

**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' CLOSING ARGUMENT AND BRIEF
FOR THE NEW MEXICO PRC REDISTRICTING TRIAL**

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

FACTUAL BACKGROUND

Every ten years, the Census Bureau conducts a census to measure the total population of the United States and each state of the union. Testimony of Brian Sanderoff (Jan. 12, 2012). 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. Id. The 2010 census establishes that the ideal population for each of New Mexico's PRC districts is 411,836, which represents the total population (2,059,179) divided by the number of districts (5). Id. Between 2000 and 2010, some areas of the state have lost population, while others have gained population. Given these changes, the current PRC districts, which are based on the 2000 census, must be adjusted to take account of the population growth, decline and shifts that have occurred over the last ten years. Id.

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. Id. Public comment was solicited on a series of redistricting plans developed as starting points in the process. Id. Comments were received at meetings in Acoma, Gallup, Farmington and Las Vegas from representatives of the Navajo Nation. Id. The Legislative Council Service adopted Redistricting Guidelines, which set forth the ground rules for the 2011 redistricting process. Id.

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. Id. During the special legislative session, the legislature passed a PRC redistricting plan—Senate Bill 24 (“Legislative Defendants’ PRC Plan”). Id.; Navajo Exhibit (“Nav. Ex.”) 3. Governor Martinez vetoed the Legislative Defendants’ PRC Plan on October 7, 2011 and issued Special Session Senate Executive Message No. 13 to the Honorable Timothy Z. Jennings, President Pro Tempore, and Members of the Senate, which communicated her veto and the reasons for the veto.

When redistricting of the New Mexico PRC is not accomplished by the state legislature, a lawsuit may be filed to request that the Court determine the proper apportionment of those districts. Several lawsuits were filed in late 2011 seeking judicial apportionment of the New Mexico PRC districts. The lawsuits were consolidated and proceeded before the Court under a single caption—Egolf v. Duran. The evidentiary hearing on the PRC plans took place January 11 and 12, 2012. In the litigation, several different plans were submitted for redistricting of New Mexico’s PRC districts. The Navajo Intervenors submitted a plan for New Mexico’s PRC districts, referred to herein as “the Navajo Plan.”

SUMMARY

In the New Mexico PRC redistricting trial, the Navajo Intervenors established that the current PRC districts are unconstitutionally apportioned, that Native Americans in New Mexico have historically been and continue to be deprived of equal access to New Mexico's electoral process, and that the Navajo Plan provides the best plan for protecting and enhancing PRC electoral opportunities for Native Americans, while respecting relevant communities of interest and tribal self-determination.

ANALYSIS

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

Given the regional changes and shifts in New Mexico's population over the last ten years, the existing PRC districts are not evenly apportioned and are unconstitutional under both the United States Constitution Amendment XIV and the New Mexico Constitution, Art. II § 18. Each of the parties to this litigation have stipulated that the current PRC districts, which are based on the 2000 census, are unconstitutionally apportioned. Joint Stipulation (Dec. 4, 2011). 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 EVIDENCE ESTABLISHES THAT NATIVE AMERICANS IN NORTHWEST NEW MEXICO CONTINUE TO BE DEPRIVED OF EQUAL ACCESS TO NEW MEXICO'S ELECTORAL PROCESS.

The evidence presented at trial establishes that in both state House and state Senate elections, Native Americans in northwest New Mexico vote as a politically cohesive group, voting in Native

American districts is racially polarized, and non-Native voters vote sufficiently as a bloc in primary elections to veto more often than not the election of the preferred candidate of Native American voters. Designated Testimony—Senate Trial Testimony of Dr. Richard L. Engstrom, Navajo Exhibit (“Nav. Ex.”) 7; Designated Testimony—House Trial Testimony of Rudolpho Espino, Nav. Ex. 5; see also, House Findings of Fact ¶¶50-52, p.11; House Conclusions of Law ¶¶20-21, p. 28; Senate Findings of Fact ¶¶39-41, p. 9; Senate Conclusions of Law ¶¶19-21, p. 17.

The evidence also establishes 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. Designated Testimony—House Trial Testimony of Kimmeth Yazzie, Nav. Ex. 4; Designated Testimony—House Trial Testimony of Rebecca Tsosie, Nav. Ex. 6; see also, House Findings of Fact ¶53, p. 12; House Conclusions of Law ¶22, p. 28; Senate Findings of Fact ¶42, p. 9; Senate Conclusions of Law ¶21, p. 17.

