 2010, some areas of the state have lost population, while others have gained population. Given these changes, the existing New Mexico State Senate Districts 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 Senate 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 THE EXISTING SENATE DISTRICTS DILUTE THE STRENGTH OF THE NATIVE AMERICAN VOTE IN VIOLATION OF THE VOTING RIGHTS ACT.**

Section 2 of the Voting Rights Act prohibits any state from imposing any voting

qualification, standard, practice or procedure that results in the abridgement of any citizen’s right to vote based on the voter’s race, color or status as a member of a language minority group. See generally, 42 U.S.C. § 1973. A protected minority group establishes a Voting Rights Act violation when it demonstrates “that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). As recognized by this Court in 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), Native Americans are a protected minority group within the meaning of the Voting Rights Act.

Thornburg v. Gingles, 478 U.S. 30 (1986), sets forth the contours of a Section 2 Voting Rights Act claim. Under Gingles, a protected minority must show that (1) it is sufficiently large, geographically compact and capable of electing a representative of choice in a hypothetical single member district; (2) it is politically cohesive; (3) others vote as a bloc such that they are usually able to defeat candidates of the minority group’s choice; and (4) that under the totality of the circumstances, the challenged voting procedure dilutes minority voting strength. Id. at 49-51.

**A. There are Sufficient Numbers of Native Americans Living Within a Geographically Compact Area of Northwest New Mexico to Support Three Majority Native American Senate Districts.**

In the last round of redistricting, three majority Native American Senate districts were created—3, 4, and 22. Since that time, however, population shifts have caused Senate District 22 to lose its majority Native American status. In 2001, Senate District 22 had a non-Hispanic Native American voting age population (“NA-VAP”) of 67.9%. Currently, the NA-VAP in each of these districts is: District 3: 85.5%; District 4: 68%; and District 22: 47.4%. In this round of redistricting,

the three majority Native American districts in the northwest quadrant of the state can not only be restored, but can be strengthened. Indeed, the Unified Native American Plan restores three Native American majority districts in the northwest quadrant of the state that are reasonably compact and contiguous, each with a strong NA-VAP as follows: SD3: 75.8%; SD4: 67.7%; SD22: 64.4%. Additionally, the Unified Native American Plan creates a Native American influence district in SD30, with a NA- VAP of 26.16%. The Navajo Intervenors, therefore, will satisfy prong one of Gingles.

**B. Native American Voters in Northwest New Mexico Are Politically Cohesive, Voting in Northwest New Mexico is Racially Polarized, and Non-Natives Vote as a Bloc Against Native American Candidates of Choice.**

The Navajo Intervenors and Multi-Tribal Plaintiffs will present expert analysis to support the conclusion that Native Americans are politically cohesive because they tend to vote for the same candidates. Homogeneous precinct analyses, ecological regression analyses, and multinomial-Dirichlet ecological inference analyses will demonstrate that voting in Native American districts is racially polarized, and that in primary elections, non-Native voters vote as a bloc to defeat, more often than not, the Native American candidates of choice. The second and third prongs of the Gingles analysis, therefore, will be satisfied.

**C. Under the Totality of the Circumstances, the Current Districting Scheme Continues to Dilute the Strength of the Native American Vote in New Mexico.**

In assessing the totality of the circumstances pursuant to Gingles, courts consider factors such history of discrimination in voting, whether voting is racially polarized, “the extent to which the minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process,” and the extent to which minority voters have been elected in the relevant jurisdictions. Gingles, 478

U.S. at 45. The Navajo Intervenors will establish that Native Americans have historically been discriminated against in areas of voting. The evidence will show that Native Americans in New Mexico have established Voting Rights Act violations in several prior redistricting proceedings, and did not gain the right to vote in New Mexico in 1948.

The Navajo Intervenors will establish that 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.

Finally, very few Native Americans hold elective office in New Mexico's Senate. According to the 2010 Census, 9.4% of New Mexico's citizens are American Indian or Alaska Native alone. If Native Americans were represented in the New Mexico State Senate at the level proportionate to their total population, Native Americans would occupy at least three seats in the Senate (total population of 193,562.83 (9.4% of 2,059,179) divided by 49,028 (the ideal district size) = 3.95 districts). Native Americans currently hold only two seats in the New Mexico Senate.

Under the "totality of the circumstances test" of Section 2 of the Voting Rights Act and Gingles therefore, the voting strength of Native Americans in the State has been diluted and Native Americans do not have an equal opportunity to participate in the political process and elect representatives of their choosing.

