IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 33,386

ANTONIO MAESTAS and BRIAN EGOLF, members of the New Mexico House of Representatives, and JUNE LORENZO, ALVIN WARREN, ELOISE GIFT and HENRY OCHOA,

Petitioners,

v.

HON. JAMES A. HALL, District Judge Pro Tempore of the First Judicial District Court,

Respondent,

and

SUSANA MARTINEZ, in her capacity as Governor of New Mexico, et al.,

Real Parties in Interest.

MULTI-TRIBAL INTERVENORS' BRIEF IN CHIEF
Oral Argument Requested

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January 27, 2012

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INTRODUCTION

Native Americans know the electoral processes are not as open for them as for other New Mexicans. Electoral disenfranchisement, although officially ended by the Supreme Court in 1948, continues today. Tribal leaders, versed in the protections offered by the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973gg-10, saw this decade's redistricting as an opportunity to redress this - using the tribes' knowledge about their own communities and needs as the starting point for building a map. They coalesced as the Native American Redistricting Workgroup, and through laborious and intense consensus building, education and negotiation with the Legislature, agreed upon the boundaries of the majority Native American Districts 6, 65 and 69 and the districts encompassing the Northern Pueblos. These districts reflected not only what the Tribes knew was the best remedy under the Voting Rights Act, but also through dialogue with the Representatives and public during the special session, what worked for the communities within those districts.

In the litigation below, the Multi-Tribal Plaintiffs presented extensive testimony and evidence which the District Court determined proved their voting rights claims, and also that the contours of the districts they proposed were indeed the best remedy. Nine of the plans presented to the District Court readily incorporated the majority Native American districts as proposed by the Native Americans themselves.

The Executive Defendants reluctantly incorporated the Native American proposals in their fourth rendition of a redistricting map for New Mexico. In contrast to the Legislature, Governor Martinez never consulted with the Tribes on any aspect of redistricting.

The Executives, in their closing briefs below, continued to argue against a finding of a Voting Rights Act violation and against incorporating tribal communities of interest in the districts affecting tribal lands - even after submitting their fourth map. Accordingly, the Multi-Tribal Intervenors are compelled to intervene in this extraordinary proceeding with two main requests: First, that the Supreme Court affirm the District Court's findings and conclusions of law that Native Americans proved a Section 2 violation of the Voting Rights Act; and Second, that the best remedy for that violation should be to respect the wishes for whom the remedy is designed, and in this manner honor tribal self-determination and preserve tribal communities of interest.

The Executive Alternative 3 Plan adopted by the District Court, as well as plans proposed by the Legislative Defendants, the Egolf Plaintiffs and Maestas Plaintiffs, include the Multi-Tribal Plan for the Native American majority districts of 6, 65 and 69. The Multi-Tribal Intervenors support the Supreme Court's adoption of any of these plans.

However, the original Executive Defendants Plan and their first two alternatives, the James Plaintiffs' and Sena Plaintiffs' Plans presented to the District Court do *not* comport with the Voting Rights Act and the self-determination requests of the Multi-Tribal Intervenors. It is the position of the Multi-Tribal Intervenors that these plans should be rejected by the Supreme Court in the event any party to this extraordinary proceeding promotes their adoption.

SUMMARY OF PROCEEDINGS

The Multi-Tribal Intervenors are the named plaintiffs in case no. D-101-CV-2011-03016, which was consolidated with and litigated below under consolidated case no. D-101-CV-2011-02942. The consolidated cases are now before this Court pursuant to the Petitions for Writ of Superintending Control filed by Antonio Maestas, et al. and Timothy Z. Jennings, et al. Because the writs have not been consolidated as of the filing of this brief, the Multi-Tribal Intervenors are submitting identical briefs-in-chief in each extraordinary proceeding.

The consolidated cases all pertain to redistricting and were filed after Governor Martinez vetoed HB 39 (Redistricting of the State House of Representatives), passed during the Legislative Special Session for Redistricting.

The District Court considered plans from the Egolf Plaintiffs, Sena Plaintiffs, James Plaintiffs, Multi-Tribal Plaintiffs, Maestas Plaintiffs, Navajo Intervenors,

Executive Defendants (Governor, Lt. Governor and Secretary of State) and Legislative Defendants. The Multi-Tribal Plan fits within the Navajo Plan which also included majority Native American Districts 4, 5, and 9. The District Court adopted the Executive's Alternative 3 Plan which included, at the suggestion of the District Court, the Multi-Tribal/Navajo Plan. In the Supreme Court's proceeding, the Legislative Petitioners request that the Supreme Court adopt the Legislative Plan. The James Intervenors state that they support the adoption of the Executive's Alternative 3 Plan. The Maestas Petitioners request that the Court adopt or direct the adoption of any plan other than the Executive Alternative 3, since that plan was not fully litigated at trial. Because Briefs in Chief are being filed simultaneously, we do not know what the Executives will propose to the Court. Because multiple plans are being suggested to the Supreme Court through the Maestas writ, the Multi-Tribal Intervenors request that any plan adopted comport with the Multi-Tribal/Navajo Plan as the best remedy for their Voting Rights Act claims.

SUMMARY OF RELEVANT FACTS

The Multi-Tribal Intervenors presented the following factual evidence below to establish their Voting Rights Act claims, as required under *Thornburg v. Gingles*, 478 U.S. 30 (1986) ("*Gingles*").

I. *GINGLES* PRECONDITIONS UNDER THE VOTING RIGHTS ACT

The 2010 census shows that total Native American population grew at a rate of 14.6%, Multi-Tribal Ex. 19; Test. of Sanderoff, Trial Tr. 95:19-24, Dec. 13, 2011, compared to the 13.2% growth rate for the State as a whole. Test. of Sanderoff, Trial Tr. 72:22-25, Dec. 12, 2011.[1] Native Americans constitute 10.7% of the population of New Mexico, Multi-Tribal Ex. 19; Test. of Sanderoff, Trial Tr. 95:6-9, Dec. 13, 2011, but only 4% of the State House members.

Native Americans in northwestern New Mexico, including several Indian Pueblos, the Jicarilla Apache Nation, and the New Mexico portion of the Navajo Nation, have a sufficiently numerous and geographically compact population to constitute a majority of voters in six State House districts. Test. of Sanderoff, Trial Tr. 123:20-25, 124:1-25, 125:1-9, Dec. 12, 2011.

