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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

NAVAJO NATION, a federally recognized Indian tribe, et al.,

Plaintiffs,

v.

SAN JUAN COUNTY, a Utah governmental subdivision,

Defendant.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THEIR SECOND CLAIM FOR RELIEF (SENATE FACTORS)

Civil No. 2:12-cv-00039-RS

Judge Robert J. Shelby
Magistrate Judge Dustin B. Pead

> William Faulkner wrote that "the past is never dead. It's not even past." *Requiem for a Nun*, Act 1, Scene 3. This seems as true today in San Juan County, Utah, as in Faulkner's Mississippi of the 1920s and 1930s.
>
> — Dr. Garth Massey, Expert Report, Dkt. 183, at p. 13 (Aug. 25, 2015).

I. MOTION

Plaintiffs move the Court, pursuant to Rule 56, Fed. R. Civ. P., and DUCivR 56-1, for entry of summary judgment in their favor on their second claim for relief that the apportionment of San Juan County (County) Commission Districts is unlawful under Section 2 of the Voting Rights Act. There are no disputed issues of material facts that, under the totality of circumstances, the County has violated Section 2 of the Voting Rights Act because the dilution and diminishment of Indian voting strength causes Indians to have an unequal opportunity to participate in the electoral process and elect their preferred candidates. This portion of the second claim for relief is distinct and separate from the other claims in this case and there is no just cause for delay in entering judgment.

II. INTRODUCTION

Section 2 of the Voting Rights Act, 42 U.S.C. 1973, *et seq*, recodified at 52 U.S.C. § 10301, prohibits any voting "standard, practice or procedure" that denies any group of citizens an equal opportunity "to elect representatives of their choice."[1] *Thornburg v. Gingles* established a three-part test to identify violations of § 2.[2] To prevail in an action under Section 2, a plaintiff must first prove existing challenged election districts are subject to three "necessary preconditions."[3] First, the minority group must be sufficiently large and geographically compact to constitute a majority in one or more single-member election districts (i.e., "numerosity" and "compactness"); second, the minority group must be politically cohesive; and, third, the majority group must vote sufficiently as a bloc to enable it to defeat the minority's preferred candidates

[1] 2 U.S.C. § 10301.
[2] 478 U.S. 30, 50-51 (1986).
[3] *Id.*

("Gingles Factors").[4]

Once there has been a threshold showing that all three Gingles Factors are met, a plaintiff must prove, under the "totality of circumstances," that minority voters have less opportunity to participate in political processes and elect representatives of their choice.[5] The Senate Report accompanying the 1982 amendments to the Voting Rights Act specifies a "variety of relevant factors, depending upon the kind of rule, practice, or procedure called into question," that may be considered under the totality of circumstances inquiry.[6] The Senate Report identified seven typically relevant factors, known as the "Senate Factors:"

> (1) The history of voting-related discrimination in the jurisdiction;
>
> (2) The extent to which voting in the elections of the jurisdiction is racially polarized;
>
> (3) The extent to which the jurisdiction has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
>
> (4) The exclusion of members of the minority group from candidate slating processes;
>
> (5) 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;
>
> (6) The use of overt or subtle racial appeals in political campaigns; and
>
> (7) The extent to which members of the minority group have been elected to public office in the jurisdiction.[7]

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[4] *Id*.; see *Sanchez v. Colorado,* 97 F.3d 1303, 1310 (10th Cir. 1996).
[5] 52 U.S.C. § 10301(b); *Sanchez v. Colorado* at 1322.
[6] S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206–07 (hereafter "Senate Report").
[7] *Gingles* at 36-37; *Sanchez v. Colorado* at 1310, n. 11 (quoting *id*.).

The Senate Report describes two additional factors, sometimes referred to as Senate Factors Eight and Nine, that are also probative of a Section 2 violation:

> (8) whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members, or
>
> (9) where a political subdivision asserts a "tenuous" policy in support of the challenged standard, practice, or procedure.[8]

The totality of circumstances is a fact-intensive, "flexible" inquiry which enables courts to make a "'searching practical evaluation' of the political realities and perform an 'intensely local appraisal' of the challenged voting system."[9] The "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority and majority] voters to elect their preferred representatives."[10] Therefore, the provision requires a court's "overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is . . . 'minimized or canceled out.' "[11] The touchstone of the inquiry is whether, under the totality of circumstances, the challenged electoral process "is equally open to minority voters."[12] The inquiry under the totality of the

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[8] *See Sanchez v. Bond*, 875 F.2d 1488, 1492 (10th Cir. 1989) (quoting unnumbered additional factors); *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 293 (5th Cir. 1996) (listings as factors eight and nine).
[9] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409 (E.D. Wash. 2014) (quoting *Gingles,* 478 U.S. at 79).
[10] *Montes*, 40 F. Supp. 3d at 1408 citing *Gingles.* at 79, 106 S.Ct. 2752 (citation omitted).
[11] Senate Report at pp. 28-29, n. 118 (quoted in *Large v. Fremont Cty., Wyo.*, 709 F. Supp. 2d 1176, 1210 (D. Wyo. 2010)).
[12] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1408 (E.D. Wash. 2014) citing *Gingles.* at 79 (citation omitted).

circumstances is amenable to summary judgment.[13]

Courts have adopted three guidelines from the Senate Report in applying the totality of circumstances test. First, the Senate Factors "are neither comprehensive nor exclusive," and "other factors may also be relevant and may be considered."[14] Second, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[15] Third, and most importantly, "whether the political processes are 'equally open' depends on a searching practical evaluation of the 'past and present reality' " and on a "functional" view of the political process.[16] The inquiry "targets the vestiges of discrimination which may lurk like 'a silent, shadowy thief of the minority's rights.'"[17]

Plaintiffs have established the first three *Gingles* factors.[18] As is demonstrated by the

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[13] See e.g. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409 (E.D. Wash. 2014) citing *Gingles*, 478 U.S. at 79.

[14] *Gingles* at 45 (citing Senate Report at 29-30); *Sanchez v. Colorado* at 1310; *see also Sanchez v. Bond*, 875 F.3d 1488, 1492 (10th Cir. 1989) (characterizing Senate Factors as "exemplary, not exclusive").

[15] Senate Report at 29; *Sanchez v. Colorado* at 1310; *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1388 (E.D. Wash. 2014).

[16] *Gingles* at 45 (quoting Senate Report at 30 and n. 120) and at 48 n. 15 (stating that under "functional" view, the most important factors are electoral success and racially polarized voting); *Sanchez v. Colorado* at 1310.

[17] *Sanchez v. Colorado*, 97 F.3d 1303, 1323 (10th Cir. 1996) citing *Uno*, 72 F.3d at 984 (also stating that "[i]n this enlightened day and age, bigots rarely advertise an intention to engage in race-conscious politics").

[18] The Motion for Summary Judgment on Plaintiffs' Second Claim for Relief (first *Gingles* Factor), Dkt. 182, dated August 20, 2015, establishes the numerosity and compactness requirements of the first Gingles Factor for County Commission Districts under the 2011 Commission Plan. Plaintiffs demonstrate that more than the existing number of majority-Indian Commission Election Districts may be drawn allowing Indian voters to elect their candidates of choice. The Motion for Summary Judgment on Plaintiffs' Second Claim for Relief *Gingles* Factors), Dkt. 202, dated September 15, 2015, establishes that Indian voters in the County are politically cohesive and non-Indian white voters vote sufficiently as a bloc to defeat Indians' preferred candidates.

undisputed material facts below, Plaintiffs can also establish each of the relevant Senate Factors: One, Two, Four, Five, Six, Seven, Eight, and Nine.[19] Accordingly, Plaintiffs are entitled to judgment as a matter of law that the County's Commission districts violate Section 2 of the Voting Rights Act.

III. STATEMENT OF LEGAL ELEMENTS AND UNDISPUTED MATERIAL FACTS

A. Legal Elements

i. Summary Judgment Standards

a. The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.[20]

b. The movant bears the initial burden of showing that there is an absence of evidence to support the non-moving party's case.[21]

c. If the moving party will bear the burden of persuasion at trial, the party must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial.[22]

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[19] Many of the facts needed to establish portions of the Senate Factors must be established through the analysis and testimony of experts. While Plaintiffs have filed testimony by a number of experts that is relevant to establishing such facts, Defendants have failed to proffer expert testimony that might rebut Plaintiffs' expert testimony. Accordingly, Defendants cannot dispute the material facts discussed below.

[20] Fed. R. Civ. P. 56(a).

[21] *Herrera v. Santa Fe Pub. Sch.*, 956 F.Supp 2d 1191, 1221 (D.N.M. 2013).

[22] *Anderson v. Dept. of Health and Human Services, 907 F.2d 936, 947 (10th Cir. 1990), quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (J. Brennan, diss.), citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983); 10A Wright, Miller & Kane § 2727 (3d ed.) (stating that the majority and dissent in *Celotex* "both agreed as to how the summary-judgment burden of proof operates").

d. In ruling on a motion for summary judgment, a nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in the nonmoving party's favor.[23]

e. A disputed material fact is "genuine" only if a reasonable jury could find for the non-movant.[24]

f. A party may move for summary judgment on a part of a claim.[25]

ii. Totality of circumstances inquiry under Section 2 of the Voting Rights Act

g. As amended, Section 2 of the Voting Rights Act provides:

> **(a)** No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> **(b)** A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[26]

h. Plaintiffs have the burden of demonstrating that, under the totality of circumstances, the challenged electoral process is not "equally open to participation by" Indian citizens because

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[23] *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1982)).
[24] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).
[25] Fed. R. Civ. P. 56(a).
[26] 52 U.S.C. § 10301.

they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[27]

i. The Senate Report accompanying the 1982 amendments to the Voting Rights Act specifies a "variety of relevant factors, depending upon the kind of rule, practice, or procedure called into question," relevant to the totality of circumstances inquiry upon which courts have come to rely and refer to as the "Senate Factors."[28]

j. Whether the political processes are "equally open" depends on a searching practical evaluation of the "past and present reality" and on a "functional" view of the political process.[29]

k. Plaintiffs can establish their burden by proving any number of relevant Senate Factors and need not demonstrate that a majority of them point one way or the other.[30]

l. Other relevant factors may be raised and considered by the Court.[31]

m. It is proper to enter summary judgment for the totality of circumstances inquiry.[32]

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[27] 52 U.S.C. § 10301(b).
[28] Senate Report at pp. 28-29; *see Thornburg v. Gingles*, 478 U.S. 30, 36-37 (quoting Senate Factors) and 43-46 (discussing Senate Factor relevance and implementation).
[29] *Gingles* at 45 (quoting Senate Report at 30 and n. 120; internal quotations omitted); *Sanchez v. Colorado* at 1310.
[30] Senate Report at 29 (stating 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"); *Sanchez v. Colorado* at 1310; *see also Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1388 (E.D. Wash. 2014).
[31] *Gingles* at 45 (stating that the Senate Factors "are neither comprehensive nor exclusive," and "other factors may also be relevant and may be considered") (citing Senate Report at 29-30); *Sanchez v. Colorado* at 1310; *see also Sanchez v. Bond*, 875 F.3d 1488, 1492 (10th Cir. 1989) (characterizing Senate Factors as "exemplary, not exclusive").
[32] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1385 (E.D. Wash. 2014) (concluding that there were no genuine issues of material fact concerning the dilutive effect of a City's election system on Latino votes and that because, under the totality of the circumstances, City Council elections are not "equally open to participation" by members of the Latino minority, plaintiffs were entitled to summary judgment under Section 2 of the Voting Rights Act).

B. Legal Elements and Undisputed Material Facts – Senate Factors

i. Senate Factor One

a. Senate Factor One - Legal Elements

n. Senate Factor One considers the "extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."[33]

o. "*Gingles* asks how the challenged electoral structure 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives.' "[34]

b. Senate Factor One - Undisputed Material Facts

Litigation

1. Indians residing on reservations were denied the right to vote by Utah until 1957.[35]

2. In 1972, in *Yanito v. Barber*, this Court found that the County Clerk violated the constitutional rights, as guaranteed by the Fourteenth Amendment, of two Navajo individuals who wished to run for County Commission when the Clerk advised them of filing a declaration and filing fee but did not inform them of the necessity of filing a nominating petition and then sought to have them disqualified.[36]

3. In *Yanito v. Barber*, this Court found a long history of discrimination against Indians, which "renders charged infringement of rights subject to close scrutiny so that not only the

[33] *Gingles*, 478 U.S. at 36-37 (quoting Senate Report at pp. 28-29).
[34] *Sanchez v. State of Colo.*, 97 F.3d 1303, 1323 (10th Cir. 1996) (citing *Gingles* at 47).
[35] U.C.A. § 20-2-14.
[36] *Yanito v. Barber*, 348 F. Supp. 587 (D. Utah 1972).

blatant infringement on the part of the state can be invalidated, but so also the more subtle mode of discrimination can be discovered."[37]

4. A three-judge panel of this Court ordered the County Clerk to place the two candidates on the ballot, stating "[w]e are moved in this case to grant the relief demanded because the evidence clearly establishes that the plaintiffs were unfairly treated and that in view of their dependent status the unfairness assumed gross proportions."[38]

5. In 1983, the United States brought two actions against the County alleging violations of the Voting Rights Act.[39]

6. The first lawsuit challenged the at-large election of County Commissioners alleging that this election process illegally diluted Indian voting strength.[40]

7. The parties entered into an Agreed Settlement and Order where the County admitted, "that the process leading to the selection of [its] County Commissioners fails to comply fully with . . . Section 2 of the Voting Rights Act."[41]

8. This Court entered a permanent injunction against the County and required it to adopt single-member election districts for the election of commissioners.[42]

9. The County adopted single-member election districts in 1986 as a result of this lawsuit, which led to the election of the first Indian Commissioner.[43]

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[37] *Yanito v. Barber*, 348 F. Supp. 587, 591 (D. Utah 1972).
[38] *Yanito v. Barber*, 348 F. Supp. 587, 592 (D. Utah 1972).
[39] *United States v. San Juan County*, C-83-1286 and C-83-1287 (D. Utah).
[40] *United States v. San Juan County*, C-83-1286 and C-83-1287 (D. Utah).
[41] *See United States v. San Juan County, et al.*, No. C-83-1286W (D. Utah, April 4, 1984).
[42] *See United States v. San Juan County, et al.*, No. C-83-1286W (D. Utah, April 4, 1984).
[43] Expert Witness Report of Dr. Dan McCool ("McCool Expert Report"), Dkt. 181, dated August 19, 2015, at p. 170.