### **III. THE UNIFIED NATIVE AMERICAN PLAN IS THE BEST PLAN FOR REDISTRICTING NEW MEXICO'S NORTHWEST QUADRANT.**

The Unified Native American Plan for three Native American majority districts and one Native American influence district in 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.

Expert testimony 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. Expert testimony 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 Senate 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 policies, such as. . . respect for tribal self-determination.”).

The Unified Native American Plan is superior to any and all conflicting plans because it restores three Native American majority districts with strong NA-VAPS and creates one Native American influence district, is consistent with tribal sovereignty and self-determination, and respects communities of interest as defined by the tribes themselves. The plans that conflict with the Unified Native American Plan fail to simultaneously achieve one or more of these four goals.

#### **IV. THE UNIFIED NATIVE AMERICAN PLAN CREATES ACCEPTABLE POPULATION DEVIATIONS THAT ARE JUSTIFIED BY NATURAL, POLITICAL, AND TRADITIONAL BOUNDARIES AND THE NEED TO REMEDY VIOLATIONS OF THE VOTING RIGHTS ACT.**

Any lawful plan for New Mexico Senate 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 a total population deviation of no more than 10% from the ideal. 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)). Population deviations within this range, i.e. five percent over or under the ideal, are acceptable so long as they are not motivated by some identified illegitimate or discriminatory purpose. Voinovich, 507 U.S. 146; Larios v. Cox, 524 U.S. 947 (2004) (rejecting districts that had no neutral justification even though populations were within the 10% deviation).

The population deviations in the Unified Native American Plan comply with principles of equal protection because they are within the 10% acceptable population deviation range; they are not motivated by any improper purpose; they are justified by the need to comply with the Voting Rights Act; and they honor the significant state policy of respect for tribal self-determination.

#### **CONCLUSION**

The Unified Native American Plan provides the best remedy for curing violations of the Voting Rights Act and increasing the strength of Native American voting power in New Mexico, while also respecting relevant communities of interests and the self determination of sovereign

Indian tribes. Consistent with that plan, therefore, Senate districts should be established in the northwest quadrant of the state as follows:

**Senate District One** is composed of San Juan county precincts 26 through 40, 43 through 46, 49 through 53, 55 and 56.

**Senate District Two** is composed of San Juan county precincts 21, 41, 42, 47, 48, 54 and 57 through 77.

**Senate District Three** is composed of McKinley county precincts 2, 4 through 6, 20, 21, 31, 33 through 39, 41, 42, 49 and 59 and San Juan county precincts 1 through 8, 12 through 13, 17, 18, 20 and 22 through 25.

**Senate District Four** is composed of Cibola county precincts 4 through 6, 14 and 15, McKinley county precincts 1, 3, 14, 16 through 19, 22 through 29, 32, 40, 43 through 48, 50 and 52 through 58 and San Juan county precincts 9 through 11.

**Senate District Twenty-Two** is composed of Bernalillo county precinct 31, McKinley county precincts 7 through 13 and 15, Rio Arriba county precincts 24, 25, 29 and 30, and San Juan county precincts 14 through 16 and 19, Sandoval county precincts 6 through 10, 14 through 27, 63, 66, 75, 78, 79 and 84.

**Senate District Twenty-Nine** is composed of Bernalillo county precinct 93, Valencia county precincts 2, 3, 5 through 8, 13 through 16, 19, 21 through 28, 31, 32, 34 through 36.

**Senate District Thirty** is composed of Cibola county precincts 1 through 3, 7 through 13, and 16 through 25, McKinley county precinct 30, Socorro county precincts 15 and 24, Valencia county precincts 1, 4, 9, 10 through 12, 17, 18, 20, 29, 33, 37, 39 through 41.

Respectfully submitted,

WIGGINS, WILLIAMS & WIGGINS  
A Professional Corporation

By s/ Patricia G. Williams

Patricia G. Williams

Jenny J. Dumas

1803 Rio Grande Blvd., N.W. (87104)

P. O. Box 1308

Albuquerque, New Mexico 87103-1308

(505) 764-8400

Dana L. Bobroff, Deputy Attorney General

Navajo Nation Department of Justice

P.O. Box 2010

Window Rock, Arizona 86515

(928) 871-6345/6205

Attorneys for Navajo Intervenors

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 30th day of December, 2011.

WIGGINS, WILLIAMS & WIGGINS, P.C.

By s/ Patricia G. Williams

Patricia G. Williams

\_\_\_\_\_