New Mexico has a history of racially polarized voting against Native Americans in the northwest portion of the State. *Sanchez v. King*, No. 82-0067-M at

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[1] Tribal leaders requested that the Court and the Legislature include all Native Americans in the demographic data, including those that may have indicated they had Hispanic or other heritage in addition to Native American. This is consistent with the approach taken in *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003) (When examining a "minority group's effective exercise of the electoral franchise . . . it is proper to look at *all* individuals who identify themselves as [being one of the minority].") (emphasis in the original).

20-25 (D.N.M. Aug. 8, 1984) ("*Sanchez v. King*"); *Jepsen v. Vigil-Giron*, No. D-101-CV-2001-02177, at 14 (Findings 11 & 12) (N.M. 1st Judicial Dist. Jan. 24, 2002) ("*Jepsen*"). Elections in northwestern New Mexico involving Native American candidates and non-Native American candidates continue to be racially polarized. Test. of Engstrom, Trial Tr. 201-202, Dec. 19, 2011; Test. of Espino, Trial Tr. 125:16-17, 127:1-3, Dec. 20, 2011. Native Americans in northwestern New Mexico have traditionally voted, and continue to vote, as a politically cohesive group. Test. of Engstrom, Trial Tr. 194:20-195:8, 196:7-12, Dec. 19, 2011.

II. FACTUAL EVIDENCE ON THE TOTALITY OF THE CIRCUMSTANCES

Historically, Native Americans in New Mexico have been denied equal access to the political process, due to long-standing discrimination. *Sanchez v. King*, at 20-25. New Mexico denied Native Americans living on Pueblo and Navajo lands the right to vote until 1948. *Montoya v. Bolack*, 70 N.M. 196, 200 (1962) (citing *Trujillo v. Garley*, No. 1350 (D.N.M. 1948)). As late as 1962, attempts were made to disenfranchise Navajo voters, as noted in the *Bolack* case. *Id.* at 198. Although the right to vote was beyond dispute, the *Sanchez* court, writing in 1982, found that there were still regular attempts by "certain legislators to deny that right to Indians." *Sanchez v. King*, at 25.

As discussed in more detail in our argument below, Native Americans continue to face obstacles in gaining equal access to the political process, as evidenced by: ongoing Department of Justice litigation against New Mexico counties for violations of section 2 of the Voting Rights Act ("Section 2"), lack of responsiveness to Indian issues at the State Legislature and by the State government, and socio-economic indicators. Multi-Tribal Ex. 11 and 20; Test. of Warren, Trial Tr. 88-89, Dec. 19, 2011.

III. FACTUAL EVIDENCE ON THE REMEDY

Candidates of choice of Native Americans and Legislators elected from majority Native American districts are usually more responsive to Native American issues. Test. of Luarkie, Trial Tr. 14:1-15, Dec. 15, 2011; Test. of Chino, Trial Tr. 151:4-18, Dec. 19, 2011; Test. of Reval, Trial Tr. 61:10-13, Dec. 19, 2011.

The Multi-Tribal Intervenors together with the Navajo Intervenors presented a map with six majority Native American districts: 4, 5, 6, 9, 65 and 69. Multi-Tribal Ex. 4; Navajo Ex. 3. In districts 6, 65 and 69 the total Native American voting age population is in excess of 65% (District 6 is 65.1%; District 65 is 65.8% and District 69 is 65.1%). Multi-Tribal Amended Ex. 3. These percentages of Native American voting age population provide a reasonable opportunity for Native Americans to elect a candidate of choice. Test. of Engstrom, Trial Tr. 204:25-205:14, 211:1-6,

211:15-213:25, Dec. 19, 2011.

Prior to the special session for redistricting, the bipartisan Legislative Redistricting Committee traveled throughout the state and held public hearings to receive comments and input from citizens and interest groups. Test. of Sanderoff, Trial Tr. 100:7-104:25, Dec. 12, 2011; Test. of Martinez, Trial Tr. 225:6-230:22, Dec. 21, 2011. The All Indian Pueblo Council ("AIPC") invited the Legislative Redistricting Committee to hold, for the first time ever, a redistricting hearing on Native American lands at Acoma Pueblo. Test. of Dorame, Trial Tr. 114:7-11, Dec. 19, 2011. The August 3, 2011, Acoma hearing was the best attended hearing of the Legislative Redistricting Committee with approximately 85 people, mostly tribal leaders, present. Test. of Sanderoff, Trial Tr. 102:24-25, Dec. 12, 2011. In addition to tribal leaders, comments were received from the Native American Redistricting Workgroup ("NARW"), which included representation and input from the 19 New Mexico Pueblos, the Jicarilla Apache Nation, and the Navajo Nation. Test. of Sanderoff, Trial Tr. 110:12-25, Dec. 12, 2011; Test. of Garcia, Trial Tr. 61:24-25, Dec. 15, 2011.

The NARW worked together to develop overarching redistricting principles and consensus maps, consistent with the Redistricting Guidelines and the Voting Rights Act (the "NARW Principles"). Test. of Garcia, Trial Tr. 61:19-62:6, Dec. 15,

2011; Multi-Tribal Exs. 7, 15 and 31. The NARW submitted the NARW Principles and consensus plans to the Legislative Redistricting Committee, the Legislature, and Governor Martinez prior to the special session on redistricting and continued to work and provide testimony throughout the legislative redistricting process. Test. of Chino, Trial Tr. 159:24-162:3, Dec. 19, 2011; Test. of Garcia, Trial Tr. 61:19-62:6, Dec. 15, 2011; Test. of Martinez, Trial Tr. 236:4-25, Dec. 21, 2011; Multi-Tribal Exs. 7, 8, 15 and 31. The NARW Principles, testimony and presentations included proposed remedies and specific requests as to the Native American communities of interest that needed to be preserved in the redistricting maps to be adopted by the Legislature, and hopefully, signed by the Governor. Test. of Chino, Trial Tr. 157:9-24, Dec. 19, 2011; Multi-Tribal Exs. 6-8, 14-15.