10. The second lawsuit brought by the United States against the County alleged that its election process violated the bilingual provisions of the Voting Rights Act.[44]

11. The County admitted that it failed to comply with Section 203 of the Voting Rights Act.[45]

12. This Court entered an injunction and ordered the County to implement language provisions, which including appointing a bi-lingual "registration agent" for each precinct on the Navajo Reservation, providing interpreters and bilingual poll officials, and providing information about elections in the Navajo language both on reservation radio stations and by written notices in newspapers.[46]

13. In 1990, the United States negotiated an amended settlement with the County in the Section 203 case that included 18 pages of specific instructions on how to implement the required language provisions and adding additional requirements, such as a full-time bilingual voting coordinator, a chapter election liaison, and specific processes the County would be required to follow before removing voters from the official register.[47]

Other Voting Practices and Procedures

14. In 1987, the DNA People's Legal Services sent a letter to the attorney for the County requesting changes to the voter purge process in part because the voter purge rate for Indian

[44] *See United States v. San Juan County, et al.*, No. C-83-1287 (1984).
[45] *See United States v. San Juan County, et al.*, No. C-83-1287 (1984).
[46] *See United States v. San Juan County, et al.*, No. C-83-1287 (1984).
[47] Consent Decree, *United States v. San Juan County*, (D. Utah Oct. 11, 1990) (No. C-83-1287). See also McCool Expert Report at pp. 163-165. This settlement was terminated after four years, except for the requirement for federal observers, with the understanding that the County "acknowledges that its obligation to comply with Section 203 of the Voting Rights Act continues." Joint Motion for Termination 19 July 1995.

precincts was more than twice that for white precincts.[48]

15. In 1990, the County Clerk, Gail Johnson, was accused of violating the law by refusing to register 400-500 Indian voters whose (1) residency she questioned (2) she suspected had previously registered, or (3) had not voted in the past four years.[49]

16. In 1990, the legal counsel for the Utah Attorney General released the following statement: "The San Juan County clerk has agreed with the attorney general and lieutenant governor to place those [400-500 names] on the formal voting list and official register."[50]

17. In 1995, the County Clerk purged voter registration lists, affecting Indian precincts disproportionately.[51]

18. Between 2004 and 2006, the County altered voter registration lists by removing names from the "active" voter list to the "inactive voter list," which disproportionately affected majority-Indian precincts.[52]

19. Between 2004 and 2006 five majority-Indian precincts experienced reductions between 22% and 34%, while four out of five majority-white precincts experienced increases during that same time period.[53]

Vote-by-Mail

20. In 2014, the County Clerk, Norman Johnson, made a unilateral decision to close all

[48] McCool Expert Report at p. 181 and Table 9.
[49] McCool Expert Report at pp. 177-178.
[50] McCool Expert Report at p. 179.
[51] McCool Expert Report at pp. 181-182 and Table 10.
[52] McCool Expert Report at pp. 182-183, Table 11. This is especially notable because inactive voters did not receive absentee ballots in the mail in the 2014 elections. Deposition of Norman Johnson, dated June 23, 2015, at p. 39.
[53] McCool Expert Report at p. 186.

physical polling locations in the County and adopt a vote-by-mail election system.[54]

21. The only official Election-Day Voting center in the primary and general elections in 2014 was located in Monticello, Utah.[55]

22. The distance between Navajo Mountain, Utah, and Monticello, Utah, is approximately 200 miles and requires approximately four hours of driving time.[56]

23. Mr. Johnson did not formally solicit input from Indians in the County before he made the decision to close polling locations.[57]

24. As a result of the closure of physical polling locations in 2014, the County did not offer formal language assistance to Indian voters, with the exception of the assistance provided by the official Navajo Elections Liaison, Edward Tapaha.[58]

25. Mr. Johnson testified that he believed family members would provide all language assistance to Indians.[59]

26. Mr. Tapaha testified that expecting family members to translate a ballot and election materials was unrealistic.[60]

County Commission - Districting

27. A county "shall reapportion district boundaries to meet the population, compactness, and

[54] McCool Expert Report at p. 186.
[55] County vote-by-mail election notice, unknown date: http://sanjuancounty.org/documents/By%20Mail%20Election%20Notice.pdf
[56] This estimation is derived from Google Maps.
[57] McCool Expert Report at pp. 186-187.
[58] Deposition of Norman Johnson, dated June 23, 2015, at p. 36.
[59] Deposition of Norman Johnson, dated June 23, 2015, at p. 35.
[60] Deposition of Edward Tapaha, dated June 24, 2015, at p. 20.

contiguity requirements… at least once every 10 years."[61]

28. "Redistricting may also be required more frequently when other events occur."[62]

29. Between 1986 and 2011 the County did not reapportion its County Commission election districts.[63]

30. The County did not reapportion its School Board election districts between 1992 and 2016.[64]

31. The overall deviation of the current School Board election districting plan, established in 1992, exceeded the maximum overall deviation permitted by the United States Constitution (10%) beginning in 1992 until this Court ruled that the election districts violated the Fourteenth Amendment of the United States Constitution and ordered the County to submit remedial plans to fix the violation.[65]

ii. Senate Factor Two

p. Senate Factor Two considers the "extent to which voting in the elections of the jurisdiction is racially polarized."[66]

q. Plaintiffs incorporate by reference the legal elements and undisputed material facts put forth in their Motion for Summary Judgment on Plaintiffs' Second Claim for Relief (second and

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[61] Memorandum Decision and Order, Dkt. 280, dated December 9, 2015, citing UTAH CODE ANN. § 20A-14-201(2)(a)(i).
[62] UTAH CODE ANN. § 20A-14-201(2)(a)(ii)-(vii), (b).
[63] Expert Witness Report of William S. Cooper ("Cooper Expert Report"), Exhibit One, Dkt. 172-1, dated July 20, 2015, p. 5, ¶ 14.
[64] Cooper Expert Report, Exhibit One, p. 5, ¶ 14; See Exhibit One, Email Communication from Carl Huefner, dated January 19 2016.
[65] Memorandum Decision and Order, Dkt. 280, dated December 9, 2015; Order on Remedial Plans for San Juan School Board Election Districts, Dkt. 281, dated December 21, 2015.
[66] *Gingles*, 478 U.S. at 37 quoting Senate Report at pp. 28-29.

third Gingles Factors) demonstrating that Indian voters in the County are politically cohesive and non-Indian white voters sufficiently vote as a bloc to defeat Indian or Indian-preferred candidates.[67]

iii. Senate Factor Three

Plaintiffs do not address Senate Factor Three in this motion.

iv. Senate Factor Four

a. Senate Factor Four - Legal Elements

r. Senate Factor Four considers whether members of the minority group are excluded from a candidate slating processes.[68]

s. Candidate slating is described as "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected."[69]

t. An inference of slating can arise when there is an absence of minority candidates for a particular office.[70]

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[67] Motion for Partial Summary Judgment on Plaintiffs' Second Claim for Relief (Second and Third *Gingles* Factors) and Memorandum of Law, Dkt. 202, dated September 15, 2015.
[68] *Gingles*, 478 U.S. at 37 quoting Senate Report at pp. 28-29.
[69] *Westwego Citizens for Better Government v. City of Westwego*, 946 F.2d 1109, 1116 n. 5 (5th Cir. 1991).
[70] *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 777 (N.D. Ga. 1997) ("[A]lthough no evidence of a formal candidate slating process was introduced, African–American voters appear to have been unable to sponsor candidates. The absence of African–American candidates is striking. For example, prior to 1995, only three African–American candidates ran for LaGrange City Council. Conversely, in this same time period, there were forty-five opportunities to run for the LaGrange City Council. In addition, whenever an African–American has appeared on the ballot, he or she has received significant support from the African–American voters. This fact suggests a lack of opportunity, rather than a lack of inclination, to sponsor minority candidates.").

b. Senate Factor Four - Undisputed Material Facts

32. The County was organized in 1880.[71]

33. Prior to 1970 no Indian ran for or was appointed to any elected office in the County.[72]

34. Although the County elections do not usually have a candidate slating process in the traditional sense, a de facto form of slating occurred in 1990.[73]

35. In 1990, an unofficial slating process occurred in the County when the Democratic Party presented an all-Indian slate of candidates that was developed in an "unusual way:" Indians "were afraid that Anglo party stalwarts would oppose their slate, so they filed just one hour before the filing deadline to the surprise of local Democratic Party leads."[74]

36. Of the all-Indian slate, five Indian candidates lost at-large elections for various County Offices, and only one candidate prevailed, Mark Maryboy, who ran in a single-member election district for County Commission District One.[75]

37. An Indian has never won a countywide elected office.[76]

38. An Indian ran for the countywide office of Sheriff on two occasions.[77]

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[71] McCool Expert Report at p. 28.
[72] See McCool Expert Report at pp. 82-94 (published election results including races between an Indian and white candidate); Expert Witness Report of Richard Engstrom (Engstrom Expert Report), Dkt. 188, dated August 31, 2015, at pp. 14-18, Tables 1-4; see also Exhibit Two (published election results of San Juan County, Utah; downloaded from at http://sanjuancounty.org/elections_voting.htm and last accessed January 26, 2016). Plaintiffs note that before 1957 Indians not living on reservations were not prohibited by state statute from the right to vote and run for elected office in the County. UTAH CODE ANN. § 20-2-14.
[73] McCool Expert Report at p. 173.
[74] McCool Expert Report at 173.
[75] McCool at 173-174.
[76] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.

39. An Indian ran for the countywide office of Assessor on one occasion.[78]

40. An Indian ran for the countywide office of Treasurer on one occasion.[79]

41. An Indian ran for the countywide office of Recorder on one occasion.[80]

42. An Indian ran for the countywide office of Recorder on one occasion.[81]

43. An Indian candidate ran for the countywide office of Clerk on one occasion.[82]

44. An Indian has never run for County Attorney.[83]

45. Prior to 1986, the County elected its Commission through at-large voting.[84]

46. In *Yanito v. Barber*, this Court found that the County Clerk violated the constitutional rights, as guaranteed by the Fourteenth Amendment, of the two Indians who wished to run as independents for the San Juan County Commission when the Clerk advised them of filing a declaration and filing fee but did not inform them of the necessity of filing a nominating petition.[85]

47. A three-judge panel of this Court ordered the County Clerk to place the two Indian

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[77] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[78] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[79] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[80] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[81] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[82] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[83] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[84] Memorandum Decision and Order, Dkt. 166, dated March 12, 2015.
[85] *Yanito v. Barber*, 348 F. Supp. 587 (D. Utah 1972).

candidates on the ballot.[86]

48. The two Indian candidates did not win.[87]

49. In total, prior to 1986, an Indian candidate ran for an at-large County Commission seat six times and lost each time (i.e., two candidates in 1972 and one each in 1974, 1976, 1980, and 1984).[88]

50. In 1986, as a result of this Court's order in *United States v. San Juan County*, three single-member election districts were established for the County Commission.[89]

51. The Commissioner from District One has always been white.[90]

52. An Indian candidate ran and lost in County Commission District One in 1992, 2000, 2004, and 2012.[91]

53. An Indian has never run for Commissioner in District Two.[92]

54. In 1986, Mark Maryboy, an Indian, was the first Indian to be elected to the Commission and was elected in District Three.[93]

55. The Commissioner from District Three has always been Indian.[94]

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[86] *Yanito v. Barber*, 348 F. Supp. 587, 592 (D. Utah 1972).
[87] See Exhibit Two.
[88] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[89] See Memorandum Decision and Order, Dkt. 166, dated March 12, 2015.
[90] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[91] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[92] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[93] McCool Expert Report at p. 170.
[94] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.

56. Prior to 1970, no Indian ever ran or was elected to or appointed to any School Board election district in the County.[95]

57. Beginning in 1972, an Indian won every election for School Board Districts Four and Five.[96]

58. Indians have run and lost in School Board District Three four times, in 1970, 1972, 1992, and 1996.[97]

59. No Indian has run for School Board District Three since 1996.[98]

v. Senate Factor Five

a. Senate Factor Five – Legal Elements

u. Senate Factor Five considers 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."[99]

v. "Where disproportionate educational, employment, income level, and living conditions can be shown and where the level of minority participation in politics is depressed, 'plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.'"[100]

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[95] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[96] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[97] See McCool Expert Report at pp. 82-94; see also Exhibit Two.
[98] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[99] *Gingles*, 478 U.S. at 36-37 (quoting Senate Report at pp. 28-29).
[100] *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 294 (5th Cir. 1996) (citing Senate Report at p. 29, n. 114); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1323 (10th Cir. 1996).

b. Senate Factor Five – Undisputed Material Facts

Education: Access to Facilities and Programs

60. The U.S. Supreme Court announced the constitutional promise of an equal, unified education for African American students by deciding *Brown v. Board of Education* in 1954, but it would take another forty years, and a lawsuit against the San Juan School District (School District or District) by individual Navajo citizens and the Navajo Nation, before a federal court addressed the basic question of whether American Indians share a similar right to equal educational opportunities.[101]

61. Before the 1950s thousands of Indian children residing in the County did not have access to a local education.[102]

62. Indian students were first admitted into the District's public schools in the 1950s, in part because the District received higher per-pupil funding for Indian students.[103]

63. Until the mid-1960s only Indians in a Latter Day Saints Placement Program or those referred by social services agencies were able to enroll in Blanding High School.[104]

64. In 1964, in part due to his father's advocacy for desegregation and a right to education, Clyde Benally became the first non-fostered Indian child to graduate from San Juan High

[101] Lawrence R. Baca, "Meyers v. Board of Education: The Brown v. Board of Indian Country," 2004 *U. Ill. L. Rev.* 1155, 1156-57 (2004), discussing *Meyers By & Through Meyers v. Bd. of Educ. of San Juan Sch. Dist*., 905 F. Supp. 1544, 1557 (D. Utah 1995).
[102] Expert Witness Report of Donna Deyhle, Dkt. 185, dated August 28, 2015, at pp. 9-10; *Meyers By & Through Meyers v. Bd. of Educ. of San Juan Sch. Dist*., 905 F. Supp. 1544, 1557 (D. Utah 1995) (District arguing that "until relatively recently, on-reservation Native Americans were not provided with any type of free, public education from the State").
[103] Deyhle Expert Report at pp. 13-14.
[104] Expert Witness Report of Garth Massey (Massey Expert Report), Dkt. 183, dated August 25, 2015, at p. 15.

