

**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,

**THE NAVAJO INTERVENORS' PRE-TRIAL BRIEF FOR THE NEW MEXICO
STATE HOUSE OF REPRESENTATIVES 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"), by and through their attorneys, Wiggins, Williams and Wiggins, PC, hereby submit this pre-trial brief for the New Mexico State House of Representatives 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 House of Representatives districts is 29,417, which represents the total population (2,059,179) divided by the number of seats (70). Between 2000 and 2010, some areas of the state have lost population, while others have gained population. Given these changes, the current House 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 House redistricting plan—House Voters and Elections Committee Substitute for House Bill 39. Governor Martinez vetoed House Voters and Elections Committee Substitute for House Bill 39 on October 7, 2011 and issued House Executive Message No. 11 to the Honorable Speaker Ben Luján and Members of the House of Representatives, which communicated her veto and the reasons therefor.

When redistricting of the New Mexico House of Representatives 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 House of Representatives districts. The lawsuits were consolidated and proceeded before the Court under a single caption—Egolf v. Duran. In the litigation, the parties submitted eight different plans for the redistricting of New Mexico's House of Representatives districts.

SUMMARY

In the New Mexico State House of Representatives Redistricting trial, the Navajo Intervenors will establish that the current House districts are unconstitutionally apportioned, that the

current House 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 plan submitted by the Navajo Intervenors 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 HOUSE 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 House of Representative 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 House 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 HOUSE DISTRICTS DILUTE THE STRENGTH OF 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) its preferred candidate can be defeated by bloc voting of others; and (4) that under the totality of the circumstances, the challenged voting procedure dilutes minority voting strength. Id. at 50-51.

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

In the last round of redistricting, the Court created six Native American majority districts in the northwest quadrant of the state with Native American voting age population (“NA-VAP”) in each district of at least 60%. 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. 5, ¶ 26. The Native American population in New Mexico has increased, and six majority Native American districts in the northwest quadrant of the state, but can be strengthened. Indeed, the plan submitted by the Navajo Intervenors in this litigation maintains six Native American majority districts in the northwest quadrant of the state that are

reasonably compact and contiguous while at the same time increasing the minimum NA-VAP in each of those six districts to 65%. The Navajo Intervenors have therefore satisfied 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.

Expert analysis has established 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 have demonstrated that voting in Native American districts is racially polarized, and that non-Native voters have voted as a bloc against Native American candidates of choice. The second and third prongs of the Gingles analysis, therefore, have been 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, the 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. Here, there is no question that Native Americans have historically been discriminated against in areas of voting, having established Voting Rights Act violations in several prior redistricting proceedings, and having only obtained the right to vote in New Mexico in 1948.

There is no dispute 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. Indeed, 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.

Finally, very few Native Americans hold elective office in New Mexico's House of Representatives. 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 House of Representatives at the level proportionate to their total population, Native Americans would occupy at least six seats in the House (total population of 193,562.83 (9.4% of 2,059,179) divided by 29,417 (the ideal district size) = 6.579 districts). Native Americans currently hold only three seats in the New Mexico House of Representatives.

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 NATION'S PROPOSAL OFFERS THE BEST PLAN FOR REDISTRICTING NEW MEXICO'S NORTHWEST QUADRANT.

The Navajo Intervenors' plan for six Native American majority districts in the northwest quadrant of New Mexico adheres to traditional redistricting principals, 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.

In the last round of redistricting, the Court created six Native American majority districts in the northwest quadrant of the state, each of which had total NA-VAP in excess of 60%. 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. 5, ¶ 26. Nevertheless, Native Americans currently hold only three seats in the New Mexico House of Representatives. The plan submitted by the Navajo Intervenors in this litigation maintains six Native American majority districts in the northwest quadrant of the state that are reasonably compact and contiguous. That plan strengthens Native American voting power, however, by increasing NA-VAP in each district to 65% or more, while at the same time maintaining and respecting relevant communities of Native American interest.

Expert testimony has established 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 has also established 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 house 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 Navajo Intervenors' proposed plan is superior to any and all conflicting plans because

it maintains six Native American majority districts, increases NA-VAP to at least 65% in each of those six districts, is consistent with tribal self-determination, and respects communities of interest as defined by the tribes themselves. The plans that conflict with the Navajo Intervenors' plans fail to simultaneously achieve one or more of these four goals.

IV. THE NAVAJO INTERVENORS' 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 House districts must comply both 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 Navajo Intervenors' 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 Navajo Intervenors' 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, six majority Native American districts should be established in the northwest quadrant of the state as follows: (1) Representative district one should be composed of San Juan county precincts 28, 29, 31 through 34, 39, 41, 42, 44, 46 through 49, 57 through 59 and 67; (2) Representative district two should be composed of San Juan county precincts 35 through 38, 40, 43, 45, 50 through 56 and 70; (3) Representative district three should be composed of San Juan county precincts 60 through 66, 68, 69 and 71 through 77; (4) Representative district four should be composed of San Juan county precincts 1 through 7, 20 through 27 and 30; (5) Representative district five should be composed of McKinley county precincts 5, 7 through 10, 13, 19, 23, 35, 36, 43, 44, 46 through 49, 55 and 56; and San Juan county precincts 10 through 14, 17 and 18; (6) Representative district six should be composed of Cibola county precincts 1, 5, 7, 8 and 13 through 15; and McKinley county precincts 15, 17, 18, 24 through 30 and 52 through 54; (6) Representative district nine should be composed of McKinley county precincts 1 through 4, 6, 20 through 22, 31 through 34, 37 through 42, 45, 50 and 57 through 59; and San Juan county precincts 8 and 9; (7) Representative district sixty-five should be composed of Bernalillo county precinct 567; Rio Arriba county precincts 24 and 29; San Juan county precincts 16 and 19; and Sandoval county precincts 1 through 4, 8 through 10, 14, 15, 19, 20, 24 through 27 and 29; (8) Representative district sixty-nine should be composed of Bernalillo county precincts 31 and 93; Cibola county precincts 2 through 4, 6, 9 through 12 and 16 through 25; McKinley county precincts 11, 12, 14 and 16; San Juan county

precinct 15; Socorro county precinct 15; 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 9th day of December, 2011.

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