The NARW Principles and tribal testimony to the Legislature and the District Court emphasized the importance of honoring tribal self-determination. Test. of Luarkie, Trial Tr. 16-18, Dec. 15, 2011; Test. of Garcia, Trial Tr. 73:17-20, Dec. 15, 2011; Test. of Reval, Trial Tr. 74:3-20, Dec. 19, 2011; Multi-Tribal Ex. 7. This is consistent with both the federal policy of respecting tribal self-determination and New Mexico policy which includes the State-Tribal Collaboration Act, NMSA 1978, Sections 11-18-1 to -5. Test. of Tsosie, Trial Tr. 83:21-84:2, 85:23-86:3, Dec. 20, 2011; Test. of Warren, Trial Tr. 77:24-79:5, Dec. 19, 2011.

The 2002 *Jepsen* decision redistricting the New Mexico House of Representatives acknowledged the importance of redistricting consistent with tribal self-determination. *Jepsen*, at 13 (Conclusion 10). Test. of Tsosie, Trial Tr. 83:16-20, Dec. 20, 2011.

Tribes know what is best for them. Test. of Tsosie, Trial Tr. 85:14-17, 102:15-22, Dec. 20, 2011; Test. of Warren, Trial Tr. 91:22-94:18, Dec. 19, 2011.

At no time prior to her veto did Governor Martinez consult with the NARW or any of the Multi-Tribal Plaintiffs regarding her position, concerns about population deviations, communities of interest or preferences about HB 39. Test. of Luarkie, Trial Tr. 26:25-27:10, Dec. 15, 2011; Test. of Reval, Trial Tr. 71:25-72:11, Dec. 19, 2011; Test. of Dorame, Trial Tr. 114:12-20, 120:1-121:9, Dec. 19, 2011; Test. of Chino, Trial Tr. 157:13-24, 159:4-20, 175:20-176:10, Dec. 19, 2011.

Contrary to the statement in the Governor's Veto message, HB 39 did not dilute the Native American vote or split tribal communities of interest. Test. of Engstrom, Trial Tr. 236:13-237:18, Dec. 19, 2011.

Community of interest concerns include the importance of keeping the Pueblos of Laguna and Acoma together in District 69 because they share a common language and cultural practices, a common high school and health facility, and a common concern for the protection of traditional cultural properties around Mt. Taylor. Test.

of Garcia, Trial Tr. 65:3-24, Dec. 15, 2011. Mt. Taylor is within the aboriginal lands of several of the Pueblos and Tribes in the area and is central to the Tribes' identity, history, traditions, culture and religion. Test. of Luarkie, Trial Tr. 21:6-9, Dec. 15, 2011; Test. of Garcia, Trial Tr. 61:7-9, 60:20-61:13, 65:6-24, 69:6-12, Dec. 15, 2011; Test. of Chino, Trial Tr. 144:12-22, Dec. 19, 2011.

District 65 was originally established by the *Sanchez v King* court as a Pueblo dominated district that the Jicarilla Apache Nation joined as part of the 2002 redistricting court case. Test. of Reval, Trial Tr. 59:12-25, Dec. 19, 2011; Test of Sanderoff Trial Tr. 280:17-281:14, Dec. 13, 2011; *Sanchez v. King*, at 135-36. The Jicarilla Apache Nation and the Sandoval County Pueblos share common interests based on size, tradition and customs, political and legal issues and inter-marriages. The Jicarilla Apache Nation reservation extends into Sandoval County. Test. of Reval, Trial Tr. 60:3-10, Dec. 19, 2011; Multi-Tribal Ex. 5.

The Multi-Tribal Plaintiffs' proposed Districts 6, 65 and 69, if inserted in the Maestas, Egolf, Legislative Plans or Executive Alternative 3, do not exceed deviations of +/- 5%. Test. of Engstrom, Trial Tr. 206:2-19, Dec. 19, 2011. Compliance with the Voting Rights Act Section 2, respect for self-determination, preservation of tribal communities of interest, maintaining tribal communities whole within a district, and the distance between and rural nature of the reservations are

legitimate reasons for deviations within the acceptable norm of +/- 5%, supported by state and federal law. Test. of Sanderoff, Trial Tr. 116:18-117:1, Dec. 13, 2011; Test. of Martinez, Trial Tr. 249:9-250:6, Dec. 21, 2011; *League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 433 (2006).

CHALLENGED FACTUAL FINDING ADOPTED BY THE COURT BELOW

The Multi-Tribal Intervenors challenge Finding of Fact No. 72 adopted by the District Court, which states:

> Incorporating the Multi-Tribal/Navajo Nation Plan into the Executive Plan necessarily produced political performance consequences in other districts outside the northwest quadrant. As a result of the inclusion of the Multi-Tribal/Navajo Nation Plan, the number of swing districts (49-51% Republican) increased from five to eight. The number of majority Republican districts (>50%) increased from 31 in the original Executive Plan, to 33 in Executive Alternate Plan 2, to 34 in Executive Alternate Plan 3. Leg. Def's House Ex. 30.
>
> Findings of Fact and Conclusions of Law ("FOF & COL") 15, Jan. 3, 2012.

Such Finding is not supported by substantial evidence. *Leo v. Sims*, 122 N.M. 618, 633 (1996) (stating the standard of review for a trial court's findings: "Findings of fact made by the district court will not be disturbed if they are supported by substantial evidence."). In fact, *no evidence* was presented to show that incorporation of the Multi-Tribal/Navajo Nation Plan necessarily produced the political consequences that it did in the Executive Plans. The *only* witness discussing this

issue and Legislative Defendants' Exhibit 30 was the Legislative Defendants' expert, Brian Sanderoff, who testified that "there were other ways to do it which would have had less partisan change." Test. of Sanderoff, Trial Tr. 119: 3-4, Dec. 22, 2011; *see* Test. of Sanderoff, Trial Tr. 44-45, 56-57, and 118-119, Dec. 22, 2011 for broader testimony on this issue.

The Multi-Tribal Plan was incorporated into the statewide Legislative, Maestas, and Egolf Plans. These plans did not produce a Republican partisan bias because of the incorporation of the Multi-Tribal Plan. Test. of Katz, Trial Tr. 43:13-44:5, Dec. 20, 2011.