School.[105]

65. In 1974, Navajo parents and students filed a federal court class action, *Sinajini v. Board of Education,* alleging deprivation of equal educational opportunities by the School District because the District expended more funds for construction and operation of schools that served non-Indian students than for those which predominantly served Indian students and because it failed to provide a bicultural and bilingual education program to benefit non-English speaking Indian students.[106]

66. The *Sinajini* litigation lasted "for almost thirty years."[107]

67. In 1975, the court entered a consent decree and injunction in *Sinajini* that imposed various legal duties upon the school district, including obligations to construct and renovate educational facilities, reimburse parents for travel expenses, operate bus routes, allocate expenditures fairly, and implement bilingual-bicultural awareness programs.[108]

68. Within eight years of the filing of the first *Sinajini* case, two high schools were built—Whitehorse High School in 1978 and Monument Valley High School in 1983.[109]

69. More than seventeen years later, the Navajo plaintiffs moved to reopen *Sinajini* seeking enforcement of the 1975 decree.[110]

70. To broaden the claims and relief covered by the decree in *Sinajini*, the Navajo plaintiffs

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[105] Deyhle Expert Report at p. 16.
[106] *Sinajini v. Bd. of Educ. of San Juan Sch. Dist*., 47 F. Supp. 2d 1316, 1318 (D. Utah 1999) rev'd, 233 F.3d 1236 (10th Cir. 2000).
[107] *Sinajini v. Bd. of Educ. of San Juan Cty. Sch. Dist*., 53 F. App'x 31, 33 (10th Cir. 2002).
[108] *Sinajini v. Bd. of Educ. of San Juan Sch. Dist*., 233 F.3d 1236, 1239 (10th Cir. 2000).
[109] Deyhle Expert Report at p. 70.
[110] *Sinajini v. Bd. of Educ. of San Juan Sch. Dist.*, 47 F. Supp. 2d 1316, 1318 (D. Utah 1999) *rev'd,* 233 F.3d 1236 (10th Cir. 2000).

filed two new cases against the District, both alleging discriminatory practices against Indian students.[111]

71. Plaintiffs asked the District to build a high school to serve the Navajo Mountain community and to secure the rights of Indians to a proper education in District schools.[112]

72. In *Meyers*, the District argued that it had no duty to educate children residing on an Indian reservation, but the Court disagreed and held that the District had a duty under the Utah Constitution to provide a system of public schools open to all the children of the District including children residing on the Navajo Reservation.[113]

73. The plaintiffs and the District entered into a consent decree that superseded the 1975 decree and agreed to make best efforts to secure passage of bond referendum, bilingual education, and cultural awareness programs to benefit Indian students.[114]

74. As late as 1984, the District counselors and school officials used the pejorative phrase "back to the blanket" to describe Indian students who refused to leave their homes to attend college or gain employment.[115]

75. In 2013, 50% of School District students identified as American Indian, 46% identified as

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[111] *Id.*, citing *Meyers v. Board of Education of the San Juan School District*, 905 F.Supp. 1544 (D.Utah 1995), and *Chee v. Board of Education of the San Juan School District*, No. 2:94–CV–0386.
[112] *Meyers v. Board of Education of the San Juan School District*, 905 F. Supp. 1544 (D. Utah 1995).
[113] *Meyers*, 905 F. Supp. at 1558.
[114] *Sinajini v. Bd. Of Educ*, 964 F. Supp. 319 (D. Utah. 1997); *see also* Deyhle Expert Report at p. 73.
[115] Deyhle Expert Report at pp. 7-8.

White, and 4% identified in other ethnic and racial categories.[116]

Education: Grades, Test Performance, and English Proficiency

76. In 1975, Indian students in San Juan High School averaged a 0.89 grade point average.[117]

77. In 1984, Indian students in San Juan High School averaged a 1.38 grade point average.[118]

78. Between 1977 and 1984, San Juan High School white students outperformed Indian students in every category tested using the California Test of Basic Skills (CTBS).[119]

79. Between 1985 and 1987, CTBS testing of 8th graders was conducted in Monticello High School, with a 98% white student population, and Monument Valley High School, with a 99% Indian student population.[120]

80. Students at Monticello High School outperformed students at Monument Valley High School by 4 grade levels in reading and 2.6 grade levels in math.[121]

81. In 1990 and 1991, 8th and 11th grade students at Whitehorse High School (WHHS) and Monument Valley High School (MVHS), which had the largest Indian populations in the District, scored in the 15th percentile or lower in reading and the 26th percentile or lower in math, well below the national average.[122]

82. Test score data from between 2004 and 2013 indicates a continuing pattern of academic performance disparity between Indian students and their white counterparts in the School

[116] Deyhle Expert Report at p. 88 (mistakenly reporting 60% Indian population instead of 50%) and 103.
[117] Deyhle Expert Report at p. 28.
[118] Deyhle Expert Report at p. 28.
[119] Deyhle Expert Report at pp. 30-31 and Figures 1 & 2.
[120] Deyhle Expert Report at p. 31.
[121] Deyhle Expert Report at pp. 31-32 and Figure 3.
[122] Deyhle Expert Report at pp. 32-34 and Figures 4 & 5.

District.[123]

83. Test score data from Fall, 2014, using a new assessment method again showed that the two majority-Indian high schools were outperformed by majority-white Monticello High School.[124]

84. American Indians in the County speak English "less than very well" at a rate forty times higher than Non-Hispanic Whites (i.e., 16.0% v. 0.04%).[125]

85. Over nearly 40 years, from the late 1970s to 2014, Indian students in the County, as a group, "have shown few real gains in academic abilities in math and language arts."[126]

Education: School Ratings

86. For the 2013-2014 school year, Monument Valley High School reported that of 225 total students, 220 students were Indians and Whitehorse High School reported that out of 283 total students, 280 were Indians.[127]

87. Both Monument Valley High School and Whitehorse High School received a grade of F from the Utah State Office of Education for the 2013-2014 school year.[128]

Education: Drop Out Rates

88. The high school dropout rate for the class of 1984 in Utah was 21.3%.[129]

89. Between 1980 and 1989, a comprehensive study of student cohorts by Dr. Donna Deyhle

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[123] Deyhle Expert Report at pp. 34-45 and Figures 6 through 16.
[124] Deyhle Expert Report at pp. 45-48 and unnumbered figures therein.
[125] Cooper Expert Report, Exhibit 4, Dkt. 172-10, at pp. 27-28 (citing 2008-2012 American Community Survey 5-year Estimates).
[126] Deyhle Expert Report at pp. 48; 74-75.
[127] Deyhle Expert Report at p. 49.
[128] Deyhle Expert Report at p. 48.
[129] Deyhle Expert Report at p. 50.

found that Navajo students had an overall 31% dropout rate and it ranged by year from 15% to 54%.[130]

90. The Principal of Monument Valley High School analyzed and reported very similar dropout rates for Navajo students.[131]

91. A 1992 "Report Card" by the School District reported that the dropout rate for non-white students, primarily Navajos and Utes, was four times higher than for white students: 81% of the dropouts reported by the district, from the 1987 to 1991 were non-white.[132]

92. Indian students who attended the predominantly Indian school, Whitehorse High School (99% Indian student population) had better completion rates for high school than Indian students who attended San Juan High School, which has a predominantly white population (47% Indian student population).[133]

93. The proportion of American Indians in the County lacking a high school diploma is four times higher than for Non-Hispanic Whites (i.e., 28.2% v. 7.0%).[134]

94. The proportion of Non-Hispanic Whites in the County that have a Bachelor's degree or higher is nearly five times higher than for American Indians (i.e., 34.1% v. 5.0%).[135]

95. An expert who studied the drop-out issue in the County for years stated that "In my

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[130] Deyhle Expert Report at pp. 50-57 and Figures 17 through 23 (citing Deyhle, D. "Constructing Failure and Maintaining Cultural Identity: Navajo and Ute School Leavers." *Journal of American Indian Education* 31, no. 2 pp. 24-47, 1992).
[131] Deyhle Expert Report at p. 58.
[132] Deyhle Expert Report at p. 58.
[133] Deyhle Expert Report at p. 56.
[134] Cooper Expert Report, Exhibit Four, Dkt. 172-10, at pp. 25-26 (citing 2008-2012 American Community Survey 5-year Estimates).
[135] Cooper Expert Report, Exhibit Four, Dkt. 172-10, at pp. 25-26 (citing 2008-2012 American Community Survey 5-year Estimates).

opinion, from the results of questionnaires, interviews and in-school observations, and my background and experience in this subject, many Indian youth drop out of school because of poor reading skills, which is directly tied to lack of English language skills, and feelings of racial discrimination, unrelated curriculum and home problems." [136]

Education: Access to Bicultural and Bilingual Education

96. In 1984, the District's bilingual and bicultural curriculum, ordered by the 1975 consent decree, "sat unused, gathering dust in the district's material center" and in practice was "nonexistent."[137]

97. In 1984, the Director of the District's Curriculum Materials Center stated that he was "only one of two in the district that is supportive of the bilingual program," that "[n]one of the principals are in support of bilingual education," and that the bilingual program required providing cultural awareness for all students "[b]ut that never happened" because "principals can do what they want" so that funding allocated for the bilingual program "was used for other purposes."[138]

98. In 1984 the District superintendent admitted that "[t]here is no real bilingual program in place now." [139]

99. Over the next ten years Dr. Deyhle observed that no uniform bilingual-bicultural program was implemented in the district.[140]

100. At the outset of efforts to implement a 1997 consent decree, *Sinajini*, 964 F. Supp. 319,

[136] Deyhle Expert Report at pp. 67-68.
[137] Deyhle Expert Report at p. 70.
[138] Deyhle Expert Report at pp. 70-71.
[139] Deyhle Expert Report at pp. 70-71.
[140] Deyhle Expert Report at p. 71.

the Justice Department's expert reviewed the District's course offerings in each school and stated "I was really shocked. I haven't seen anything so bad since the 60s in the south."[141]

101. Even after the 1997 consent decrees, "consensus teams" for five years "monitored the school district's resistance to the use of school dollars for Navajo language and cultural instruction," which occurred in "daily discourses, in and out of school."[142]

102. In 2002, the District complained about the burden of implementing the Navajo language curriculum and unilaterally decided to make it optional.[143]

103. Following negotiation, in 2003 the District again made the Navajo language a mandatory offering District-wide but shifted the brunt of the workload required to Navajo teachers such that the "success or failure of the reform efforts centered on the least powerful educators—Navajo teachers—in the district" and in effect, "school officials and non-native teachers could continue with a vision that rendered American Indian youth invisible beyond language and culture classes."[144]

104. When Navajo language program monitoring required by the 1997 consent decree ceased in 2002, the monitors "had just begun to see some positive gains in the educational environment experienced by Indian students."[145]

105. By 2015, there were "no longer any cultural programs" in the District and several of the Navajo language and culture teachers had been "kicked out of the district."[146]

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[141] Deyhle Expert Report at p. 75.
[142] Deyhle Expert Report at p. 77.
[143] Deyhle Expert Report at pp. 77-79.
[144] Deyhle Expert Report at pp. 79-80.
[145] Deyhle Expert Report at p. 80.
[146] Deyhle Expert Report at p. 80.

Education - Racial Conflict in Classrooms and Punishment

106. Plaintiffs' education expert, Dr. Donna Deyhle, documented impressions by Indian students in the District's schools that white students and teachers mistreat them.[147]

107. Dr. Deyhle documented instances of lowered expectations on the part of teachers in the District's schools for Indian students as compared to white students.[148]

108. Dr. Deyhle documented instances of racism in the classroom towards Indians in the District's schools carried out by white students.[149]

109. Dr. Deyhle documented a perception of tension between school officials and Indian students.[150]

110. In 2011, Indian students, who comprised 47.7% of the K-12 student population of the District, accounted for 80% of all disciplinary actions given, while White students were 47.7% of the student population and accounted for 19.1% of all actions taken.[151]

111. In 2011, the District reported 181 referrals to law enforcement; 161 for Indian students and 20 for white students.[152]

112. In 2011, every one of the 22 students arrested on a District campus was an Indian student.[153]

Income and Poverty

113. In 1965, the County reported that over 30 percent of its population was on public

[147] Deyhle Expert Report at p. 24.
[148] Deyhle Expert Report at pp. 22-24.
[149] Deyhle Expert Report at pp. 24-25.
[150] Deyhle Expert Report at p. 27.
[151] Deyhle Expert Report at p. 103.
[152] Deyhle Expert Report at p. 104.
[153] Deyhle Expert Report at p. 105 (i.e., 52% of the state-wide arrest total of 42 equals 22).

assistance, but that this included nearly 60 percent of its Navajo population.[154]

114. In 1973, one study reported that 95% of people in the County who were on welfare were Navajo.[155]

115. In 1980, 58% of the Indians in the County were living in poverty, compared to 12.5% of whites.[156]

116. Indian residents in the County are four times more likely to be poor than non-Indians.[157]

117. Between 2008 and 2012, 9.9% of Non-Hispanic White residents of the County were classified as having income below poverty level, as compared with 40.5% of American Indians.[158]

118. Between 2008 and 2012, the median household income for Non-Hispanic Whites in the County was nearly double that of Indians (i.e., $48,576 v. $24,338, respectively).[159]

119. Between 2008 and 2012, per capita income for Non-Hispanic Whites in the County was more than double that of Indians (i.e., $21,722 v. $9,967, respectively).[160]

120. Between 2008 and 2012, 8.2% of Non-Hispanic Whites in the County received food stamps/SNAP in the past twelve months, compared with 29.3% of American Indians.[161]

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[154] McCool Expert Report at p. 68.
[155] McCool Expert Report at p. 69.
[156] McCool Expert Report at p. 69 (citing 1980 Census).
[157] Massey Expert Report at p. 6 (citing U.S. Census data published in 2013).
[158] McCool Expert Report at p. 70 and Cooper Expert Report, Exhibit Four, at pp. 29-30 (both citing 2008-2012 American Community Survey 5-year Estimates).
[159] Cooper Expert Report, Exhibit Four, at pp. 36-37 (citing 2008-2012 American Community Survey 5-year Estimates).
[160] Cooper Expert Report, Exhibit Four at pp. 44-45 (citing 2008-2012 American Community Survey 5-year Estimates).
[161] Cooper Expert Report, Exhibit Four at pp. 53-54 (citing 2008-2012 American Community Survey 5-year Estimates).