III. THE EVIDENCE ESTABLISHES THAT ABILITY TO INFLUENCE PRC ELECTIONS AND PRC COMMISSIONERS IS IMPORTANT TO THE NAVAJO PEOPLE.

At trial, it was established that the Navajo people have an interest in ensuring that all of their lands are located within a single PRC district, that the PRC commissioner from that district understands the needs and concerns of the Navajo people, and that the PRC remain an accessible avenue for Navajo politicians to serve in statewide office. Testimony of Leonard Gorman (Jan. 12, 2012); see also, Testimony of Rod Adair (Jan. 11, 2012). These interests can be served by creating a PRC district in the northwest portion of the state with a Native American voting age population sufficient to allow Native American voters to influence the election in that district. See Designated

Testimony of Dr. Richard L. Engstrom, Nav. Ex. 7 (discussing influence districts). The Navajo Plan serves all of these interests. Testimony of Leonard Gorman (Jan. 12, 2012).

IV. A NATIVE AMERICAN INFLUENCED PLURALITY DISTRICT SHOULD BE CREATED IN THE NORTHWEST QUADRANT OF THE STATE.

In the context of PRC redistricting, creation of a Native American majority-minority district to address issues faced by Native American voters is not possible. There are not sufficient numbers of Native Americans in a geographically compact area of the State of New Mexico to create an effective Native American majority-minority PRC district. Testimony of Brian Sanderoff (Jan. 12, 2012). Creating a Native American influenced PRC district, however, is possible. In fact, each of the plans advocated in the PRC trial contain such a district. Id.

Influence districts, while not mandated by the Voting Rights Act, are recognized as a useful tool for states to utilize to increase the ability of minorities to influence the electoral and legislative processes. See, Georgia v. Ashcroft, 539 U.S. 461, 482 (2003). In an influence district “minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process.” Id.; see also Senate Conclusions of Law, ¶24, p. 18. When minority groups have sufficient numbers within a district to be considered “influential,” representatives ultimately elected are expected to be more “sympathetic to the interests of minority voters.” Id.

The same facts which justified creation of Native American majority-minority districts in the House and Senate litigation support creation of a PRC district here which keeps Native American communities of interest together and achieves a Native American influenced plurality PRC district 4 with a total Native American voting age population of 33.5%.

V. THE NAVAJO PLAN IS THE BEST PLAN FOR CREATING A NATIVE AMERICAN INFLUENCED PLURALITY PRC DISTRICT.

Native American tribes and their representatives are in the best position to define what communities of interest exist within and around their tribal lands, and what is best for their own communities. Designated Testimony of Rebecca Tsosie, Nav. Ex. 6; Testimony of Leonard Gorman (Jan. 12, 2012); see also, House Findings of Fact ¶48, p.11; Senate Findings of Fact ¶ 37, p. 8. The Navajo Nation has a right of self-determination, which requires the Court to consider the Nation’s expressed preferences regarding the drawing of PRC districts in the northwest quadrant of the State.

Designated Testimony of Rebecca Tsosie, Nav. Ex. 6. In both the current round of redistricting, and the prior round of redistricting, this court expressly recognized tribal self-determination as a legitimate factor to be considered in drawing legislative districts. House Findings of Fact ¶60, p. 13; House Conclusions of Law ¶ 24, p. 29; Senate Findings of Fact ¶ 51, p. 11; Senate Conclusions of Law ¶ 26, p. 18; Jepsen v. Vigil-Giron, No. D-0202-CV-2001 (N.M. First Judicial District Court, January 24, 2002) at p.13, ¶10 (deferring to plans presented by the Navajo and Jicarilla Apache Nations in part because they “further[ed] significant state polices, such as. . . respect for tribal self-determination.”).

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

VI. THE NAVAJO INTERVENORS DO NOT OPPOSE THE STATEWIDE PRC PLANS THAT SERVE THE NAVAJO INTERVENORS' INTERESTS.

The Maestas 2 Plan incorporates, without alteration, the Navajo Plan's PRC District 4. Maestas Exhibit 1. The Navajo Intervenors, therefore, do not oppose Maestas 2 Plan. The James 3 Plan¹ does not incorporate the Navajo Plan's PRC District 4, but it does achieve the Navajo Intervenors' goals with respect to that district. Testimony of Leonard Gorman (Jan. 12, 2012). The Navajo Intervenors, therefore, do not oppose the James 3 Plan. *Id.* The Legislative Defendants' PRC Plan, on the other hand, does not achieve a Native American voting age population in PRC District 4 that is equivalent to or better than the Navajo Plan and the Navajo Intervenors, therefore, opposes the Legislative Defendants' PRC Plan.