The Executives had access to the requests of the Multi-Tribal Plaintiffs for redistricting the House since at least September 26, 2011 when the Pueblo of Laguna and the AIPC requested that Governor Martinez sign HB 39 because they believed that Districts 6, 65 and 69 comported with the Voting Rights Act and met their tribal self-determination goals. Multi-Tribal Ex. 8; Test. of Chino, Trial Tr. 157:13:-158:6, Dec. 19, 2011. In addition, the Multi-Tribal Plaintiffs and the Navajo Intervenors filed their proposed redistricting maps and served them on all counsel on November 9, 2011. During discovery, when it became evident that the Executive Plan's drastic changes to Districts 6, 65, 69 were not acceptable to the Tribes, the Executive attorneys directed that an alternative map be drawn to "conform as close as possible

to the actual boundaries of the Native American districts that were given to the Court." Test. of Morgan, Trial Tr. 69:9-70:6, Dec. 14, 2011. That work began in November, around Thanksgiving. Test. of Morgan, Trial Tr. 135:10, Dec. 14, 2011. The Executives had ample time to fully incorporate the Multi-Tribal map and share it with the Multi-Tribal Plaintiffs and other parties to the litigation below to determine its affect on partisan performance before the last day of trial after most parties' witnesses had testified. Argument of Leger de Fernandez, Trial Tr. 22:3-23, Dec. 22, 2011.

The Multi-Tribal Intervenors do not take a position on whether a court can lawfully adopt a map that changes the partisan make-up of the House of Representatives. Our point is simply that the late inclusion of the Native American districts should not be used as an excuse for such a result. The evidence does not support this finding.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT THE MULTI-TRIBAL PLAINTIFFS AND NAVAJO INTERVENORS HAD PREVAILED ON THEIR CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

The District Court's Findings of Fact 42 through 60, and its Conclusions of Law 18-25, support the conclusion that Native Americans in New Mexico had proven

violations of Section 2 of the Voting Rights Act. These findings are supported by substantial evidence and indeed were not controverted by any expert testimony presented at trial. A finding will not be disturbed if it is supported by substantial evidence. *See Sims,* at 633.

If the Court chooses to adopt a plan other than Executive Alternative Plan 3, these findings would be consistent with and should be applied to the Egolf, Legislative or Maestas Plans.

Congress extended the protections of the Voting Rights Act to American Indians in 1975 after finding that "a 'pattern of educational inequity exists with respect to children of Indian . . . origin'" and "'substantial' evidence of discriminatory practices that affected the right of Indians to vote". *Windy Boy v. Cnty of Big Horn,* 647 F.Supp. 1002, 1007 (D. Mont. 1986) (quoting and citing 1975 U.S. Code Cong. & Ad. News at 774, 795, 797). Accordingly, the Native American population of New Mexico, collectively, constitutes a protected class under the Voting Rights Act for purposes of redistricting. 42 U.S.C. §§ 1973b(f)(2) and 1973 aa-1a(e).

In Conclusion of Law 19, the District Court properly noted that a Section 2 Voting Rights Act claim is one in which:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State . . . are not equally open to participation by members of [a protected class] . . . in

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).

FOF & COL 27-28.

A. Substantial Evidence Established the Three *Gingles* Preconditions.

Conclusion of Law 20 correctly held that to demonstrate a violation of Section 2, the United States Supreme Court requires that three preconditions be met:

> (1) a particular racial group is sufficiently large and geographically compact to constitute a majority in a single-member district;
> (2) the racial group is politically cohesive; and
> (3) the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

Id. at 28 (citing *Gingles*, 478 U.S. at 50-51).

Conclusion of Law 21, found that the:

> evidence establishes that Native Americans meet the threshold criteria required under *Gingles*, at 50-51, to establish a Section 2 violation of the Voting Rights Act by showing: a) The Native American population in the northwest quadrant of the state is large and compact enough to create multiple, compact Native American majority districts; b) the Native American population is politically cohesive; and, c) the racial bloc voting exists to defeat the representatives of the Native Americans' choice.

Id.

The evidence referenced in Conclusion of Law 21 was substantial and should not be overturned. *See Sims*, at 633 and summarized in Findings of Fact 45-47, 49-

52. In support of those findings, the first *Gingles* prong was proved by the ability to draw six compact Native American majority districts in six of the eight original plans and was corroborated by at least three of the parties' experts. Test. of Engstrom, Trial Tr. 204:11-16, Dec. 19, 2011; Test. of Sanderoff, Trial Tr. 158:6-9, Dec. 12, 2011; Test. of Williams, Trial Tr. 191:23-25, Dec. 15, 2011; Multi-Tribal Ex. 4.

The six plans are the Multi-Tribal Plaintiffs', the Navajo, Egolf, Maestas, Legislative and Sena Plans. The Multi-Tribal Plaintiffs argued at trial that the Executive original plan was not compact as described by Supreme Court precedence because it split minority (tribal) communities of interest apart. As the Supreme Court stated in *LULAC v. Perry*, a Section 2 compactness analysis should "take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries[],'" at 433 (quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997)).

The second and third *Gingles* prongs concern the presence of racially polarized voting. Racially polarized voting is the "'keystone of a vote dilution case.'" *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020 (8th Cir. 2006) (quoting *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 473 (8th Cir. 1986)). It is proven through expert analysis of preferably endogenous elections, and preferably between candidates who are members of the protected class and non-protected class. *Id.* at

1020-21 (citations omitted).

Professor Richard Engstrom conducted an analysis of the endogenous elections from 2004 to 2010 in the area comprising House Districts 6, 65 and 69, which also included Senate Districts 4, 22 and 30. The results were recorded in Multi-Tribal Exhibit 2. He used the most recent version of the ecological inference analysis developed by Professor Gary King of Harvard University and looked only at elections that involved Native Americans running against non-Native Americans in competitive races. His ecological inference procedure demonstrated both political cohesion and racially polarized voting. Test. of Engstrom, Trial Tr. 196:7-11, 201-202, Dec. 19, 2011. While "political cohesiveness is implicit in racially polarized voting[,]" *Sanchez v. Colorado*, 97 F. 3d 1303, 1312 (10th Cir. 1996) (quoted in *Bone Shirt*, 461 F.3d at 1020), Engstrom's analysis specifically highlights the political cohesion of the Native American vote, and separately the bloc voting of the non-Native American voters. Test. of Engstrom, Trial Tr. 196:7-11, 201-202, Dec. 19, 2011.