Living Conditions

121. In 1981, a study reported that 70% of reservation homes did not have refrigeration, only 23% had flush toilets, and 75% of the respondents reported hauling domestic water from community wells and other places.[162]

122. To date, residents of Westwater, an Indian community adjacent to Blanding, must provide for their own water (by hauling it), electricity (from generators and solar collectors), and sewage disposal (septic tanks) and residents must hike across an arroyo to Blanding where their mail is stored in road-side postal boxes.[163]

123. When, in 2007, a Navajo representative requested that the County Commissioners support providing electricity and water service to Indian residents of Westwater, County Commissioner Stevens responded that, even if the County supplied those utilities, the residents were too poor to buy them.[164]

124. Between 2008 and 2012, American Indians in the County reported more than one occupant per room in a household at seven times the rate of Non-Hispanic Whites (22.7% v. 3.1%).[165]

125. In 2010, Navajo residents of the County were heavily dependent on donations from the Utah Food Bank, in part because many homes do not have electricity so they could not store

[162] Expert Witness Report of Lillian Tom-Orme (Tom-Orme Expert Report), Dkt. 189, dated August 31, 2015, at p. 20.
[163] Massey Expert Report at p. 21.
[164] McCool Expert Report at p. 69.
[165] Cooper Expert Report, Exhibit Four, at pp. 63-64 (citing 2008-2012 American Community Survey 5-year Estimates).

fresh food.[166]

Health

126. Historically, few health care facilities were accessible to Navajo residents in the County.[167]

127. By the 1950's, Navajo residents of the County had access to very little health or medical care, with only a charity clinic (St. Christopher Mission) and hospital (Monument Valley Adventist Hospital).[168]

128. During the 1960s, infectious and communicable diseases remained a problem among the Navajo population throughout the reservation, including the County.[169]

129. Tuberculosis, which "more than any other major disease" was an "expression of the socioeconomic conditions in a community" was a significant health problem for Navajo residents of the County into the 1970s.[170]

130. Between 2008 and 2012, nearly two-thirds of American Indians over age 65 in the County reported having a disability, which was nearly twice the rate of Non-Hispanic Whites over age 65 (i.e., 64.8% v. 37.3%).[171]

131. Between 2008 and 2012, American Indians aged 18 to 64 in the County reported having no health insurance at more than twice the rate of Non-Hispanic Whites aged 18 to 64 (i.e.,

[166] McCool Expert Report at p. 69.
[167] Tom-Orme Expert Report at pp. 5-9.
[168] Tom-Orme Expert Report at p. 10.
[169] Tom-Orme Expert Report at p. 10.
[170] Tom-Orme Expert Report at pp. 10-12, 20.
[171] Cooper Expert Report, Exhibit Four, at pp. 65-66 (citing 2008-2012 American Community Survey 5-year Estimates).

54.3% v. 20.5%).[172]

Civic Participation

132. Scholars have demonstrated a connection between levels of educational attainment and civic participation, including patterns of voting participation, community involvement, and participation in political campaigning.[173]

133. Higher levels of educational attainment are associated with higher voting rates and other forms of civic participation.[174]

134. Voting precincts in the areas served by predominately Indian schools in the School District that have deficient academic achievement have significantly less voter turnout than those served by predominately white schools in the northern part of the County (e.g., in the 2000 General Election the Aneth precinct, which is in the predominately Indian community served by Whitehorse High School, had a voter turnout of 49.76% of registered voters, as compared to 68.29% in the North Monticello precinct, which is in the predominately white community served by Monticello High School, and in the 2010 general election the Monticello precinct had a 72.23% turnout rate compared with Aneth's 43.53%).[175]

[172] Cooper Expert Report, Exhibit Four, at pp. 67-68, citing 2008-2012 American Community Survey 5-year Estimates.
[173] Deyhle Expert Report at p. 83.
[174] Deyhle Expert Report at pp. 84-88.
[175] Deyhle Expert Report at p. 84.

vi. Senate Factor Six

a. Senate Factor Six – Legal Elements

w. Senate Factor Six inquires as to the "use of overt or subtle racial appeals in political campaigns."[176]

x. Senate Factor Six can be satisfied where appeals involve allusions to, or threats of, minority control of government.[177]

b. Senate Factor Six – Undisputed Material Facts

135. In 1990, Indians ran a slate of candidates for countywide offices.[178]

136. A flyer distributed at that time contained the following statement: "Utah Navajos are 7 out of 109 chapters, so they can never control the tribal council. Utah Navajos are 60% of all the people in San Juan County, so if they all vote, they can always control the county."[179]

137. The all-Indian slate was described as "controversial," and the election was marked by racial tension and some white voters complained that Indians should not control county government when they "don't even pay property taxes.[180]

138. In 2012, Bruce Adams (a white Republican) ran as an incumbent for County Commission District One against Gail Johnson (a white Independent) and Willie Grayeyes (a Navajo Democrat).[181]

139. In 2012, supporters of Bruce Adams produced a campaign ad that noted that if Mr.

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[176] Senate Report at pp. 28-29.
[177] *See e.g. Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) *aff'd*, 498 U.S. 1019, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).
[178] McCool Expert Report at pp. 50, 88-89.
[179] McCool Expert Report at p. 129.
[180] McCool Expert Report at pp. 50, 82, 88-105, 111-113; 176-180.
[181] McCool Expert Report at p. 129.

Adams and Ms. Johnson split the votes of those opposing Mr. Grayeyes, then Mr. Grayeyes could win, and the "consequences" for the county "will be significant."[182]

140. The advertisement noted above stated that the "excellent progress made by San Juan Hospital in recent years could be derailed."[183]

141. The supporters of Bruce Adams ran another advertisement that stated: "Voters should consider the following: Willie Grayeyes is campaigning on promises that if he is elected he will use San Juan County money for projects on the reservation which are clearly the responsibility of the Federal Government or the Navajo Nation to finance."[184]

142. The advertisement referenced above also stated: "Providing water to these homes [on the reservation] is the responsibility of the U. S. federal Indian Health Services. Providing electricity is the responsibility of the Navajo tribal utility authority. Funding for reservation roads is the responsibility of the federal Bureau of Indian Affairs. Every year Navajo government officials and private citizens living on the reservation request that San Juan County provide funds for projects on the reservation which are definitely not the responsibility of the county. Bruce Adams has been very successful in preventing the expenditure of San Juan County tax money on reservation projects for which the county has no responsibility."[185]

vii. Senate Factor Seven

a. Senate Factor Seven – Legal Elements

y. Senate Factor Seven considers "the extent to which members of the minority group have

[182] McCool Expert Report at p. 129.
[183] McCool Expert Report at p. 129.
[184] McCool Expert Report at p. 129.
[185] McCool Expert Report at p. 129.

been elected to public office in the jurisdiction." [186]

z. The fact that no members of a minority group have been elected to office over an extended period of time is probative.[187]

aa. Some success at the polls does not negate a showing of polarized voting or disprove the existence of vote dilution. [188]

bb. Even though Section 2 is explicit that the statute provides no right to proportional representation, numerous courts have considered the record of minority electoral success in conjunction with population statistics and proportional representation as probative of a violation.[189]

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[186] *Gingles*, 478 U.S. at 36-37 (quoting Senate Report at 28-29).
[187] *See Teague*, 92 F.3d at 285 (entering judgment for violation of § 2 against a county where blacks made up 39.5% of its population but no black candidate had ever won election in a white majority district when pitted against a white candidate or a county-wide election, including to offices such as court judge, constable, sheriff, circuit clerk, coroner or county attorney); *Montes*, 40 F. Supp. 3d at 1385 (§ 2 violated, in part, because no Latino had ever been elected to a city council in the 37-year history of the challenged system despite accounting for approximately one-third of the city's VAP and approximately one-quarter of its citizen VAP).
[188] Senate Report at 29, n. 115 (also stating that otherwise "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate"); *Gingles* at 60 (approving lower court's discounting of "only minimal and sporadic success" and accounting for "the benefits incumbency and running essentially unopposed") and 75 (discounting success in an election after the case had been filed); *Sanchez v. Colorado*, 97 F.3d at 1324 (concluding that record did not justify the district court's credit of the extent to which minorities have been elected to public office) and 1329 (concluding that under the totality of circumstances racial polarization drives the voting community in the challenged district "despite [the minority's] limited local success in being elected or appointed to political office"); *Large*, 709 F. Supp. 2d at 1221 (finding significant that only one Indian out of eight candidacies had ever been elected to the County Commission); *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994) (stating that success in municipal elections "do[es] not demonstrate that black citizens have an equal opportunity to elect their preferred candidates to county-wide offices").
[189] *See* 42 U.S.C. § 1973(b) (providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"); *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245, 1265 (N.D. Miss. 1987)

b. Senate Factor Seven – Undisputed Material Facts

143. Many Indians in the County do not vote because "they feel it is a waste of time, given the conspicuous lack of electoral success."[190]

144. Given the history of prejudice and discrimination in the County and the legal battles and face-offs between Indians and the white-dominated county government, group-position prejudice presents a formidable barrier to political equity in the County.[191]

145. The 1990 census indicated that the County was 51.7% Indian VAP and the non-Hispanic white population was 43.89%.[192]

146. According to the 2000 Census, the County was 52.58% Any Part Indian VAP.[193]

147. According to the 2010 census, the County is 50.33% Any Part Indian VAP.[194]

148. Indians have never been elected to a majority of the seats on the County Commission.[195]

149. Indians have never been elected to a majority of the seats on the School Board.[196]

150. An Indian has never won a countywide election for any elected position, including

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aff'd sub nom, 932 F.2d 400 (5th Cir. 1991) (because blacks hold 9.9% of elected offices in Mississippi but comprise about 35% of the population and most of those officials were elected from black majority districts they have "substantial difficulty" electing candidates of their choice); *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (noting that "[n]otwithstanding a black population of 29.4%, only 7% of Louisiana's elected officials are black") and 351 (describing a fifteen percent success rate for black candidates at the polls as "substantially lower than might be anticipated" given the parish's fifty-five percent black population).

[190] McCool Expert Report at p. 198 (summarizing his findings from interviews).

[191] Massey Expert Report at p. 34.

[192] Engstrom Expert Report, Dkt. 188, ¶ 19.

[193] Cooper Expert Report, Exhibit One, Exhibit H-2.

[194] Cooper Expert Report, Exhibit One, Exhibit H-1.

[195] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.

[196] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.

County Assessor, County Attorney, County Clerk/Auditor, County Recorder, County Sheriff, County Surveyor, and County Treasurer.[197]

151. Prior to the changes in elections forced as a result of the 1984 lawsuits and consent decrees, no Indian had ever held an elected County office.[198]

152. Prior to 1986, an Indian candidate ran for an at-large County Commission seat six times and lost each time (i.e., two candidates in 1972 and one each in 1974, 1976, 1980, and 1984).[199]

153. In 1990, Indian candidates ran for five of six countywide offices, including County Sheriff, County Treasurer, County Assessor, County Recorder, and County Clerk.[200]

154. The Indian candidate did not prevail in any of the five countywide elections in 1990, "a shutout" for non-Indian candidates.[201]

155. In 2002, an Indian candidate ran for County Sheriff but was not elected.[202]

156. The switch from at-large elections to district elections made it possible for an Indian to be elected to represent Commission District Three.[203]

157. In the nine elections since 1986, a Navajo has been elected to County Commission District Three every time.[204]

158. The County Commission District Three seat is the only County office held by an

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[197] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[198] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[199] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[200] Engstrom Expert Report, ¶ 29.
[201] Engstrom Expert Report, ¶¶ 19-36.
[202] Engstrom Expert Report, ¶¶ 25.27.
[203] McCool Expert Report at p. 197.
[204] McCool Expert Report at p. 197.

Indian.[205]

159. Mark Maryboy served four successive terms from 1986 to 2002 as District 3 County Commissioner.[206]

160. When Mr. Maryboy's turn came to serve as Chair of the Commission the other two, non-Indian Commissioners denied him the position.[207]

161. In 1992, 2000, 2004, and 2012 an Indian candidate ran for County Commission District One and lost the general election each time.[208]

162. No Indians served on the school board until 1971, when an Indian was appointed to fill a vacancy.[209]

163. Indians have been elected to the two school board districts that are located mostly or completely on the Navajo Reservation.[210]

164. Beginning in 1972, an Indian has won each election for School Board Districts 4 and 5.[211]

165. No Indian has ever been elected to a school district position other than Board Member for one of the two districts that are largely or wholly on the reservation.[212]

166. Indians have been candidates for School Board District Three four times and failed to win

[205] McCool Expert Report at p. 197.
[206] McCool Expert Report at p. 28-29.
[207] Massey Expert Report at p. 28-29; Expert Witness McCool Expert Report at pp. 120-121.
[208] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[209] McCool Expert Report at p. 197 (citing SJC School Board minutes 14 June 1971).
[210] McCool Expert Report at p. 197.
[211] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[212] McCool Expert Report at p. 197.

each time (i.e., in 1970, 1972, 1992, and 1996).[213]

167. No Indian has run for School Board District Three since 1996.[214]

168. An Indian has never been appointed to be a County judge.

169. In 2014, there were retention elections for eleven County judges.[215]

170. The County has 24 special service districts governed by 120 board members.[216]

171. Of the 120 board members of these special service districts, only one, appointed to a position on the Library Board, is an Indian.[217]

172. There are no Indians serving on the County's Community Development Board.[218]

viii. Senate Factor Eight

a. Senate Factor Eight – Legal Elements

cc. Senate Factor Eight considers whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members.[219]

dd. "If the officials are unresponsive it suggests that they are willing to discriminate against minorities and need not be accountable to minority interests."[220]

ee. Some responsiveness does not preclude a finding of Factor Eight because. The Senate Report notes, a showing of unresponsiveness may have some probative value, but a showing of

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[213] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[214] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[215] See Exhibit Two.
[216] McCool Expert Report at p. 213.
[217] McCool Expert Report at p. 213.
[218] McCool Expert Report at p. 213.
[219] Senate Report at pp. 28-29.
[220] *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1043 (D.S.D. 2004) quoting *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1572 (11th Cir. 1984).

responsiveness on the part of elected officials has very little.[221]

ff. Evidence considered under this factor includes officials actively oppose or are hostile to the desires of the minority community, ignore or fail to address requests and/or complaints by the minority community, or the jurisdiction fails to remedy evident inequalities without a court order or other compulsion.[222]

gg. Senate Factor Eight has probative value.[223]

b. Senate Factor Eight – Undisputed Material Facts

Lack of Responsiveness - Education

173. In 1974, Navajo parents and students filed an action in this Court, *Sinajini v. Board of Education*, alleging deprivation of equal education opportunity by the School District.[224]

174. One of the issues in *Sinajini v. Board of Education* was the extended distance Navajo students were required to travel to school, up to 166 miles round-trip each day and the fact that these miles for the most part were on "rutted, eroded, unpaved, dirt roads that frequently washed

[221] Senate Report at 209 n. 16; *Marengo County*, 731 F.2d at 1572.See also *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1047 (D.S.D. 2004). "Defendants' evidence of limited responsiveness does not counter the overwhelming evidence of unresponsiveness by the legislature on legislative issues of particular interest to Indians."
[222] See e.g. *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984) ("While the Board may finally be providing equal education it has done so only after three decades of resistance, and only because the courts ordered it to do so."); *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 495 (2d Cir. 1999) (considering a failure to respond to complaints of discrimination and the denial or disregard of funding requests for community centers in minority communities as evidence of unresponsiveness); *See also* "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," Final Report of the Voting Rights Initiative University of Michigan Law School.
[223] Senate Report at p. 29.
[224] Deyhle Expert Report at p. 68; see also *Sinajini v. Bd. of Educ.*, No. 74-346, 1975 U.S. Dist. LEXIS 15526 (D. Utah 1975).

out during rains."[225]

175. At that time the average Navajo student traveled four times as far to school as did the average non-Indian student.[226]

176. In 1975, this Court entered a consent decree and injunction in *Sinajini v. Board of Education*, which ordered the construction of elementary and high schools on the Reservation, equality in financing, equipment, supplies, and other resources, and the provision of educational services and programs beneficial to Indian students, including bilingual and bi-cultural education.[227]

177. As a result of *Sinajini v. Board of Education*, Whitehorse High was built in 1978 and Monument Valley High School was built in 1983.[228]

178. In 1984, plaintiffs' education expert, Donna Deyhle, discovered that the bilingual and bicultural curriculum was not being implemented in the County.[229]

179. Between 1984 and 1994, Dr. Deyhle did not see a uniform bilingual-bicultural program being implemented at the District level or in classrooms.[230]

180. In the 1990s, further litigation in *Sinajini v. Board of Education* commenced.[231]

181. In 1991, the District was found to be out of compliance with federal English-as-a-Second Language requirements by the United States Department of Education's Office of Civil

[225] Deyhle Expert Report at p. 68.
[226] Deyhle Expert Report at p. 68.
[227] Deyhle Expert Report at pp. 69-70.
[228] Deyhle Expert Report at p. 70.
[229] Deyhle Expert Report at pp. 70-71.
[230] Deyhle Expert Report at p. 71-72. The San Juan School District Superintendent confirmed this fact in 1984.
[231] Deyhle Expert Report at p. 72.

