STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

BRIAN F. EGOLF, JR., HAKIM BELLAMY, MEL HOLGUIN, MAURILIO CASTRO, and ROXANNE SPRUCE BLY

Plaintiffs,

NO. D.101-CV-2011-02942
Honorable James A. Hall

v.

DIANNA J. DURAN, in her official capacity as New Mexico Secretary of State, SUSANA MARTINEZ, in her official capacity as New Mexico Governor, JOHN A. SANCHEZ, in his official capacity as New Mexico Lieutenant Governor and presiding officer of the New Mexico Senate, TIMOTHY Z. JENNINGS, in his official capacity as President Pro-Tempore of the New Mexico Senate, and BEN LUJAN, SR., in his official capacity as Speaker of the New Mexico House of Representatives,

CONSOLIDATED WITH
D-101-CV-2011-02944
D-101-CV-2011-02945
D-101-CV-2011-03016
D-101-CV-2011-03099
D-101-CV-2011-03107
D-202-CV-2011-09600
D-506-CV-2011-00913

Defendants.

RESPONSE IN OPPOSITION TO MOTIONS FOR APPOINTMENT OF SPECIAL MASTER BY PLAINTIFFS PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA, AND LEON REVAL

Introduction.

Respondents Pueblo of Laguna, Pueblo of Acoma, Jicarilla Apache Nation, Pueblo of Zuni, Governor Richard Luarkie, Lt. Governor Harry Antonio, Jr., Governor David F. Garcia, President Levi Pesata and Leon Reval strenuously oppose the appointment of a special master in these

consolidated cases.[1] Respondents are Native American tribes and individuals who seek only to protect the basic fundamental civil rights of minority voters, which are threatened by the veto of Governor Martinez of Senate Bill 33 and House Bill 39. Governor Martinez' veto of the Senate and House plans forced redistricting to the courts. Governor Martinez was well aware of the expense that would be imposed upon the State if she vetoed those plans - which Native American Respondents believed complied with all constitutional and Voting Rights Act requirements. Her attempt to claim that a special master would somehow reduce that expense is inaccurate; a special master would increase the expense of resolving redistricting in this court because it would be duplicative and add extra complexity to the case. Moreover, since a special master's fees must be paid for by the parties, such a move would impose financial hardship upon the Native American Respondents. It would deprive them of their right to a trial before the court on the legal issues that are basic to their claims under the New Mexico and U.S. Constitutions and the federal Voting Rights Act. Movants motion would increase the cost to the taxpayers and delay the expeditious resolution of the constitutional claims raised by Plaintiffs. The Native American Respondents, therefore, urge this Court to deny Movants' motions and proceed with the Scheduling Order issued by this Court on October 19, 2011 without further delay.

The Appointment of a Special Master is the Exception, Not the Rule, and Should Be Denied Because it Will Increase the Expense and Time of the Tribes.

The appointment of a special master is left to the discretion of the court and is not a matter

[1]This Response addresses both the James Plaintiffs' Motion for Appointment of a Special Master and the Motion for Appointment of a Special Master filed by Governor Martinez and Secretary of State Duran. The James Plaintiffs, Governor Martinez and Secretary Duran will be referred to collectively herein as the "Movants." Plaintiffs Pueblo of Laguna, Pueblo of Acoma, Pueblo of Zuni, Jicarilla Apache Nation, Richard Luarkie, Harry Antonio, Jr., and David F. Garcia will be referred to collectively herein as "Native American Respondents."

of right. Ira S. Bushey & Sons, Inc. v. W.E. Hedger Transp. Corp., 167 F.2d 9 (2nd Cir. 1948). And, doubts about the propriety of appointing a special master are ordinarily resolved against such appointment. Id. In cases such as these, which are to be tried without a jury, such an appointment may be made "only upon a showing that some exceptional condition requires it." Rule 1-053(B) NMRA. Contrary to the assertions of Movants, the appointment of a special master is not needed to resolve the consolidated cases expeditiously. In fact, as proposed, the appointment of a special master in these cases threatens to only increase the expense of the parties and delay final resolution. Governor Martinez and Secretary Duran implicitly acknowledge the duplication inherent in their proposal. They suggest that the parties would first be required to present their positions, evidence and other input to the special master, have the special master develop new maps, then have the maps subject to the objections of the parties and review of the Court. However, the special master proposed as a demographer, would not be in a position to decide the competing arguments and legal issues that bear significantly on how the maps should be drawn. Under the Movants proposal, the Court would need to conduct evidentiary hearings or a bench trial to hear evidence, witness testimony and expert testimony related to any proposal submitted by the special master, and that the Court will "not be bound in any way by any of the findings of the special master." Mot. for Appointment of a Special Master 10.