No expert or witness challenged Professor Engstrom's findings or analysis. Although the Executives argued in their closing brief that the *Gingles* preconditions were not met, they did so without any citation to the evidence. Executive Defendants Written Closing Argument Regarding the New Mexico House of Representatives Redistricting Plan 22 fn 4, Dec. 28, 2011. This bald assertion is contrary to all the

evidence introduced at trial. The Executives' own experts acknowledged that they were not conducting any racially polarized voting analysis. Test. of Gaddie, Trial Tr. 283-284:4, Dec. 14, 2011; Test. of Brunnel, Trial Tr. 201:21-201:3, Dec. 21, 2011.

B. The Totality of Circumstances Evidence Supported the District Court Findings That Native Americans Do Not Have the Same Opportunities To Participate Equally in the Political Process.

The *Bone Shirt* case noted that satisfying the three *Gingles* prongs took a plaintiff "'a long way towards showing a section 2 violation,'" *id.* at 1021 (quoting *Hawell v. Blytheville Sch. Dist.*, 71 F.3d 1382, 1390 (8th Cir. 1995) (en banc). However, an analysis of the totality of circumstances factors was the ultimate proof required to show that Native Americans had "'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice[.]'" *Bone Shirt* at 1021 (citation omitted) (quoting 42 U.S.C. § 1973(b)).

The District Court's Conclusion No. 22, found that

> [u]nder the totality of the circumstances, Native Americans in New Mexico do not possess the same opportunities to participate in the political process as other New Mexican, in violation of Section 2 of the Voting Rights Act. *Gingles*, at 46.

Id. at 28.

In evaluating the totality of the circumstances, courts often look to the factors listed in Senate Report 97-417, 97th Cong. 2nd Sess. (1982) ("Senate Report") that

accompanied the 1982 amendments to the Voting Rights Act. The relevant factors for New Mexico's Native American citizens are:

> the history of voting-related discrimination in the State or political subdivision;
>
> the extent to which voting in the elections of the State or political subdivision is racially polarized; . . .
>
> the extent to which 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[.]

Gingles, 478 U.S. at 44-45 (citations omitted). However, the court in *Gingles* explained that the Senate Report stresses that the list of factors "is neither comprehensive nor exclusive[,]" *id.* at 45, and that "other factors may also be relevant and may be considered." *Id.* (citing Senate Report at 29-30). The court also noted that "'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."' *Id.* (quoting Senate Report at 29). The courts have added additional factors such as whether elected officials are unresponsive to the particularized needs of the members of the minority group, *id.* (citing Senate Report at 29), and "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994)

voters to turn out on election day. The Cibola County Clerk failed to enter the names of those newly registered voters onto the voting rolls and, as a result, those newly registered voters were not allowed to vote in the 2004 election. The County Clerk also purged other Laguna voters from the lists and failed to provide the required provisional ballots to the Laguna polling sites, thereby compounding the problem when the newly registered, or recently purged, voters showed up and found they could not vote. Test. of Luarkie, Trial Tr. 12:1-6, Dec. 15, 2011; Test. of Martinez, Trial Tr. 252: 17-253: 12, Dec. 21, 2011; Multi-Tribal Exs. 10 and 11.

Similarly, the Crow and Northern Cheyenne Indians in Montana were engaged in major Indian voter registration drives that were thwarted by the county's failure to include them in the voter lists. *Windy Boy*, 647 F. Supp. at 1008. As that court noted, "[f]or Indians who could not register or could not vote, it does not much matter whether there was a specific intent to interfere with their rights or simply an inability or unwillingness on the part of the county to make sure Indians rights were protected." *Id.* The successful Latino plaintiffs in *LULAC v. Perry*, likewise, were engaged in voter mobilization efforts that the State was attempting to undermine through the redistricting process. *Id.* at 440.

The counties of both Cibola and Sandoval, which contain between them twelve different tribes and tribal lands, have been under federal court supervision since 1994

for violations of the Voting Rights Act related to Native Americans. The Consent Decree in Sandoval County has been extended until 2013 because the County has continually failed to remedy the violations. Multi-Tribal Ex. 20, Order Granting Joint Mot. for Entry of Limited Consent Decree, *United States v. Sandoval Cnty*, No. 88-CV-1457 (D.N.M. July 6, 2011). This summer, the three Judge panel found that the County Clerk in Sandoval County is hostile to the Native American efforts and threatened the County with contempt of court. *Id.* at 3, 10-15.

The Cibola County Consent Decree was modified to include the County's stipulation that the electoral irregularities in the 2004 election violated the National Voter Registration Act and the Help America Vote Act. The Cibola County Consent Decree has been extended through the 2012 election. Multi-Tribal Ex. 11, Second Order Extending and Modifying Stipulation and Order Originally Entered April 21, 1994, *United States v. Cibola Cnty*, No. 93-1134 (D.N.M. Mar. 19, 2007).

While 23% of New Mexicans were voting early in 2006, there were no early voting sites on Pueblo lands, and only one site on Native American lands – at Shiprock. Multi-Tribal Ex. 12; Test. of Luarkie, Trial Tr. 12:18-20, Dec. 15, 2011. Cibola County was unwilling to install early voting on Pueblo lands until it was mandatory – thanks to the early voting law the Pueblo of Laguna championed. Test. of Luarkie, Trial Tr. 43:15-21, Dec. 15, 2011; Test. of Martinez, Trial Tr. 253:7-19,

Dec. 21, 2011.

The official disenfranchisement, long-standing consent decrees, lack of early voting, and Laguna 500 project all demonstrate that Native Americans living in Cibola and Sandoval counties 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)

2. Racially Polarized Voting Exists in New Mexico.

The third Senate factor, racially polarized voting, is a combination of the second and third *Gingles* preconditions, Native American political cohesion and majority bloc voting. *Gingles*, 478 U.S. at 56. Professor Engstrom's analysis demonstrates racially polarized voting in elections involving Native American and non-Native American candidates. Test. of Engstrom, Trial Tr. 201-202, Dec. 19, 2011; Multi-Tribal Ex. 2.