Rights.[232]

182. In 1997, this Court approved a superseding consent decree, requiring efforts to, among other things, provide permanent classroom facilities at Whitehorse High School, improve Monument Valley High School, construct an elementary school at Monument Valley, develop a sufficient water source at Navajo Mountain to meet the needs of the school community, implement improved bilingual and cultural awareness educational programs.[233]

183. In 1995, members of the Navajo Nation brought an action in this Court against the Board of Education of the School District and its members to "compel the District to provide secondary school facilities and services at Navajo Mountain and to improve the quality of elementary education at Navajo Mountain."[234]

184. In *Meyers*, this Court found that, despite the District's claim otherwise, it did have a duty to provide educational services to Native American students residing at Navajo Mountain.[235]

185. This Court has kept the *Sinajini* and *Meyers* cases open for continued monitoring and enforcement of education services to Indian students in the County.[236]

186. Even after being ordered by this Court in December 2015 to develop jointly with Plaintiffs a School Board election district plan that achieves equal populations as nearly as practicable, the County failed to consult with Plaintiffs to prepare a joint redistricting plan.[237]

Lack of Responsiveness - Perception

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[232] Deyhle Expert Report at pp. 72-73.
[233] *Sinajini v. Board of Education of the San Juan County School District*, 964 F. Supp. 319 (D. Utah 1997). The United States intervened in this action.
[234] *Meyers*, 905 F. Supp. at 1551.
[235] *Meyers*, 905 F. Supp. at 1551.
[236] Deyhle Expert Report at p. 73.
[237] Plaintiffs' Status Report on Remedial Plan Development, Dkt. 296 (Jan. 28, 2016).

187. Plaintiffs' expert, Dr. McCool, documented numerous examples of historical and contemporary instances of a lack of responsiveness on the part of the County to requests for services.[238]

188. Plaintiffs' expert, Dr. McCool, through his interviews with Navajo in the County, documented a general feeling that no one wants to take responsibility for providing services on the Utah portion of the Navajo Reservation.[239]

189. One interviewee noted, "Many essential services that most people take for granted, such as telephones and electricity, are still not available."[240]

190. Another interviewee commented, "The Arizona people say, 'don't give any money to Utah; they have the trust fund… The Utah people say, 'Don't give any money to them [the Navajos], Arizona is supposed to be taking care of them'"[241]

191. Dr. McCool interviewed a Navajo and resident of the County who commented: "Today the equity is not there; that is the problem in San Juan County. Like services; the county doesn't come to Navajo Mountain and talk about our needs. There are no county offices at Navajo Mountain. County services are just not readily available to the people there."[242]

192. Dr. McCool documented feelings of hopelessness on the part of Indians in the County in response to these denials, linking this to depressed political participation.[243]

193. In 2007, a representative of the Navajo Nation made a presentation to the County

[238] McCool Expert Report at pp. 208-213.
[239] McCool Expert Report at pp. 198-216.
[240] McCool Expert Report at p. 210.
[241] McCool Expert Report at p. 210.
[242] See McCool Expert Report at pp. 212-213 for a summary of interviews.
[243] McCool Expert Report at pp. 208-213.

Commission the lack of electrical and water service to Navajo residents of Westwater, near Blanding, a Commissioner responded that the County should not supply those utilities because the residents were too poor to buy them.[244]

Lack of Responsiveness - Roads

194. Roads are an important service in the County, especially those accessing remote parts of the Reservation.[245]

195. The quality of roads directly affects electoral participation.[246]

196. The quality of roads also directly affects education, particularly of Indian students in the southern portion of the County.[247]

197. In 1973, at a hearing before the U.S. Commission on Civil Rights, tribal chairman Peter McDonald stated: 'To be sure, the Voting Rights Act provides that the Navajo may not be disenfranchised by any government, but to the Navajo stranded on a muddy road 25 or 30 miles from the nearest polling place, of what value is this right?"[248]

198. Dr. McCool documented numerous complaints by Indians about the conditions of the roads in the southern portion of the County.[249]

199. In 1931, a County Commission described reservation roads as "poor" and roads in other parts of the County as "fairly good" or "good."[250]

200. In the 1970s one resident of the County stated, "Nothing south of the river was paved [in

[244] McCool Expert Report at p. 69.
[245] McCool Expert Report at p. 201.
[246] McCool Expert Report at p. 201.
[247] See *Sinajini v. Bd. of Educ.*, No. 74-346, 1975 U.S. Dist. LEXIS 15526 (D. Utah 1975).
[248] McCool Expert Report at p. 201.
[249] McCool Expert Report at pp. 204-205
[250] McCool Expert Report at p. 201.

1949]. In fact, the roads are still really bad south of the river."[251]

201. Two Navajos sought office in the 1972 County Commission elections "to improve the roads in the County, which, despite its size, has minimal paved highways," which "not only makes travel and communication difficult; it renders it impossible in inclement weather" and "also prevents transporting the children to school when the roads are muddy."[252]

202. In *United States v. San Juan County*, the complaint noted "the few paved roads on the Navajo Reservation portion."[253]

203. In 1989, County Commissioners traveled to Navajo Mountain and declared that the roads were "deplorable," but blamed the Bureau of Indian Affairs and other federal government agencies for the conditions of the roads.[254]

204. Minutes for the County Commission reflect numerous citizen complaints regarding the condition of roads in the Southern portion of the County.[255]

205. Between 1958 and 2007, County Commissioners publicly attempted to get federal agencies to pay for roads in the Southern portion of the County on at least 10 occasions.[256]

206. In 1963, the Commission recognized the need for more roads on the reservation.[257]

207. In 1961, a road to Aneth, Utah, was started but the State of Utah refused to complete it and the County followed suit, arguing that the BIA was responsible.[203]

208. Three months later the County agreed to match funds provided by the federal

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[251] McCool Expert Report at p. 201.
[252] *Yanito v. Barber*, 348 F. Supp. 587, 589 (D. Utah 1972).
[253] McCool Expert Report at p. 201.
[254] McCool Expert Report at p. 201.
[255] McCool Expert Report at p. 201, years 1991, 1997, 2000, 2007.
[256] McCool Expert Report at p. 202.
[257] McCool Expert Report at p. 203.

government.[258]

209. Three years later, the BIA stated that the County had yet to provide any funding for this road and the County responded by staying it would pay for part of the road but only if the State of Utah contributed funds.[259]

210. In 1971 the president of the Oljato Chapter wrote to the County Assessor stating his concerns that motor vehicle taxes were being illegally collected from residents of the Navajo Reservation in Utah.[260]

211. The County attorney sent a reply, which included the following statement: "It seemed to me that the Commissioners were rather concerned that your group would question the payment of these taxes when the Commissioners have been making a special effort to do additional road work on the reservation for the primary benefit of inhabitants of the reservation."[261]

212. Indians were eventually forced to sue the County and the State of Utah to enjoin the County from collecting illegal sales, use, and personal property taxes from reservation Indians.[262]

213. In 1977 the road to Monument Valley was described in a newspaper article as being in

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[258] McCool Expert Report at p. 203.
[259] McCool Expert Report at p. 203.
[260] Exhibit Two, Approved minutes of the San Juan County Commission, dated 24 May 1971.
[261] Exhibit Two, Approved minutes of the San Juan County Commission, dated 24 May 1971.
[262] See Exhibit Three, *Rockwell v. San Juan County, Utah*, Judgment and Decree, Civil No. 4826, 7th Judicial Court for San Juan County, State of Utah (July 6, 1988) (concluding that since 1981 Utah and San Juan County had collected sales and use taxes from enrolled members of Indian Tribes living on reservation or allotted trust land in violation of State law and policy); Exhibit Four, *Benally v. San Juan County, Utah*, Judgment and Decree, Civil No. 4827, 7th Judicial Court for San Juan County, State of Utah (July 6, 1988) (concluding that since 1976 the County had "collected property taxes from enrolled members of Indian Tribes living on reservation or allotted trust land in violation of law").

"disgracefully poor condition."[263]

214. In response to this article, Commissioner Calvin Black wrote to the regional BIA director and placed the responsibility for all reservation roads on them; the Monument Valley road is "not unlike the other 500 miles of roads on the Utah portion of the Navajo Reservation which San Juan County is trying to maintain and improve…. As you know, the responsibility for construction of roads on the Navajo Reservation in both Utah and Arizona is the Bureau of Indian Affairs."[264]

215. In 1992, White Mesa Utes requested County assistance for their streets, and were told that the county prioritizes roadwork according to "use and population."[265]

216. Road conditions on the Navajo Reservation in Utah are a contemporary problem.

217. For example, in 2015 six school buses got stuck in the mud after a snowstorm and classes were canceled in Montezuma Creek and Monument Valley.[266]

218. In a news article about this situation Elsie Dee, School Board Member from District Four, stated, "'"People are calling me and they telling me, 'Our kids eat school breakfast and lunch, and we don't have any food. We're stuck.' It's so hard out there. The roads are muddy as ever.'"'[267]

Lack of Responsiveness – Law Enforcement

219. There has been a recognized need for a cross-deputization agreement between the county

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[263] McCool Expert Report at p. 204.
[264] McCool Expert Report at p. 204.
[265] McCool Expert Report at p. 204.
[266] McCool Expert Report at p. 201.
[267] "*Muddy roads in Navajo Nation keep kids from school*," Deseret News, December 17, 2015. http://www.ksl.com/?sid=37797859&nid=148&fm=most_popular&s_cid=article_popular-8 (accessed January 26, 2016).

and the Nation for over fifty years, but it has only been achieved sporadically.[268]

220. As early as 1959 there were proposals to cross-deputize law enforcement due to ongoing problems.[269]

221. This call was repeated in 1983, 1991, 2006, and 2007. [270]

222. In the early nineties one-year cross-deputization agreements were signed but often lapsed before a new agreement could be worked out, so they failed to have a lasting impact.[271]

223. Dr. McCool documented numerous complaints by Indians regarding unfair treatment and racial profiling by law enforcement in the County.[272]

ix. Senate Factor Nine

hh. Senate Factor Nine considers whether the policy underlying the state or political subdivision's use of the challenged standard, practice, or procedure is tenuous.[273]

To establish Senate Factor Nine, Plaintiffs incorporate by reference the undisputed material facts set forth in their Motion for Summary Judgment on Plaintiffs' Second Claim for Relief, which states that no disputed issues of material fact exist regarding the fact that the County's justification for the policy underlying the mal apportionment of its County Commission election districts is tenuous.[274]

IV. ARGUMENT

[268] McCool Expert Report at p. 207.
[269] McCool Expert Report at p. 207.
[270] McCool Expert Report at p. 207.
[271] McCool Expert Report at p. 207.
[272] McCool Expert Report at p. 207-208.
[273] Senate Report at pp. 28-29.
[274] Motion for Partial Summary Judgment on a Portion of Plaintiffs' Second Claim for Relief, Dkt. 234, dated October 13, 2015.

A. Summary Judgment

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A disputed material fact is "genuine" only if a reasonable jury could find for the non-movant.[275] The burden is on the moving party to show that "there is an absence of evidence to support the nonmoving party's case."[276] The Court may draw reasonable inferences from the evidence in a light most favorable to the non-moving party.[277]

Although the totality of circumstances inquiry requires this court to perform a "'searching practical evaluation' of the political realities and perform an 'intensely local appraisal' of the challenged voting system," this does not bar summary judgment.[278] The defendant has hired no experts to opine on the history of official discrimination in the County related to voting practices and procedures, education, health care, services and related issues. Yet it is still required to respond with "specific facts showing that there is a genuine issue for trial."[279] A mere scintilla of evidence will not suffice.[280] Moreover, where a plaintiff can prove the three *Gingles* factors, it

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[275] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).
[276] *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991) quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).
[277] *Berry & Murphy, P.C. v. Carolina Cas. Ins. Co.*, 586 F.3d 803, 808 (10th Cir. 2009). See also *Anderson v. Dept. of Health and Human Services, 907 F.2d 936, 947 (10th Cir. 1990), quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (J. Brennan, diss.), citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983); 10A Wright, Miller & Kane § 2727 (3d ed.) (stating that the majority and dissent in *Celotex* "both agreed as to how the summary-judgment burden of proof operates").
[278] See e.g. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409 (E.D. Wash. 2014) citing *Gingles*, 478 U.S. at 79.
[279] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409 citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quotation omitted).
[280] *Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993).

would be "the rare case" for that party not to establish a violation of Section 2 under the totality of the circumstances.[281]

B. There is no genuine dispute of material fact that, under the totality of circumstances, Indians in the County have a diminished opportunity to participate in the political process and elect representatives of their choice.

i. Senate Factor One

Senate Factor One considers the "extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."[282] This inquiry is intended to be comprehensive to examine a broad picture of the nature and frequency of official discrimination against the minority group.[283]

The County's history is replete with instances of official discrimination against Indians. The examples presented below are some of the critical components of a larger picture of comprehensive discrimination against Indians in San Juan County. This discrimination has played out over decades, beginning long before the Voting Rights Act was contemplated, and

[281] *Sanchez v. Colorado* at 1322; *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir.1994); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116, n. 6 and 1135 (3d Cir.1993); *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (noting that this framework imposes a high hurdle for those who seek to defend the existing system despite meaningful statistical evidence that suggests bloc voting along racial lines).