The special master would therefore be an unnecessary extra step for the parties. Under the Movants proposal, the parties would incur extraordinary time and expense in having the special master develop new maps, which could then be discarded by the Court only to be followed by a trial which should have been conducted in the first instance. Such redundancy will only complicate and increase the expense of resolving what are essentially legal issues that need to be addressed by the

Court before any existing maps are reviewed or new maps are developed. It makes no sense to have a demographer special master spend the time and expense of developing new maps based solely on demographics before the legal issues are resolved. Judge Hall is better suited to, and has presented a schedule for resolving these consolidated cases in a timely and efficient manner.

The Exceptional Conditions Presented by the Consolidated Cases Have Been Adequately Addressed by The New Mexico Supreme Court.

Movants fail to address in their motions the fact that the New Mexico Supreme Court has already taken into account and provided for the exceptional conditions of these consolidated cases by appointing the very experienced, retired Judge Hall to hear all the consolidated cases. The Supreme Court's Order, dated October 12, 2011 explains the reasons for appointing Judge Hall:

> given the existing case loads in the district courts of New Mexico, no sitting district court judge is able to expeditiously dispose of the following consolidated cases, and because it would be in the best interest of judicial economy and expeditious disposition of the following cases if retired District Court Judge James A. Hall is appointed as *Judge Pro Tempore* pursuant to Article VI, Section 15 of the Constitution of New Mexico.

Order in the Matter of the Designation of Hon. James A. Hall As Judge Pro Tempore, No. 11-8500. (NMSC Oct. 12, 2011) Apparently Movants are unhappy with the Supreme Court's choice of Judge Hall, and now attempt to minimize the litigants' ability to have their important constitutional and federal voting rights fully heard and considered by Judge Hall. The appointment of a special master is unnecessary since the Supreme Court appointed an experienced judge without an existing case load, who can devote the time and attention necessary to resolve these cases quickly and economically.

The redistricting cases cited by Movants are inapposite here because they deal with the appointment of a special master in cases where the sitting judge or judges had existing and ongoing

case loads. To address this, the courts appointed a master, often a retired judge with no ongoing case load, who was able to devote full time and attention to the cases they were appointed to. See, e.g., Larios v. Cox, 306 F.Supp.2d 1212 (N.D.Ga. 2004) (three-judge panel appointed retired judge Joseph Hatchette as special master); Rodriguez v. Pataki, 207 F.Supp.2d 123 (S.D.N.Y. 2002) (three-judge panel appointed retired judge Frederick B. Lacey as special master); Fund For Accurate and Informed Representation, Inc. v. Weprin, Nos. 92-CV-283, 92-CV-720, and 92-CV-0593 1992 WL 512410 at 1 (N.D.N.Y. Dec. 23, 1992) (Three-judge panel appointed retired judge Frederick B. Lacey as special master); Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt, 796 F.Supp. 681, 684 (E.D.N.Y. 1992) (three-judge panel appointed retired judge Frederick B. Lacey as special master); DeGrandy v. Wetherell, 794 F.Supp. 1076 (N.D. Fla. 1992) (three-judge panel appointed retired judge Clyde Atkins as special master). The appointment of Senior Judge Hall resolves the exceptional conditions in the present consolidated cases. Movants have not shown that Judge Hall is unable to manage the consolidated cases expeditiously.

The Appointment of a Special Master Will Impose a Financial Hardship on Native American Respondents Who Seek Only to Protect Their Fundamental Rights as Voters.

Movants each devote a considerable portion of their briefs describing elaborate plans giving the special master a significant role, which minimizes the role of Judge Hall. But, they do not discuss the cost of the special master or who will pay for it. Rule 1-053(A) NMRA provides that

> [t]he compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct.