3. Despite Progress, There Remains a Lack of Legislative Responsiveness to Native American Concerns.

Historically and up to the present, the New Mexico Legislature has not been as responsive to the needs of the state's Native Americans as it has to other communities. Former Secretary of Indian Affairs, Mr. Alvin Warren, testified about the disparity in legislative funding for basic infrastructure that exists between Indian

and non-Indian communities throughout the state and how the lack of dependable paved roads, clean dependable running water, sewage systems, and health care facilities make it difficult in the Native American communities to get to school, medical appointments, work and the voting booth. Test. of Warren, Trial Tr. 80-85, 100:17-102:1, Dec. 19, 2011; *see also* Multi-Tribal Ex. 21 (Indian Affairs Department document setting out disproportionate funding).

Of extreme concern to the Native Americans is the lack of responsiveness and outright adversity to their requests for respect for traditional cultural properties. Test. of Chino, Trial Tr. 148:2-6, 150:17-24, 151:8-23, Dec. 19, 2011. A 2005 Executive Order of the State of New Mexico's Governor acknowledged that the "State of New Mexico's actions may have the unintended and inadvertent result of disturbing and adversely impacting Native American cultural and historic sites and sacred places, requiring a process of consultation to avoid any irreplaceable loss[.]" Multi-Tribal Ex. 18. As an example, based on an application from the Pueblos of Acoma, Laguna, and Zuni, the Hopi Tribe in Arizona, and the Navajo Nation, the New Mexico Cultural Properties Review Committee designated Mt. Taylor as a Traditional Cultural Property under state law. In a swift and adverse backlash, several bills were introduced in the New Mexico Legislature which would undermine the Traditional Cultural Properties designation or nomination process. Test. of Chino, Trial Tr.

148:2-149:4, Dec. 19, 2011.

While tribal leaders testified to the improved legislative relationship between the state and the tribes, the testimony was always qualified as needing improvement. Test. of Chino, Trial Tr. 154:20-25, Dec. 19, 2011; Test. of Warren, Trial Tr. 80:20-81:5, 89:12-14, Dec. 19, 2011 ("its taken a very long time to get even as far as we are now." and tribes still have "many challenges").

4. Native Americans Rank the Worst in the State's Socioeconomic Indicia.

The lack of equal access in the electoral and legislative processes affects the lives of Native Americans in other profound ways. Based on U.S. Census Bureau data, New Mexico's Native American population is significantly poorer than the rest of the State's population: 31.5% of Native Americans live in poverty compared to 10.5% of non-Hispanic Whites. Multi-Tribal Ex. 33; Test. of Engstrom, Trial Tr. 234:22-235:8, Dec. 19, 2011. *See also*, Multi-Tribal Ex. 21; Test. of Warren, Trial Tr. 80:25-85:19, Dec. 19, 2011; Test. of Luarkie, Trial Tr. 27:16-28:2, Dec. 15, 2011. The courts have noted that "[o]nce lower socio-status. . . has been shown, there is no need to show the causal link of this lower status on political participation. . . . 'Inequality of access is an inference which flows from the existence of economic and educational inequalities.'" *Windy Boy* at 1016 (citations omitted).

This substantial evidence regarding the totality of circumstances supports the District Court's Findings of Fact and the Conclusions of Law that the Native American claimants had established a violation of Section 2 of the Voting Rights Act.

II. THE DISTRICT COURT PROPERLY FOUND THAT THE MULTI-TRIBAL PLAN TOGETHER WITH THE NAVAJO NATION PLAN WAS THE BEST REMEDY TO THE SECTION 2 BECAUSE THESE PLANS RESPECTED TRIBAL SELF-DETERMINATION AND PRESERVED TRIBAL COMMUNITIES OF INTEREST.

Once Section 2 of the Voting Rights Act has been triggered, the inquiry necessarily focuses on the remedy. The District Court found that "[t]ribal communities are in the best position to determine what is best for their communities." FOF & COL 11, Finding No. 48. The evidence in support of this finding ranged from testimony of tribal leaders, Test. of Luarkie, Trial Tr. 15: 23-16: 23, Dec. 15, 2011, and Garcia, Trial Tr. 73:7-74: 19, Dec. 15, 2011, to testimony of Egolf's expert, Test. of Williams, Trial Tr. 113: 22-114: 17, Dec. 15, 2011, and the House Majority Floor Leader, Test. of Martinez, Trial Tr. 236: 9-14, Dec. 21, 2011, to an acknowledgment by the Executive's expert that a minority group seeking a remedy should be involved in crafting the remedy. Test. of Gaddie, Trial Tr. 280:19-23, Dec. 14, 2011. In addition, expert testimony was introduced on the role of self-determination in the development of federal and state policy, and its application to redistricting. Test. of Tsosie, Trial Tr. 83:21-84:2, Dec. 20, 2011.

The District Court properly respected tribal self-determination in its adoption of a map that reflected the concerns of the tribes. *Windy Boy* acknowledged that its decision on the Voting Rights Act and Native Americans would have to take into account global issues - including the "dual status of Indians as both United States citizens and as members of sovereign tribes that are self-governed and not subject to full control by state and local government[.]" 647 F.Supp. at 1007.

Aside from individual tribal members being recognized as a minority group subject to the protections of the Voting Rights Act, Indian tribes have long been recognized as inherently self-governing sovereign entities independent of state jurisdiction and control absent congressional authorization. *Worcester v. Georgia*, 31 U.S. 515, 531 (1832). The District Court heard significant testimony from tribal leaders and experts about the importance of both tribal sovereignty and self-determination, and the interaction of these concepts with redistricting. Test. of Luarkie, Trial Tr. 15:7-16:23, Dec. 15, 2011; Test. of Tsosie, Trial Tr. 76:13-86:3, Dec. 20, 2011; Test. of Engstrom, Trial Tr. 228:6-229:10, Dec. 19, 2011.

Professor Tsosie considered the *Jepsen* court's finding, that the 2002 map was consistent with tribal self-determination, as both forward thinking and a vindication that self-determination is an important state policy. Test. of Tsosie, Trial Tr. 83:16-20, Dec. 20, 2011; *Jepsen*, Court's Findings of Fact and Conclusions of Law

Concerning State House of Representatives Redistricting, at 13 (Conclusion 10).