[282] *Gingles*, 478 U.S., at 36-37 quoting Senate Report at pp. 28-29.

[283] See e.g. *United States v. City of Euclid*, 580 F. Supp. 2d 584, 605 (N.D. Ohio 2008) (finding that a governmental entity had a history of discrimination in the areas of housing and education and that its history resulted in depressed political participation among the minority group); *Cuthair v. Montezuma-Cortez, Colorado Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1169 (D. Colo. 1998) (finding that Indians have experienced a history of discrimination in both the electoral process and in life in general). Some courts have found recent examples to be more probative. See e.g. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409 (E.D. Wash. 2014).

tragically, enduring long after its passage. Discrimination has continued despite efforts by the United States and the Navajo Nation to secure the civil rights of the County's Indian residents.[284]

In this motion Plaintiffs focus on the County's lengthy history of official discrimination related to Indian voting rights, including two lawsuits where the County admitted liability for violations of the Voting Rights Act. These examples could support a finding of Senate Factor One on their own.[285] Yet numerous other examples can be drawn from the undisputed facts and argument in Senate Factors Five and Eight. When this history is coupled with plaintiffs' present-day examples of how discrimination persists despite legal gains, it is undeniable that plaintiffs have established Senate Factor One.

a. Historical Voting Rights Litigation

Utah has the distinction of being the last state to enfranchise its Indian citizens, not doing so until more than 30 years after Congress settled their status as United States citizens.[286] Yet removing that overt legal barrier did not eliminate or prevent other barriers from being erected to infringe on Indian voting rights in the County. In 1972, when the first Indian candidates ever to run for County Commission presented themselves to the County Clerk, she intentionally misstated candidate nomination requirements and sought their disqualification when their filings

[284] See e.g. history documented in McCool Expert Report.
[285] *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1409-10 (E.D. Wash. 2014) (in summary judgment finding that a lawsuit by the federal government alleging the County's failure to provide voting materials in Spanish and minority voter assistance to Spanish-speaking voters weighed slightly in plaintiffs' favor under Senate Factor One.
[286] U.C.A. § 20-2-14; *Yanito v. Barber*, 348 F. Supp. 587, 591 (D. Utah 1972); McCool Expert Report at 109, citing *Allen v. Merrell*. 353 U. S. 932 (1957).

were incomplete.[287] This Court concluded that the Clerk violated their constitutional rights, as guaranteed by the Fourteenth Amendment, and a three-judge panel ordered her to place the two Indian candidates on the ballot.[288] In its opinion, the Court noted the long history of discrimination against Indians in the County, which "renders charged infringement of rights subject to close scrutiny so that not only the blatant infringement on the part of the state can be invalidated, but so also the more subtle mode of discrimination can be discovered."[289]

In 1983, the United States brought two lawsuits against the County to attempt to secure Indian voting rights in the County. The first lawsuit challenged the at-large election of County commissioners, alleging that it diluted Indian voting strength. The County entered into an Agreed Settlement and Order, where it admitted that, "the process leading to the selection of [its] County Commissioners fails to comply fully with . . . Section 2 of the Voting Rights Act," and was permanently enjoined to adopt single-member election districts for the election of commissioners. [290] As a result of the Agreed Settlement and Order that case, the County established three single-member election districts for the County Commission (1986 Commission Plan).[291] This led to the election of the first Indian, Mark Maryboy, to the County Commission in 1986.[292] Although there has been an Indian on the County Commission since

[287] *Id.* at 589 (concluding that the County Clerk unlawfully discriminated against the Navajo candidates in violation of their rights under the Fourteenth Amendment and ordering the Clerk to place the candidates on the ballot).
[288] *Yanito v. Barber*, 348 F. Supp. 587, 592 (D. Utah 1972).
[289] *Yanito v. Barber*, 348 F. Supp. 587, 591 (D. Utah 1972).
[290] *United States v. San Juan County, et al.*, No. C-83-1286W (D. Utah, April 4, 1984).
[291] See Memorandum Decision and Order, Dkt. 166, dated March 12, 2015.
[292] McCool Expert Report at p. 170.

1986, an Indian has never served as Chairman of the Commission.[293]

The second lawsuit alleged that the County's election processes violated the bilingual provisions of the Voting Rights Act.[294] The County again admitted liability and was ordered to appoint a bilingual "registration agent" for each precinct on the Navajo Reservation, provide interpreters and bilingual poll officials, and provide information about elections in the Navajo language both on reservation radio stations and by written notices in newspapers. [295]

b. Ongoing Violations of Indian Voting Rights in the County

Unfortunately, the 1983 lawsuits did not end official discrimination against Indians in the County. Although the three single-member election districts lead to the election of an Indian Commissioner in 1986, the 1986 Commission Plan packed Indians into Commission District Three and fragmented the remaining populations between Districts One and Two.[296] This packing continued after the 1990, 2000, and 2010 censuses despite state law requiring the County to redistrict after every decennial census.[297] The plan's overall population deviation exceeded the maximum of 10% from the day it was adopted through November 2011.[298]

In 2011, the County adopted its current districting plan (2011 Commission Plan), which it created by moving two precincts from District One to District Two without altering the

[293] See e.g. McCool Expert Report at p. 197.
[294] *United States v. San Juan County, et al.*, No. C-83-1287 (D. Utah 1984).
[295] *United States v. San Juan County, et al.*, No. C-83-1287 (D. Utah 1984).
[296] Cooper Expert Report, Exhibit One at ¶¶ 90, 93, 99.
[297] Cooper Expert Report, Exhibit One at ¶¶ 76, 90, 93, 94, Exhibits H1-H3. See UTAH CODE ANN. § 20A-14-201(2)(a)(i).
[298] Cooper Expert Report, Exhibit One at ¶¶ 91-95, .(according to decennial censuses in 1980, 1990, 2000, and 2010 the overall deviation of the 1986 plan exceeded the *prima facie* constitutional maximum of 10% from the date it was first created until rescinded in 2011).

boundaries of District Three.[299] As a result, for nearly 30 years the County has unnecessarily packed the County's Indian citizens into District Three in violation of the Voting Rights Act.[300]

The County School Board election districts also unequivocally manifest official discrimination. The overall deviation of the 1992 School Board plan has also always exceeded the maximum of 10%.[301] Last month, this Court ruled in favor of Plaintiffs that the County's School Board election districts violate the Fourteenth Amendment.[302] Even after being ordered by this Court in December 2015 to develop jointly with Plaintiffs a School Board election district plan that achieves equal populations as nearly as practicable, the County failed to meaningfully consult with Plaintiffs to prepare a joint redistricting plan.[303]

The County's record of inadequate compliance with injunctive relief also exemplifies official discrimination. For example, following the failure of the remedies ordered in the 1983 lawsuit regarding bilingual language assistance, in 1990 the United States was forced to revisit and renegotiate the settlement order with the County to include more specific instructions about how to implement the language requirements.[304] Discrimination related to complying with court-ordered language assistance arose again in 2014 when the County Clerk unilaterally decided to

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[299] Exhibit Five, Approved Minutes for the San Juan County Commission, dated November 14, 2011. 21 Cooper Expert Report, Exhibit One, at ¶ 76.
[300] Cooper Expert Report, Exhibit One, ¶¶ 76-80, 90, 93, 94 & n. 20.
[301] Cooper Expert Report, Exhibit One, ¶¶ 96-98 (exceeding population deviation of 10% based on 1990, 2000, and 2010 censuses).
[302] Memorandum Decision and Order, Dkt. 280, dated December 9, 2015.
[303] Plaintiffs' Status Report on Remedial Plan Development, Dkt. 296 (Jan. 28, 2016).
[304] Consent Decree, *United States v. San Juan County*, (D. Utah Oct. 11, 1990) (No. C-83-1287). See also McCool Expert Report at pp. 163-165. This settlement was terminated after four years, except for the requirement for federal observers, with the understanding that the County "acknowledges that its obligation to comply with Section 203 of the Voting Rights Act continues." Joint Motion for Termination 19 July 1995. See also vote-by-mail section below.

close all polling places in the County and adopt a vote-by-mail election system.[305] Input from Indians was not formally solicited until the decision was made.[306] Closure of all polling locations eliminated official language assistance on election day, with the exception of assistance from a single Navajo Elections Liaison.[307] The Clerk, Mr. Johnson, testified that Indian family members would be responsible for translating the ballot and other election materials once official language assistance had ceased.[308] The Navajo Elections Liaison testified that expecting family members to translate the ballot and other election materials was unrealistic.[309]

The vote-by-mail system recently adopted by the County has numerous additional discriminatory impacts on Indian voters. The only election day voting center is now located in Monticello, Utah, approximately 200 miles and four hours of driving time away from the most remote Navajo community in the County.[310] Receiving ballots by mail caused problems for Indians who lived in remote locations because many do not have post offices boxes, share boxes with other family members, or have to drive long distances over dirt roads to get their post office boxes — often as much as 30 or 40 miles.[311] Dr. McCool documented frustrations with the vote-by-mail process during his interviews with Indians in the County.[312] Meanwhile, the switch to

[305] McCool Expert Report at pp. 186-187.
[306] McCool Expert Report at pp. 186-187.
[307] Deposition of Norman Johnson, dated June 23, 2015, at p. 36.
[308] Deposition of Norman Johnson, dated June 23, 2015, at p. 35.
[309] Deposition of Edward Tapaha, dated June 24, 2015, at p. 20.
[310] McCool Expert Report at pp. 189-90; mileage estimate from Google Maps (maps.google.com). *See also* Woodard, Stephanie. 2015. "Going Postal: How All-Mail Voting Thwarts Navajo Voters." *In These Times* (13 Aug.).
[311] McCool Expert Report at pp. 188-189.
[312] McCool Expert Report at pp. 189-191.

mail-in ballots had comparatively "little impact" on voter turnout in white precincts.[313]

The history of official discrimination in the County extends to numerous other areas, including education, health care, and basic services such as the funding, construction, and maintenance of roads. Those examples are detailed below under Senate Factors Five and Eight.

c. Official Discrimination by Disproportionately/Unlawfully Purging Indian Voters

County officials have been repeatedly scrutinized for disproportionately and unlawfully purging Indian voters. In 1987, DNA People's Legal Services requested changes to the County's voter purge process after it discovered that the voter purge rate for Indian precincts was more than twice that for white precincts.[314] In 1990, the County Clerk was accused of unlawfully refusing to register 400 to 500 Indian voters whose residency she questioned, whom she suspected had previously registered, or who had not voted in the past four years.[315] In 1995, the Clerk again purged voter registration lists incorrectly, affecting Indian precincts disproportionately.[316] Finally, in 2005 the County placed a disproportionate number of Indians voters on inactive status resulting in the reduction of eligible voters in five majority-Indian precincts between 22% and 34%. At the same time, four out of five majority-white precincts experienced increases.[317]

The County's lengthy history of official discrimination against Indians by the County, its repeated failures to comply with the Voting Rights Act and the Constitution until challenged in Court, its failure to implement language assistance and other injunctive relief in good faith, its

[313] McCool Expert Report at p. 189.
[314] McCool Expert Report at p. 181 and Table 9.
[315] McCool Expert Report at pp. 177-178.
[316] McCool Expert Report at pp. 181-182 and Table 10.
[317] McCool Expert Report at pp. 182-183, Table 11.

packing and diluting the Indian votes unlawful and unconstitutional election districts, its unilateral switch, while this litigation is pending, to vote-by-mail with no apparent consideration of the disproportionate impacts on Indian citizens, and its discriminatory voter registration and purging practices unequivocally establishes Senate Factor One.

ii. Senate Factor Two

Senate Factor Two considers the "extent to which voting in the elections of the jurisdiction is racially polarized."[318] Plaintiffs incorporate by reference the legal elements, undisputed material facts, and argument put forth in their Motion for Summary Judgment on Plaintiffs' Second Claim for Relief (Second and Third Gingles Factors) demonstrating that Indian voters in the County are politically cohesive and that non-Indian white voters vote sufficiently as a bloc to defeat Indians' preferred candidates.[319]

iii. Senate Factor Three - Plaintiffs do not raise Senate Factor Three in this motion.

iv. Senate Factor Four

Senate Factor Four considers whether members of the minority group are excluded from candidate slating processes.[320] Slating occurs where there is "a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval for the candidates selected."[321] Slating can occur

[318] *Gingles*, 478 U.S. at 37 quoting Senate Report at pp. 28-29.
[319] Dkt. 202, dated September 15, 2015.
[320] Senate Report at pp. 28-29.
[321] *Westwego Citizens for Better Government v. City of Westwego*, 946F.2d 1109, 1116 n. 5 (5th Cir. 1991).

officially, unofficially, or may be inferred when there is an absence of minority candidates for a particular office.[322]

A form of official slating occurred in 1972 when the first two Indians to run for public office in the County attempted to register as candidates but were intentionally thwarted from doing so by the County Clerk until they filed suit.[323] An unofficial form of slating was evident in 1990 when Indians decided to run a slate of candidates for countywide offices.[324] Concerned that "Anglo party stalwarts would oppose their slate," they filed for candidacy just one hour before the filing deadline to surprise local Democratic Party leaders.[325] This "unusual" method for gaining access to the ballot through the Democratic Party indicates the existence of an unofficial slating process in the County.

The absence of Indian candidates for elected positions also indicates unofficial slating. With the exclusion of the 1990 slate of candidates, no Indian has ever run for County Clerk, County Recorder, County Assessor, or County Treasurer.[326] An Indian has run for County Sheriff on only two occasions.[327] Indians have never run in County Commission District Two.[328]

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[322] "[A]lthough no evidence of a formal candidate slating process was introduced, African–American voters appear to have been unable to sponsor candidates. The absence of African–American candidates is striking. For example, prior to 1995, only three African–American candidates ran for LaGrange City Council. Conversely, in this same time period, there were forty-five opportunities to run for the LaGrange City Council. In addition, whenever an African–American has appeared on the ballot, he or she has received significant support from the African–American voters. This fact suggests a lack of opportunity, rather than a lack of inclination, to sponsor minority candidates." *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749, 777 (N.D. Ga. 1997).
[323] *Yanito v. Barber*, 348 F. Supp. 587 (D. Utah 1972).
[324] McCool Expert Report at p. 173.
[325] McCool Expert Report at p. 173.
[326] *Supra*, ¶¶ 39-41.
[327] *Supra*, ¶¶ 35-36, 38.