Rule 1-053(A) NMRA. To the knowledge of Native American Respondents, there is no fund available for the court to use for the payment of a special master in this case. The expense would,

therefore, be borne by the parties. It has been noted that such costs can pose an unacceptable financial hardship on individual litigants because they "frequently are so high that impecunious litigants will, in some instances, agree to settlements which, were it not for the threat of a reference, would be unacceptable." D.E. Ytreberg, "What are 'exceptional conditions' justifying reference under Rule of Civil Procedure 53(b), 1 A.L.R. Fed. 922, § 2(b)" (2009), citing Fraver v. Studebaker, 11 F.R.D. 94, 95 (W.D. a. 1950) (Denying appointment of a special master in a patent infringement case noting that appointment of a special master would impose a financial hardship on the plaintiff and that litigants do not anticipate such "extraordinary and unusually heavy expenses."). Native American Respondents, members of a protected minority, seek to protect their fundamental rights as voters. They have a right to demand constitutional redress without being forced to bear the unusual, extraordinary, and unnecessary costs of a special master. The Indian tribes, who are parties to this litigation, must use their limited resources to provide essential governmental services to their members. The individual tribal members have no resources to cover such extraordinary expenses. The protection of these litigants' fundamental right to vote without discrimination should not be dependent on their ability to bear an extraordinary and unanticipated financial burden.

The Appointment of a Special Master Would Effectively Deprive Native American Respondents of Their Right to a Trial Before the Court on Important Constitutional Civil Rights

The resolution of Native American Respondents' claims in these consolidated cases rests not so much on complex demographics as on the important legal issues implicated by the New Mexico and U.S. Constitutions and the Voting Rights Act for minority voters such as Native American Respondents. Before any new maps are developed, important legal issues such as equal protection, dilution of minority voting strength, the creation of majority-minority districts and influence districts

need to be heard, considered and decided by the Court. Unhappy with the outcome of the Legislature's redistricting plans, Movants now seek to limit the Court's role in reviewing and revising those plans. They seek instead to have a demographer formulate new plans and foreclose Plaintiffs' ability to propose alternative plans. Movants make an assumption that the plans passed by the legislature are unlawful. If the Court finds that the Legislature's maps are constitutional and consistent with the Voting Rights Act, there is no need to draw any new maps.

Movants also improperly assume that the primary issues boil down to mere demographics. Given the demographic data and software available to the parties and the Court, Judge Hall is extremely capable of, and has adequate time and resources to hear and decide the important legal issues that are presented in these cases and to evaluate the demographics at play as well. By seeking to delegate as much as they do to the special master, it appears that the Movants are really seeking to minimize the involvement of Judge Hall in reviewing the existing plans, and the alternative plans the parties may present. Native American Respondents and the other plaintiffs may present alternative maps for the Court's consideration. Movants would eliminate this option with their special master proposal. See, Montano v. Suffolk County Legislature, 263 F.Supp.2d 644, 650 (E.D.N.Y. 2003) (where the principal issue before the court is whether the plan meets the requirements of the Voting Rights Act and Constitution, the issue is for the court to decide, not a special master; appointment of special master denied.).

Conclusion.

Native American Respondents acknowledge that the timely and efficient resolution of the consolidated cases present a challenge to the Court. However, the New Mexico Supreme Court has already taken measures sufficient to address that challenge by consolidating the cases and appointing

an experienced former judge, Judge Hall, to handle them. Judge Hall, who can devote the time and attention needed to resolve these cases, adopted a Scheduling Order that will resolve these cases economically and expeditiously. The appointment of a special master would serve only to impose an extraordinary and unanticipated financial burden on a group of litigants who seek only to protect their fundamental right to have their votes properly counted. The Voting Rights Act issues the Native American plaintiffs pursue are essential to our democracy; they should not be conditioned on payment of the costs of a special master. Native American Respondents prefer instead to look to the Court for a full and fair hearing to resolve their claims as is their right.

Respectfully submitted this ___ day of October, 2011.

By /s/ Teresa Isabel Leger

TERESA ISABEL LEGER
CYNTHIA KIERSNOWSKI
Nordhaus Law Firm, LLP
1239 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-3622 (Phone)
(505) 982-1827 (Fax)
tleger@nordhauslaw.com
ckiersnowski@nordhauslaw.com

CASEY DOUMA
In-House Legal Counsel
Pueblo of Laguna
P.O. Box 194
Laguna, NM 87026
(505) 552-5776 (Phone)
(505) 552-6941 (Fax)
cdouma@lagunatribe.org

Attorneys for Plaintiffs
Pueblo of Laguna, Pueblo of Acoma, Pueblo of Zuni, Jicarilla Apache Nation, Governor Richard Luarkie, Lt. Governor Harry A. Antonio, Jr, Lt. Governor David F. Garcia, President Levi Pesata,

and Leon Reval.

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2011, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTIONS FOR APPOINTMENT OF SPECIAL MASTER BY PLAINTIFFS PUEBLO OF LAGUNA, PUEBLO OF ACOMA, JICARILLA APACHE NATION, PUEBLO OF ZUNI, RICHARD LUARKIE, HARRY A. ANTONIO, JR., DAVID F. GARCIA, LEVI PESATA, AND LEON REVAL** was mailed via first-class U.S. mail, to the parties/counsel listed below.