The state action of redistricting will affect the voting rights of tribal members for the next decade. The ability of Native Americans to elect representatives of their choice will impact their ability to develop economically, obtain basic education, protect important cultural properties, protect their people and lands from the adverse impacts of mining, and to pursue other important community interests of individual tribes as well as those common to multiple tribes. It is essential, therefore, to respect the Pueblos and tribal Nations' exercise of self-determination--in identifying the communities of interest that are most important to them, and in asserting a preference for which district or districts they wish to be in. Test. of Luarkie, Trial Tr. 16:16-23, 19:12-23:11, Dec. 15, 2011; Test. of Warren, Trial Tr. 91:22-25, Dec. 19, 2011 ("Too much of our history in the State has involved the creation of policy and allocation of resources without regard to the needs and the opinions of Tribes on behalf of our Tribal members").

Professor Engstrom called for respecting the tribal preferences as "something that relates directly to representation." Test. of Engstrom, Trial Tr. 220:8-10, Dec. 19, 2011. The self-governing tribes are in the best position to determine the issues that are most important to them and how those issues should be addressed. Test. of Warren, Trial Tr. 91:22-94:18, Dec. 19, 2011; Test. of Tsosie, Trial Tr. 84:21-85:22,

Dec. 20, 2011. Even the Executives' expert recognized that the minority community should be listened to when developing a Section 2 remedy. Test. of Gaddie, Trial Tr. 280:19-23, Dec. 14, 2011.

The District Court repeatedly heard the tribal leaders dismay at the failure of the Governor to consult with the tribal leadership about her redistricting plans – before the session, during the session, before her veto and when drafting her original plan and the multiple alternatives. Test. of Luarkie, Trial Tr. 20:20-25, 27:4-14, Dec. 15, 2011; Test. of Chino, Trial Tr. 159:12-16, Dec. 19, 2011; Test. of Reval, Trial Tr. 71:25-72:11, Dec. 19, 2011; Test. of Warren, Trial Tr. 88:23-89:5, Dec. 19, 2011; Test. of Dorame, Trial Tr. 120:6-121:9, Dec. 19, 2011 ("I just don't see how these decisions were being made [by the Executives] without talking to our tribal government.").

The request for respect for self-determination has a very practical effect – it leads to solutions. Test. of Luarkie, 16:16-23, Dec. 15, 2011. The Legislature's commitment to honoring self-determination this time around led to the adoption of a plan for the Pueblos and Jicarilla Apache Nation in Districts 6, 65 and 69 that they could support at the Legislature and in the courtroom. The Governor's failure to honor self-determination and tribal state collaboration meant that the Multi-Tribal Plaintiffs had to respond to four different plans proffered by Governor Martinez, each

with a different set of problems concerning Native Americans.[2]

III. THE SUPREME COURT, IN THE EXERCISE OF ITS EQUITABLE AND SUPERINTENDING CONTROL OF THIS MATTER, SHOULD ONLY ADOPT, OR DIRECT THE ADOPTION OF, A PLAN THAT IS CONSISTENT WITH THE MULTI-TRIBAL/NAVAJO PLAN AND RESPECT FOR TRIBAL COMMUNITIES OF INTEREST.

The Supreme Court has before it multiple plans for redistricting the State House. It may chose to affirm, to adopt one of those plans or to remand this matter to the District Court with specific directives. Of these potential maps, the Multi-Tribal Plaintiffs urge the Supreme Court to reject–if they are promoted–the James Plan and the Executive's original and first two Executive alternatives as potentially violating Section 2 of the Voting Rights Act and undermining traditional redistricting criteria and tribal self-determination.

The original Executive Plan creates six majority districts that, based on numerical analysis alone, are not that different than the Multi-Tribal districts. Test. of Engstrom, Trial Tr. 218:17-20, Dec. 19, 2011. However, the Executive Defendants' original plan splits the Laguna Pueblo community into two different districts; it moves part of Laguna Pueblo into District 6, a Gallup based district. It

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[2]The split of the Ohkay Owingeh Pueblo in Executive Alternative 3 is an example of an issue that could have been addressed more fully during the evidentiary phase if the map had been available in advance, with time to carefully review it and have witnesses testify about it.

moves Acoma Pueblo from District 69 where it has historically been, to District 6. Test. of Luarkie, Trial Tr. 21:1-22:2, Dec. 15, 2011; Test. of Garcia, Trial Tr. 66:6-20, Dec. 15, 2011; Multi-Tribal Ex. 25. These changes make the Executive's districts non-compact. As the Supreme Court stated in, *LULAC v. Perry*, a Section 2 compactness analysis should "take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries[,]'" at 433 (quoting *Abrams*, 521 U.S. at 92).

The Governor's expert testified that he had preserved Native American communities of interest, Test. of Morgan, Trial Tr. 126:17-19, Dec. 14, 2011, but then acknowledged that he did not know what Native American communities of interest were impacted by his map, Test. of Morgan, Trial Tr. 127:11-19, Dec. 14, 2011, and acknowledged his Districts 6, 65 and 69 were different than the existing districts. Test. of Morgan, Trial Tr. 128:16-20; 129:5-11, 131:1-10 and 130:15-18, Dec. 14, 2011. This lack of knowledge as to Native American communities of interest is not surprising, given that he did not read the documents provided by the tribes to Governor Martinez and the Legislature, and Governor Martinez failed to conduct any consultation with the tribes before, during or after the special session, or while formulating the alternative plans. Test. of Morgan, Trial Tr. 127:5-8, Dec. 14, 2011; Test. of Luarkie, Trial Tr. 20:20-25, 22:7-16, 26:13-16, Dec. 15, 2011. In addition,

the Executives' original and first two alternative plans split Tesuque Pueblo and San Ildefonso Pueblo. Multi-Tribal Ex. 32; Test. of Dorame, Trial Tr. 120:1-5, Dec. 19, 2011. The first alternative plan changes the Pueblo-Apache nature of House District 65. Test. of Reval, Trial Tr. 63:24-64:7, Dec. 19, 2011. Each alternative plan does damage to the voting rights of Native Americans and/or Native American communities of interest and ignores tribal self- determination and the Executives' obligations to consult with the tribes. Test. of Dorame, Trial Tr. 120:11-20, Dec. 19, 2011.

The splitting of tribal political boundaries is directly contrary to the Legislative Redistricting Criteria which provides that districts should be drawn "to take into consideration political and geographic boundaries." Leg. Defs' House Ex. 2, ¶ 7.