Out of hundreds of opportunities, Indian candidacies have been extremely limited, giving rise to an inference of slating. The above evidence of candidate slating demonstrates that Senate Factor Four weighs in favor of Plaintiffs.

v. Senate Factor Five

Senate Factor Five considers 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."[329] In *Gingles*, the Court explained

> Congress intended that the Voting Rights Act eradicate inequalities in political opportunities that exist due to the vestigial effects of past purposeful discrimination. Both this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.[330]

A court, therefore, must evaluate how the challenged electoral structure interacts with social and historical conditions to cause an inequality in election opportunities.[331] Where disparate socio-economic status and political participation is shown, plaintiffs are not required to prove "a causal connection," or nexus between the two.[332] Indeed, "education, age, income, and employment, accepted predictors of voter participation, create a 'reinforcing milieu,' which impedes [minority] participation."[333] "While not conclusive proof, marked disparities in socio-economic status are circumstantial evidence of discrimination" and because "depressed socio-economic

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[328] *Supra*, ¶ 53.
[329] *Gingles*, 478 U.S. at 36-37 (quoting Senate Report at pp. 28-29).
[330] *Gingles*, 478 U.S. at 69 (internal citations omitted).
[331] *Sanchez v. State of Colo.*, 97 F.3d 1303, 1323 (10th Cir. 1996) (citing *Gingles* at 47).
[332] *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 294 (5th Cir. 1996) (citing Senate Report at 29, n. 114).
[333] *Sanchez v. State of Colo.*, 97 F.3d 1303, 1323 (10th Cir. 1996) (quoting expert testimony).

conditions have at least some detrimental effect on participation in the political process."[334]

Courts have relied on comparisons of a variety of socio-economic data and sources.[335] Courts have cited expert testimony, census data, and state demographic data.[336] When experts properly present such data, courts cannot rely "on denials of a few lay witnesses."[337]

A range of standard socio-economic measures published by the U.S. Census Bureau covering 2008 through 2012 indisputably illustrate that Indians in the County have significantly lower socio-economic status than non-Indians.[338] Disparities in income and rates of poverty between Indians and non-Indians in the County are extreme.[339] Living conditions for Indians in

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[334] *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1413 (E.D. Wash. 2014).
[335] *Large v. Fremont Cty., Wyo.*, 709 F. Supp. 2d 1176, 1218-19 (D. Wyo. 2010); *aff'd on other grouds by* 670 F.3d 1133 (10th Cir. 2012) (high school completion, college education, unemployment, single-parent households, renting or owning homes, income spent on rent, crowded households, poverty and low-incomes, household vehicle ownership, home values, and median and per-capita incomes); *Sanchez v. State of Colo.*, 97 F.3d 1303, 1323-24 (10th Cir. 1996) (poverty, unemployment, school drop-out, housing, and alcoholism; expert testimony concluding, based on census and demographic information, that "education, age, income, and employment, accepted predictors of voter participation, create a 'reinforcing milieu' which impedes [minority] participation); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1413 (E.D. Wash. 2014) (poverty rate, median family income, home ownership, lack of high school diploma, lack of health insurance, employment by political subdivision); *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 294 (5th Cir. 1996) (comparing rates of poverty, low income, median family income, unemployment, wage-earning v. white collar employment, and educational achievement); *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 727 (N.D. Tex. 2009) (identifying disparities in education level, median household income, and per-capita income).
[336] *Large* at 1218-19 (U.S. Census data): *Sanchez v. Colorado* at 1323-24 (expert testimony concerning census and demographic information); *Montez* at 1413 (expert reports and data from 2010-2012 ACS 3-Year Estimates).
[337] *Teague v. Attala Cty., Miss.*, 92 F.3d 283, 293 (5th Cir. 1996).
[338] Cooper Expert Report, Exhibit Four, Dkt. 172-10, pp. 4-68 (citing 2008-2012 American Community Survey data published by the U.S. Census Bureau).
[339] *Supra*, ¶¶ 113-120, 125 (experts reporting study findings and statistics for the County establishing disparate rates public assistance back to the 1960s, that Indian residents in the County are four times more likely to be poor, that median household income and per-capita

the County historically and currently are far below typical American living standards.[340] Indians in the County historically suffered from preventable diseases and other health problems at a far higher rate than Americans in general, largely because health care facilities were far less available and accessible to Indians in the County.[341]

Disparities in education are also extreme.[342] Historically and currently, Indian students, when compared with white students, have suffered from a lack of access to facilities and programs;[343] poorer grades, test performance, and English proficiency;[344] schools with lower

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income of whites is nearly double that of Indians, and that Navajo residents are heavily dependent on donation from the Utah Food Bank).

[340] *Supra*, ¶¶ 121-125 (experts report study findings and statistics establishing in 1981 only 30% of Navajo Reservation homes had a refrigerator, 23% had flush toilets, and 25% had on-site domestic water; that Indian residents in a community adjacent to Bland do no have water, electric or sewer service and that the County refuses to provide it because "residents are too poor" to afford it, that Indians in the County have more than one occupant per room per household at a rate seven times higher than whites, and that as of 2010 many Indian residents still lack refrigerators so they could not store perishable food).

[341] *Supra*, ¶¶ 126-131 (expert and Census data documenting lack of access to health care facilities historically for Navajo residents, that preventable infectious disease tied to socio-economic conditions such as tuberculosis afflicted Navajo residents at high rates into the 1960s and 1970s, that nearly two-thirds of Indian residents over age 65 report having a disability, a rate nearly double that of whites, and that over half of adult age Indian residents report not have having health insurance compared to 20.5% of whites).

[342] Deyhle Expert Report at pp. 1-2.

[343] *Supra*, ¶¶ 60-75 and 96-105 (expert reports and published cases documenting lack of Indian access to District schools until the 1950s, necessity of filing multiple suits against the District to attempt to secure equal education access and facilities for Indians beginning in 1974, and District recalcitrance to implement certain programs it agreed to implement).

[344] *Supra*, ¶¶ 76-85 (expert report describing low grade point averages of Indian students, substantially higher performance of District's white students on standardized tests from 1977 - 2014, that Indians in the County speak English "less than very well" at a rate forty times higher than whites, and concluding that from the late 1970s to 2014, Indian students in the County, as a group, "have shown few real gains in academic abilities in math and language arts").

State ratings;[345] higher dropout rates and lower rates of obtaining college degrees;[346] a lack of access to bicultural and bilingual education; [347] and racial conflict and punishment.[348] These disparities persist despite multiple lawsuits that successfully sought explication of the right of Indian children to equal education and resulted in multiple consent decrees under which the School District admitted liability.[349]

The lower socio-economic status of Indians in the County also indisputably hinders their ability to fully participate in the political process. Scholars have consistently demonstrated a connection between levels of educational attainment and other socio-economic factor and civic

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[345] *Supra*, ¶¶ 86-87 (expert report citing Utah State Office of Education ratings of "F" for two predominately Indian (i.e., 98-99%) District high schools for 2013-2014 school year).
[346] *Supra*, ¶¶ 88-95 (expert report describing published study of disparate high school completion rates of Navajo students in the County, a 1992 study finding non-white students [primarily Indians] accounted for 81% of drop outs from 1987-1991, and concluding "many Indian youth [in the County] drop out of school because of poor reading skills, which is directly tied to lack of English language skills, and feelings of racial discrimination, unrelated curriculum and home problems;" Census data estimating that Indians in the County lack a high school diploma at four times the rate of whites (i.e., 28.2% v. 7.0%) and that the proportion of whites that have a Bachelor's degree is nearly five times higher than for Indians (i.e., 34.1% v. 5.0%)).
[347] *Supra*, ¶¶ 96-105 (expert stating that bilingual and bicultural curriculum agreed to by District in 1975 consent decree was "unused, gathering dust" by 1984, that no "real bilingual program" was put in place over the next ten years, that in 1997 a consulting expert was "shocked" by the District's course offerings because he or she "hadn't seen anything so bad since the 60s in the south," that even throughout five years of monitoring between 1997 and 2002 the District resisted "the use of school dollars for Navajo language and cultural instruction" in "daily discourses, in and out of school" but that by the end of that period the monitors "had just begun to see some positive gains in the educational environment experienced by Indian students," but that by 2015 there were "no longer any cultural programs" in the District and several of the Navajo language and culture teachers had been "kicked out of the district").
[348] *Supra*, ¶¶ 106-112 (expert Dkt.ing impressions of Indian students that they are mistreated by white students and teachers, of white teachers having diminished expectations of Indian students, of racism toward Indian students by white students, of tension between school officials and Indian students, and data indicating that Indian students are disciplined, referred to law enforcement, and arrested at school at a far higher rate than white students).
[349] *Supra*, ¶¶ 65-73 (summarizing multi-decade proceedings of *Sinajini* and *Meyers*).

participation, including patterns of voting participation, community involvement, and participation in political campaigning.[350] This is apparent in San Juan County. Voting precincts in the areas served by predominately Indian schools in the School District having inferior academic performance have significantly less voter turnout than those served by predominately white schools in the northern part of the County (e.g., the Aneth precinct in the 2000 general election in the predominately Indian community served by Whitehorse High School had a voter turnout of 49.76% of the registered voters compared with 68.29% in the North Monticello precinct in the predominately white community served by Monticello High School in the northern part of the county and in the 2010 general election the Monticello precinct had a 72.23% turnout rate compared with Aneth's 43.53%).[351]

Indians in the County "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." Senate Factor Five strongly weighs in Plaintiffs' favor.

vi. Senate Factor Six

Senate Factor Six considers the use of overt or subtle racial appeals in political campaigns. Senate Factor Six has been satisfied where there are allusions to, or threats of,

[350] Deyhle Expert Report at pp. 83-88; *Gingles*, 478 U.S. at 69 (courts recognize that "political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes"); *Sanchez v. Colorado* at 1323 ("education, age, income, and employment, accepted predictors of voter participation, create a 'reinforcing milieu' which impedes [minority] participation."); *Montes* at 1431 ("marked disparities in socio-economic status are circumstantial evidence of discrimination" and "depressed socio-economic conditions have at least some detrimental effect on participation in the political process.").

[351] Deyhle Expert Report at p. 84.

minority control of government.[352] Even a few examples of racial appeals are sufficient to establish this factor.[353] Notable examples of overt racial appeals used in political campaigns in the County occurred in 1990 and 2012.

In 1990, Indians ran a slate of candidates for countywide offices.[354] The all-Indian slate was controversial, created racial tension, and provoked vitriol among whites in the County, some of whom specifically resented Indians because they "don't even pay property taxes."[355] A campaign flyer distributed at the time contained the following statement: "Utah Navajos are 7 out of 109 chapters, so they can never control the tribal council. Utah Navajos are 60% of all the people in San Juan County, so if they all vote, they can always control the county."[356] This flyer constitutes a "threat" of Indian control of County government, which qualifies as a racial appeal.

In a more recent example, in 2012, Bruce Adams (a white Republican) ran as an incumbent for County Commission District One against Gail Johnson (a white Independent) and Willie Grayeyes (a Navajo Democrat).[357] Supporters of Bruce Adams published two campaign advertisements in the San Juan Record that contained "blatant," overt racial appeals.[358] The first advertisement warned that if Mr. Adams and Ms. Johnson split the votes of those opposing Mr. Grayeyes, then Mr. Grayeyes could win, and the "consequences" for the county "will be

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[352] See e.g. *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) *aff'd*, 498 U.S. 1019, 111 S. Ct. 662, 112 L. Ed. 2d 656 (1991).
[353] Senate Report at pp. 28-29. See e.g. *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1041 (D.S.D. 2004).
[354] McCool Expert Report at p. 129.
[355] McCool Expert Report at p. 111. Backlash in the form of purging of Indian voters occurred in the wake of this election, prompting a letter from the U.S. DOJ to County Clerk/Auditor Gail Johnson. See McCool Expert Report at pp. 177-179.
[356] McCool Expert Report at p. 129.
[357] McCool Expert Report at p. 129.
[358] McCool Expert Report at pp. 129-130.

significant,"[359] and it noted that the "excellent progress made by San Juan Hospital in recent years could be derailed."[360] The statement about health care alludes to the potential for an Indian-controlled county government to divert funds from the San Juan Hospital to projects on the Reservation. The second advertisement stated:

> "Voters should consider the following: Willie Grayeyes is campaigning on promises that if he is elected he will use San Juan County money for projects on the reservation which are clearly the responsibility of the Federal Government or the Navajo Nation to finance…Providing water to these homes [on the reservation] is the responsibility of the U. S. federal Indian Health Services. Providing electricity is the responsibility of the Navajo tribal utility authority. Funding for reservation roads is the responsibility of the federal Bureau of Indian Affairs. Every year Navajo government officials and private citizens living on the reservation request that San Juan County provide funds for projects on the reservation which are definitely not the responsibility of the county. Bruce Adams has been very successful in preventing the expenditure of San Juan County tax money on reservation projects for which the county has no responsibility."[361]

This advertisement is a clear threat of the specter of minority governance.[362] These examples of overt racial appeals establish that Senate Factor Six weighs in favor of Plaintiffs.

vii. Senate Factor Seven

Senate Factor Seven considers "the extent to which members of the minority group have been elected to public office in the jurisdiction."[363] This is one of the two "most important"

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[359] McCool Expert Report at pp. 129-130.
[360] McCool Expert Report at pp. 129-130.
[361] McCool Expert Report at p. 129. These statements are especially remarkable given that available evidence indicates that the County receives a great deal more funding from the U.S. government because of its Indian citizens than it actually dedicates to their needs. *See id*. at 199-200 (discussing 1978 report that the county collected $28.5 million in taxes on the Navajo Reservation but only spent $7.2 million there and a 1989 investigation that found that only 25% of the tax revenue generated on the Reservation was returned to the Reservation).
[362] See argument on Senate Factor Eight below detailing the history of County responsibility for services, particularly roads.
[363] *Gingles*, 478 U.S. at 36-37 (quoting Senate Report at pp. 28-29).