/s) Cynthia Kiersnowski
Cynthia Kiersnowski

The Honorable James A. Hall
James A. Hall, LLC
505 Don Gaspar
Santa Fe, NM 87505
(505) 988-9988
jhall@jhall-law.com

Paul J. Kennedy
201 12th Street, N.W.
Albuquerque, NM 87102
(505) 842-0653
pkennedy@kennedyhan.com

Patricia G. Williams
Jenny J. Dumas
Wiggins, Williams & Wiggins, PC
1803 Rio Grande Blvd., NW
P.O. Box 1308
Albuquerque, NM 87103
(505) 764-8400
pwilliams@wwwlaw.us
jdumas@wwwlaw.us

Gary King, Attorney General
Scott Fuqua, Asst. Attorney General
Office of the NM Attorney General
408 Galisteo Street
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-5843
gking@nmag.gov
sfuqua@nmag.gov

Robert M. Doughty, III
Judd C. West
Doughty & West, P.A.
20 First Plaza N.W., Suite 412
Albuquerque, NM 87102
(505) 242-7070
rob@doughtywest.com
yolanda@doughtywest.com

Jessica Hernandez
Matthew J. Stackpole
Office of the Governor
490 Old Santa Fe Trail #400
Santa Fe, NM 87401-2704
(505) 476-2200
jessica.hernandez@state.nm.us
matthew.stackpole@state.nm.us

Joseph Goldberg
John W. Boyd

Ray M. Vargas, II
David P. Garcia

David H. Urias
Sara K. Berger
Freedman Boyd Hollander Goldberg & Ives
20 First Plaza Center, N.W., #700
Albuquerque, NM 87102
(505) 842-9960
jg@fbdlaw.com
jwb@fbdlaw.com
dhu@fbdlaw.com
skb@fbdlaw.com

Erin B. O'Connell
Garcia & Vargas, LLC
303 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-1873
ray@garcia-vargas.com
david@garcia-vargas.com
erin@garcia-vargas.com

Patrick J. Rogers
Modrall, Sperling, Roehl,
Harris & Sisk, PA
P.O. Box 2168
Albuquerque, NM 87103
(505) 848-1849
pjr@modrall.com

David K. Thomson
Thomson Law Office, LLP
303 Paseo de Peralta
Santa Fe, NM 87501-1860
(505) 982-1873
david@thomsonlawfirm.net

Stephen G. Durkovich
Law Office of Stephen Durkovich
534 Old Santa Fe Trail
Santa Fe, NM 87505-0372
(505) 986-1800
romero@durkovich.com

John V. Wertheim
Jones, Snead, Wertheim & Wentworth, P.A.
P.O. Box. 2228
Santa Fe, NM 87505-2228
(505) 982-0011
johnv@thejonesfirm.com

Henry M. Bohnhoff
Rodey, Dickason, Sloan,
Akin & Robb, P A
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900
hbohnhoff@rodey.com

Christopher T. Saucedo
Iris L. Marshall
Saucedo Chavez, P.C.
100 Gold Ave., S.W., Suite 206
Albuquerque, NM 87102
(505) 338-3945
csaucedo@saucedolaw.com
imarshall@saucedolaw.com

David A. Garcia
David A. Garcia, LLC
1905 Wyoming Blvd. NE
Albuquerque, NM 87112
(505) 275-3200
lowthorpe@msn.com

Dana L. Bobroff
Deputy Attorney General
Navajo Nation Dept. of Justice
P.O. Box 2010
Window Rock, AZ 86515
(928) 871-6345
dbobroff@nndoj.org

Luis G. Stelzner
Sara N. Sanchez

Richard E. Olson
Jennifer M. Heim

Stelzner Winter Warburton Flores Sanchez & Dawes, PA
P.O. Box 528
Albuquerque, NM 87103-0528
(505) 938-7770
lgs@stelznerlaw.com
ssanchez@stelznerlaw.com

Hinkle Hensley Shanor & Martin LLP
P.O. Box 10
Roswell, NM 88202-0010
(575) 622-6510
rolson@hinklelawfirm.com
jheim@hinklelawfirm.com

Charles R. Peifer
Robert E. Hanson
Matthew R. Hoyt
Peifer, Hanson & Mullins, PA
P.O. Box 25245
Albuquerque, NM 87125-4245
(505) 247-4800
cpeifer@peiferlaw.com
rhanson@peiferlaw.com
mhoyt@peiferlaw.com