The Executive maps, which split and move the Pueblos around from district to district, as if the tribes are interchangeable, also misunderstand the Voting Rights Act. In rejecting Texas' attempts to move Latino communities between districts without regard for the community's wishes, the Supreme Court noted that in formulating a redistricting plan to comply with Section 2 of the Voting Rights Act, "a State may not trade off the rights of some members of a racial group against the rights of other members of that group." *LULAC v Perry*, 548 U.S. at 437.

LULAC v. Perry also stated that the inquiry regarding the proposed Latino

districts must take into account communities of interest and traditional redistricting principles. *Id.* at 432. The Court rejected the map that substituted a state drawn Latino district, which did not share communities of interest, for an existing Latino district that had a strong community of interest.

The Executive Defendants' and James Plaintiffs' maps have a more egregious effect. As noted above, the Pueblo of Laguna has begun to mobilize voters, to register new voters, and to encourage early voting. Test. of Luarkie, Trial Tr. 11:2-5, 12:9-24, Dec. 15, 2011. Like in *LULAC v. Perry*, the Executives' original plan would "break apart," the Native American opportunity district just as the Laguna members were becoming mobilized. *Id.* at 441. Test. of Luarkie, Trial Tr. 12:9-17, Dec. 15, 2011. Like the emerging electoral minority community in *LULAC v. Perry*, if adopted, these maps would "[make] fruitless the [Laguna] mobilization efforts but also [act] against those [Pueblo members] who were becoming most politically active, *dividing them with a district line* . . ." 578 U.S. at 440 (emphasis added). Like Texas attempted in *LULAC v. Perry*, the Executives' map would "undermine[] the progress of a racial group that has been subject to significant voting-related discrimination and that was becoming increasingly politically active and cohesive." *Id.* at 403. *See* Test. of Luarkie, Trial Tr. 11:2-5, Dec. 15, 2011; Test. of Warren, Trial Tr. 91:4-94:18, Dec. 19, 2011. Splitting communities like the Pueblo of Laguna or Pueblo of

Tesuque could affect electoral participation such as candidate pools, organization and mobilization efforts and lead to voter confusion. Test. of Engstrom, Trial Tr. 229:11-230:15, Dec. 19, 2011.

The Court heard Governor Richard Luarkie and Lt. Governor David F. Garcia's testimony that the dividing district line proposed in the original Executive Defendants' and James Plaintiffs' Plans would place Mt. Taylor in a separate political district from Acoma and part of Laguna. Multi-Tribal Exs. 3, 23 and 25. These maps would sever these two Pueblos from an aboriginal homeland and traditional cultural property that is central to these Native Americans' history, culture, identity and practices. Test. of Luarkie, Trial Tr. 33:12-14, Dec. 15, 2011. The ability of the State Legislature to take actions that would harm, inadvertently or intentionally, the cultural sites on the mountain causes great alarm, especially if the Pueblos are no longer a significant political force within the legislative district that encompasses the property. The tribal leaders believed that Acoma and Laguna would have "less of a voice if there were any threat to that cultural property," and no direct constituent access to the elected official. Test. of Chino, Trial Tr. 154:6-16, Dec. 19, 2011.

For these reasons, the Multi-Tribal Intervenors respectfully urge the Court to reject the adoption of the Executive's original and first two alternatives and the James maps, if these are promoted.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-213(A)(6) and Rule 12-214(B)(1) NMRA, Multi-Tribal Intervenors request oral argument on the issues of the Voting Rights Act and tribal self-determination. The inclusion of the Multi-Tribal/Navajo map in Executive Alternative 3 as a remedy for the Voting Rights Act violations is a central issue in this appeal. The Voting Rights Act claimants are in the best position to present and preserve those issues before the Supreme Court if the Justices believe that to be necessary.

CONCLUSION

The Multi-Tribal Intervenors respectfully request that this Court, in the exercise of its superintending control, reaffirm the District Court's conclusions of law holding that Native Americans had proven their claims under Section 2 of the Voting Rights Act. Further, we ask the Court to affirm that the Multi-Tribal/Navajo Plan for districts in the northwest quadrant provided the best remedy for the Section 2 claim because it was consistent with tribal self-determination, maintaining tribal communities of interest and traditional redistricting principles, as enunciated in the Legislative Redistricting Guidelines. Accordingly, the Court should adopt a map redistricting the House of Representatives only if it includes the Multi-Tribal/Navajo Plan and respects the political boundaries of tribal communities.

By 

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Dated: January 27, 2012

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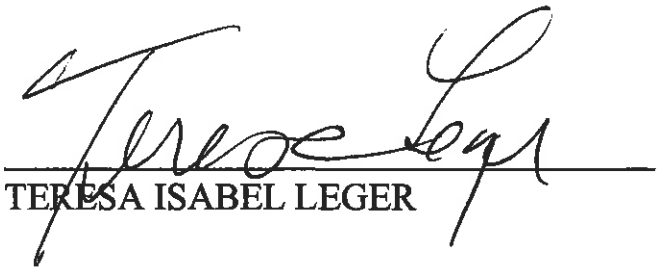
STATEMENT OF COMPLIANCE

Counsel for the Multi-Tribal Intervenors hereby certifies that this Brief in Chief complies with the limitations of Rule 12-213(F)(3) NMRA. This brief was prepared using Times New Roman typeface and the body of the brief is in size 14 point font

and is 8144 words in length. It was prepared and the word count determined using WordPerfect X4.



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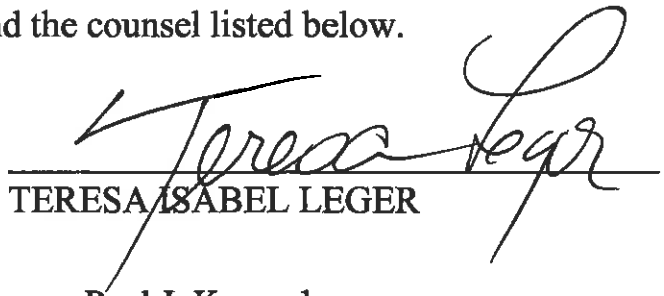
CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2012, a true and correct copy of the foregoing **MULTI-TRIBAL INTERVENORS' BRIEF IN CHIEF** was electronically mailed to Judge Hall and the counsel listed below.



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