Senate Factors bearing on § 2 challenges because "unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect' " under § 2(b).[364]

Of course, the fact that no members of a minority group have been elected to a particular office over an extended period of time is probative.[365] Some success at the polls does not negate a showing of polarized voting or disprove the existence of vote dilution.[366] Even though Section 2 is explicit that the statute provides no right to proportional representation, courts often consider the record of minority electoral success in conjunction with population statistics and proportional representation as probative.[367]

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[364] *Gingles* at 51, n. 15; *Sanchez v. Bond*, 875 F.2d at 1496 (stating that "the lack of success of Hispanic candidates is a strong factor tending to show vote dilution").

[365] *See Teague*, 92 F.3d at 285 (entering judgment for violation of § 2 against a county where blacks made up 39.5% of its population but no black candidate had ever won election in a white majority district when pitted against a white candidate or a county-wide election, including to offices such as court judge, constable, sheriff, circuit clerk, coroner or county attorney); *Montes*, 40 F. Supp. 3d at 1385 (§ 2 violated, in part, because no Latino had ever been elected to a city council in the 37-year history of the challenged system despite accounting for approximately one-third of the city's VAP and approximately one-quarter of its citizen VAP).

[366] Senate Report at 29, n. 115 (also stating that otherwise "the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a 'safe' minority candidate"); *Gingles* at 60 (approving lower court's discounting of "only minimal and sporadic success" and accounting for "the benefits incumbency and running essentially unopposed") and 75 (discounting success in an election after the case had been filed); *Sanchez v. Colorado*, 97 F.3d at 1324 (record did not justify the district court's credit of the extent to which minorities have been elected to public office) and 1329 (concluding that under the totality of circumstances racial polarization drives the voting community in the challenged district "despite [the minority's] limited local success in being elected or appointed to political office"); *Large*, 709 F. Supp. 2d at 1221 (finding significant that only one Indian out of eight candidacies had ever been elected to the County Commission); *Clark v. Calhoun Cty., Miss.*, 21 F.3d 92, 97 (5th Cir. 1994) (stating that success in municipal elections "do[es] not demonstrate that black citizens have an equal opportunity to elect their preferred candidates to county-wide offices").

[367] *See* 42 U.S.C. § 1973(b) (providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population");

Historically and currently, Indian candidates have had no success in County elections for all but one County office and two School Board offices. Despite comprising slightly more than half of the County's voting age population since at least 1990, Indian candidates have never been elected to a majority of the seats on the County Commission or the School Board.[368] An Indian has never won a countywide election for any elected position, including County Assessor, County Attorney, County Clerk/Auditor, County Recorder, County Sheriff, County Surveyor, and County Treasurer.[369] The switch from at-large elections to district elections made it possible for an Indian to get elected to represent Commission District 3 under past and current County districting plans, but that is the only elected, non-School Board County office ever held by an Indian. Unfortunately, even that representative was denied the dignity of his turn as Chairman of the Commission.[370] No Indian citizen served on the School Board until one was appointed in 1971 and, since then, Indians candidates have only been elected to the two school board districts that are largely or wholly on the reservation and packed with Indian voters.[371]

This lack of success is not from lack of trying. Prior to 1986, when Commission elections were at-large, an Indian candidate ran for a County Commission seat six times and lost each time

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Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1265 (N.D. Miss. 1987) *aff'd sub nom*, 932 F.2d 400 (5th Cir. 1991) (because blacks hold 9.9% of elected offices in Mississippi but comprise about 35% of the population and most of those officials were elected from black majority districts they have "substantial difficulty" electing candidates of their choice); *Major v. Treen*, 574 F. Supp. 325, 341 (E.D. La. 1983) (noting that "[n]otwithstanding a black population of 29.4%, only 7% of Louisiana's elected officials are black") and 351 (describing a fifteen percent success rate for black candidates at the polls as "substantially lower than might be anticipated" given the parish's fifty-five percent black population).

[368] *Supra*, ¶¶ 144-147 (County Census data from 1990, 2000, and 2010).

[369] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.

[370] McCool Expert Report at p. 197.

[371] McCool Expert Report at p. 197.

(i.e., two candidates in 1972 and one each in 1974, 1976, 1980, and 1984).[372] In 1990, an Indian slate of candidates ran for five of six countywide offices on the ballot, including County Sheriff, County Treasurer, County Assessor, County Recorder, and County Clerk, but each lost in "a shutout."[373] In 2002, an Indian candidate ran for County Sheriff but was not elected.[374] Four times, in 1992, 2000, 2004, and 2012, an Indian candidate ran for County Commission District One and lost the general election each time. Similarly, Indians ran for School Board District Three four times (i.e., in 1970, 1972, 1992, and 1996) and unwaveringly failed to be elected.[375] As a result, it is not surprising that many Indian citizens of the County do not vote because "they feel it is a waste of time, given the conspicuous lack of electoral success."[376]

Indians have also been completely marginalized from County appointments. An Indian has never been appointed to be a County judge. Of the County's 24 special service districts, governed by 120 board members, an Indian is appointed only one position on the Library Board.[377] Although Indians have strong economic interests and a rich cultural heritage, no Indians serve on the County's Community Development Board or its Historical Commission.[378]

The undisputed material facts demonstrate that Indians in the County have had extremely limited success at election to public office in the County. Therefore, Senate Factor Seven, one of

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[372] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[373] Engstrom Expert Report, ¶¶ 19-36; Massey Expert Report at pp. 28-29; McCool Expert Report at pp. 120-121.
[374] Engstrom Expert Report, ¶¶ 25-27.
[375] See McCool Expert Report at pp. 82-94; Engstrom Expert Report at pp. 14-18, Tables 1-4; see also Exhibit Two.
[376] McCool Expert Report at p. 198 (summarizing findings from personal interviews).
[377] McCool Expert Report at p. 213.
[378] McCool Expert Report at p. 213

the most probative factors, strongly weighs in Plaintiffs' favor.

viii. Senate Factor Eight

Senate Factor Eight considers whether there is a lack of responsiveness on the part of elected officials to the particularized needs of the minority group.[379] In general, unresponsiveness suggests "a willingness to discriminate against minorities and to not be accountable to their interests."[380] The Senate Report does not define responsiveness so courts have adopted a case-by-case analysis.[381] Relevant evidence includes active opposition or hostility to the needs of the minority, ignoring or failing to address requests or complaints, and a history of requiring courts to compel the governmental entity to respond to minority needs.[382] Senate Factor Eight weighs strongly in Plaintiffs' favor because County officials have a history of failing to respond to the particularized needs of Indians, especially in the southern part of the County.

a. Lack of Responsiveness - Education

Multiple lawsuits have been necessary to compel the County to admit that it is has a legal duty to provide satisfactory education services to Indian students in the County.[383] For example, litigation was necessary to force the County to construct schools at Montezuma Creek,

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[379] Senate Report at p. 29.
[380] *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1043 (D.S.D. 2004) quoting *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1572 (11th Cir. 1984).
[381] See Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982. Final Report of the Voting Rights Initiative, University of Michigan Law School (2005).
[382] See e.g. *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1573 (11th Cir. 1984) ("While the Board may finally be providing equal education it has done so only after three decades of resistance, and only because the courts ordered it to do so."); *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 495 (2d Cir. 1999) (considering a failure to respond to complaints of discrimination and the denial or disregard of funding requests for community centers in the minority communities as evidence of unresponsiveness by the Town Board).
[383] See e.g. *Meyers*, 905 F. Supp. at 1551.

Monument Valley, and Navajo Mountain, to renovate existing facilities (in 1975 and again 20 years later), to provide of basic services to those schools, and to implement bilingual and bicultural education programs (in 1975 and again 20 years later) to serve the particularized needs of Indian students at these schools and throughout the County.[384] This lengthy history demonstrates the County's lack of responsiveness to Indian citizens' education needs absent court orders and its lack of responsiveness even when subject to them.[385]

Legal gains have not translated to sustained, comprehensive educational gains for Indian students in the County, as measured by treatment of students, student performance (test scores), school performance, and the implementation of lasting, effective bicultural and bilingual programs.[386] Dr. Deyhle documented widespread racism and mistreatment by white students and teachers against Indian students, tension between school officials and Indian students, lowered expectations for Indian students and the use of pejorative terms to describe them, disproportionately higher disciplinary actions, referrals to law enforcement, and on campus arrests, and higher dropout rates among Indian students.[387] Since testing was implemented as early as 1975, Indian students consistently and significantly underperform compared to white students in the County and at the national level.[388] In 2014, two of the schools built as a result of

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[384] See e.g. *Sinajini v. Board of Education of the San Juan County School District*, 964 F. Supp. 319 (D. Utah 1997); *Meyers By & Through Meyers v. Bd. of Educ. of San Juan Sch. Dist.*, 905 F. Supp. 1544, 1551 (D. Utah 1995); *Sinajini v. Bd. of Educ. of San Juan Sch. Dist*., 233 F.3d 1236, 1239 (10th Cir. 2000). See also Deyhle Expert Report; Lawrence R. Baca, "Meyers v. Board of Education: The Brown v. Board of Indian Country," 2004 *U. Ill. L. Rev.* 1155, 1156-57 (2004),
[385] *Meyers*, 905 F. Supp. at 1551.
[386] *See discussion* supra, section IV.B.v.
[387] Deyhle Expert Report at pp. 7-8; 22-27; 50-58; 83; 103-105.
[388] *Supra*, ¶¶ 77-88, citing test scores reported in Deyhle Expert Report.

the *Sinajini* and *Meyers* litigation received failing grades by the Utah Taxpayers Association.[389]

b. Lack of Responsiveness - Roads

The County's failure to adequately construct, maintain, and fund roads in the southern part of the County over the last 85 years is emblematic of its failure to respond to the particularized needs of Indians.[390] Poor road conditions have played a central role in the quality of Indian education in the County, from the first *Sinijini* lawsuit detailing the 166 mile round trip trek to school made by Navajo students on "rutted, eroded, unpaved, dirt roads that frequently washed out during rains," to the 2015 stranding of eight school busses in southern the County due to muddy, unpaved roads after a snowstorm, resulting in school closures lasting several days.[391] The County's response has, in many instances, been to play a game of "pass-the-buck," arguing that other federal agencies and the State of Utah should be funding roads on the Navajo Reservation.[392] The misperception that the County should not be responsible for funding any road projects on the Reservation is held by County residents today and used as leverage in recent political campaigns to defeat Indian candidates.[393]

c. Lack of Responsiveness – Law Enforcement

The County has also failed to consistently and adequately respond to calls for improved law enforcement on the Navajo Reservation in the County.[394] Dr. McCool cites the need for

[389] Deyhle Expert Report at p. 48.
[390] McCool Expert Report at pp. 201-204.
[391] Deyhle Expert Report at p. 68; McCool Expert Report at p. 201.
[392] See e.g. McCool Expert Report at p. 203.
[393] See e.g. McCool Expert Report at p. 129.
[394] Dr. McCool notes that Tribal law enforcement has also been ineffective, but here we focus on the County's role in this issue. McCool Expert Report at p. 206.

improvements as a recurrent theme in Commission meetings between 1983 and 2002.[395] Proposals to cross-deputize law enforcement have been raised, denied, implemented and then allowed to lapse between 1959 and 2013.[396] Dr. McCool concludes, "There has been a recognized need for a cross-deputization agreement between the county and the Nation for over fifty years, but it has only been achieved sporadically."[397] Instances of unfair treatment and racial profiling is another a recurring problem in law enforcement.[398]

d. Lack of Responsiveness –Basic Services

Although it is not the only entity that has failed Indians, the County has played an integral role in the story of how "Navajo people living in San Juan County appear to have been short-changed by every governing body that is supposed to provide services…"[399] The County's record of failing to respond to the particularized needs of Indians in the County is borne out by the many data and anecdotal examples provided here and in the expert report of Dr. McCool and Dr. Deyhle. Moreover, the County's conduct with respect to request for services has, at times, been extremely hostile.[400] Perhaps most tellingly, the County has played a vigorous game "pass-the-buck" regarding essential services for Indians.[401] Available evidence indicates that the County receives a great deal more funding from the United States government because of its

[395] McCool Expert Report at p. 206.
[396] McCool Expert Report at pp. 206-207.
[397] McCool Expert Report at p. 207.
[398] McCool Expert Report at pp. 207-208
[399] McCool Expert Report at p. 208.
[400] See e.g. McCool Expert Report at p. 209.
[401] See e.g. McCool Expert Report at p. 209.

Indian citizens than it actually dedicates to their needs.[402]

Dr. Deyhle and Dr. McCool documented a perception among many Indians in the County that no one wants to take responsibility for providing services and a generalized feeling of hopelessness that this will ever change.[403] Dr. McCool states that this perception leads to depressed political participation by Indians.[404] Importantly, Dr. McCool and Dr. Deyhle connect the County's failure to respond to the needs of Indians to reduced educational attainment and civic participation, including voting and participation in political campaigns.[405]

The examples of a lack of official responsiveness to the particularized needs of Indians in the County establishes that Senate Factor Eight weighs strongly in Plaintiffs' favor.

ix. Senate Factor Nine

To establish Senate Factor Nine, Plaintiffs incorporate by reference the legal elements, undisputed material facts, and argument put forth in their Motion for Summary Judgment on Plaintiffs' Second Claim for Relief, which demonstrates that no disputed issues of material fact exist regarding the fact that the County's justification for the policy underlying the mal apportionment of its County Commission election districts is tenuous.[406]

V. CONCLUSION

Plaintiffs have established, under the undisputed material facts, that each of the relevant

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[402] McCool Expert Report at pp. 199-200 (discussing 1978 report that the county collected $28.5 million in taxes on the Navajo Reservation but only spent $7.2 million there and a 1989 investigation that found that only 25% of the tax revenue generated on the Reservation was returned to the Reservation).
[403] McCool Expert Report at p. 210.
[404] McCool Expert Report at pp. 208-213.
[405] *See* Deyhle Expert Report at pp. 83-88.
[406] Motion for Partial Summary Judgment on a Portion of Plaintiffs' Second Claim for Relief, Dkt. 234, dated October 13, 2015

Senate Factors weigh in favor of Plaintiffs. There is no genuine dispute of material fact that, under the totality of circumstances, Indians in the County have a diminished opportunity to participate in the political process and elect representatives of their choice. Plaintiffs are entitled to judgment as a matter of law that the County's Commission Districts violate Section 2 of the Voting Rights Act.

DATED this 28th day of January 2016.

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

by: */s/ Steven C. Boos*
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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January 2016, I electronically filed the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE SECOND CLAIM FOR RELIEF (SENATE FACTORS)** with the U.S. District Court for the District of Utah. Notice will automatically be electronically mailed to the following individual(s) who are registered with the U.S. District Court CM/ECF System:

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