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

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

¹ The James 2 Plan has been withdrawn by the James Plaintiffs since the close of evidence in this case.

The Navajo Plan is well within the acceptable population deviation range as no district is more than one percent over or under the ideal. See Nav. Ex. 1. Testimony adduced at trial establishes that the Navajo Plan is not motivated by any improper or partisan purpose. Testimony of Leonard Gorman (Jan. 12, 2012); Testimony of Ronald Gaddie (Jan. 12, 2012). The Navajo Plan achieves a Native American influenced plurality district in PRC District 4, has low population deviations, and respects, to the extent practical, current district boundaries. Id. The Navajo Plan strikes an appropriate balance between various communities of interest and, to a reasonable extent, respects boundaries of political units. Id. The Navajo Plan, therefore, is the most fair and balanced statewide PRC redistricting plan.

CONCLUSION

The Navajo Plan is the best plan for promoting equal electoral access for Native Americans in statewide elections, while also respecting relevant communities of interests and the self determination of sovereign Indian tribes.

Consistent with the Navajo Plan, one Native American influenced plurality PRC district should established in the northwest quadrant of the state as follows:

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

Consistent with the Navajo Plan, four additional PRC districts should be established as follows:

PUBLIC REGULATION COMMISSION DISTRICT ONE.--Public regulation commission district one is composed of Bernalillo county precincts 4, 5, 7 through 18, 20 through 28, 30, 39, 83, 107, 108, 110 through 112, 114, 119 through 121, 125, 131, 150 through 154, 161 through 166, 180 through 187, 191 through 197, 211, 212, 215, 216, 241 through 246, 251 through 258, 271 through 275, 278, 281 through 287, 289 through 302, 304 through 308, 311 through 318, 321 through 324, 326 through 333, 341 through 347, 351 through 358, 371 through 375, 381 through 387, 400 through 456, 461 through 466, 471 through 478, 480 through 500, 502 through 550, 560 through 566, 568, 569 and 601 through 603.

PUBLIC REGULATION COMMISSION DISTRICT TWO.--Public regulation commission district two is composed of Bernalillo county precincts 303, 551 through 559 and 570 through 573; Chaves county; Colfax county precincts 2 through 5, 7 and 10 through 22; Curry county; De Baca county; Dona Ana county precincts 6, 66, 75, 76 and 110; Eddy county; Guadalupe county; Harding county; Lea county; Lincoln county precincts 1, 3, 12 and 14 through 16; Mora county precincts 9 through 11; Otero county precincts 1 through 13, 19, 20, 22, 23, 26 through 28, 30 through 33, 35, 37 through 39 and 41; Quay county; Roosevelt county; San Miguel county; Santa Fe county precincts 15, 18, 19, 73, 84 and 85; Torrance county precincts 1 through 9 and 11 through 16; and Union county.

PUBLIC REGULATION COMMISSION DISTRICT THREE.--Public regulation commission district three is composed of Bernalillo county precincts 1 through 3, 6, 19, 29, 57, 68 through 70, 78 through 82, 84 through 87, 89, 113, 115 through 118, 127 through 129, 134, 170, 171

and 567; Colfax county precinct 1; Los Alamos county; Mora county precincts 1 through 8; Rio Arriba county precincts 1 through 23, 28 and 31 through 42; Sandoval county precincts 1 through 6, 11 through 13, 28 through 76 and 80 through 86; Santa Fe county precincts 1 through 11, 13, 14, 16, 17, 20 through 71, 74 through 83 and 86 through 88; and Taos county.

PUBLIC REGULATION COMMISSION DISTRICT FIVE.--Public regulation commission district five is composed of Catron county; Dona Ana county precincts 1 through 5, 7 through 65, 67 through 74, 77 through 109 and 111 through 120; Grant county; Hidalgo county; Lincoln county precincts 2, 4 through 11, 13 and 17 through 21; Luna county; Otero county precincts 14 through 18, 21, 24, 25, 29, 34, 36 and 40; Sierra county; Socorro county precincts 1 through 14 Research & Polling, Inc. For the New Mexico Legislative Council Service Page 2 and 16 through 25; Torrance county precinct 10; and Valencia county precincts 1 through 12 and 14 through 41.

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 16th day of January, 2012.

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