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Examination No. \_\_\_\_\_

**519 LEGISLATIVE AND ADMINISTRATIVE PROCESSES**

Spring 2002

UNM School of Law  
Final Examination  
Three Credit Hours

Professors Bay and Canova  
Friday, May 3, 2002  
1:30 p.m. - 4:30 p.m.

**INSTRUCTIONS**

(Three Hours)

Good afternoon. This is a three-hour exam, which consists of two parts. Read the questions thoroughly, take each issue separately, organize your analysis, and budget your time.

You may have with you the class materials, state and federal constitutions, and any notes, outlines, or other materials you prepared yourself or with your fellow students. You may not have any other materials with you.

Organize your answers before you begin writing. You will probably find it helpful to outline your answers first. Please write neatly, in ink, and on only one side of each blue book leaf. If you type, please double space and be sure that your examination number, your professor's name, and the page number appear at the top of every page. Clarity of thought, simple writing and creativity will be amply rewarded.

**GOOD LUCK!**

**[EXAMINATION BEGINS ON NEXT PAGE]**

## **PROBLEM 1**

**Total points:** 90 points (½ total exam grade)

**Recommended time to answer Problem 1:** 90 minutes

### **Background**

Assume that in January 1999, the New Mexico Legislature passed, and the governor signed into law, a state Administrative Procedure Act (APA) that is substantially identical to the federal APA. This New Mexico APA now applies to every state and local agency in the State of New Mexico. [Note: In other words, this New Mexico APA is not the weak one that we reviewed in our LAP IV readings this past semester, but applies widely to state agencies, much as the federal APA in our LAP IV readings].

You are an associate at a small law firm in Albuquerque. Your client, Rita Begay, lives in Santa Fe, in a house on East Water Street, a part of town where the roads are paved with cobblestone. She purchased her house many years ago and it was recently appraised at \$463,000. Over the past couple of years, Ms. Begay has spent more than \$5000 to repave the sidewalk and driveway in front of her house with cobblestone.

In November 2000, the Planning Commission of the City of Santa Fe recommended the repaving of a number of streets, including East Water Street. The recommendation was made after several months of study by the Planning Commission. The Planning Commission is a city agency that is funded by appropriations made by the Santa Fe City Council (the city's legislative branch) and approved by the Mayor (the city's executive officer).

By law, the Planning Commission is a three-member agency composed of two mayoral appointees and the president of the New Mexico Association for Economic Development (AED), a private trade association. All members serve for four-year terms, and the two mayoral appointees require confirmation by the City Council. The Mayor can remove members of the Planning Commission only upon a showing of "gross misfeasance of duties" and only with the approval of the City Council's Committee on Public Works, Community Planning, and Land Use.

The Mayor appointed Elizabeth McMahan as the Chairperson of the Planning Commission and Henry Serrano as a member. Charles Warren, as president of the AED, is the third Planning Commission member. Ms. McMahan is a strong backer of the Mayor, contributed several thousand dollars to his last campaign, and is also the majority shareholder and chief executive officer of Hayes Asphalt & Paving, Inc.

New Mexico's Governor, while running before dawn on January 17, 2001, slipped and fell on icy cobblestones. He suffered compression fractures to two vertebrae near his shoulder blades.

On February 6, 2001, the New Mexico Legislature approved Capital Outlay Request 180 as part of its Transportation Surface Improvement Act (TSIA). The legislation, which was signed into law by the Governor, provided funding of \$299,600 for improvements of specified roads in Santa Fe County, including the repaving of East Water Street.

The TSIA also delegated to designated local planning commissions (and expressly including the Santa Fe Planning Commission) the authority to promulgate rules and regulations in the interests of "public safety," after "full public hearings," for the construction, paving, and repaving of road surfaces.

In March 2002, the Santa Fe Planning Commission invited written comments from the public about the kinds of materials that should be used in the paving of new roads and the repaving of existing roads. On April 12, 2002, after the thirty-day comment period was over, the Planning Commission announced that all new roads and all repavings would be done with concrete and asphalt.

At its April 19, 2002 meeting, the Planning Commission adopted a "Schedule for Road Construction" that included the repaving of East Water Street and assessed a charge for homeowners abutting the street. The Planning Commission also requested authorization from the Mayor of Santa Fe to enter into a contract for \$32,070.81 with J.R. Hamilton Contracting for the East Water Street and Cathedral Place Drainage, Paving and Sewer Improvements Project. The Mayor promptly gave such approval.

On October 2, 2002, Ms. Begay awoke to discover a construction crew tearing up the cobblestone street in front of her house. Ms. Begay, and other members of the Santa Fe Historic Preservation Society (HPS) to which she belongs, immediately spoke with the local news media to express their outrage at the destruction of the city's historic cobblestone streets. Some news reports suggested that the Governor was opposed to cobblestone because of his slip and fall the year before and that the Governor was tied to "concrete and asphalt interests." The Governor has denied such allegations. To disprove his critics, he now threatens to refuse to spend capital outlay funds on the East Water Street repaving that were appropriated under TSIA.

Ms. Begay and the HPS have called your law firm for legal assistance. Your senior partner, Gloria Chavez, met with Ms. Begay yesterday, and has asked for a memorandum from you to discuss the following issues:

**Part A (40 points)**

Ms. Begay would like to challenge the authority of the Planning Commission on separation of powers and non-delegation grounds. The New Mexico Supreme Court, in interpreting the state constitution, has followed and applied all relevant federal precedents on these issues to the actions of state, local and municipal governments in New Mexico.

**Assess whether the Planning Commission has overstepped its authority on separation of powers or non-delegation grounds.**

**Part B (40 points)**

Ms. Begay has asked you to challenge: (1) the Planning Commission's November 2000 recommendation to repave East Water Street; (2) its April 12, 2002 decision to use concrete and asphalt in its repavings; and (3) its April 19, 2002 Schedule for Road Construction decision to repave East Water Street and assess charges on abutting homeowners.

**Assess whether these Planning Commission decisions violate Ms. Begay's constitutional due process rights or the New Mexico APA.**

**Part C (10 points)**

Ms. Chavez wants to request documents from the Planning Commission and the New Mexico State Highway and Transportation Department under the New Mexico Inspection of Public Records Act to determine if J.R. Hamilton Contracting has purchased any concrete or asphalt from Hayes Asphalt & Paving, Inc., and the relationships between the New Mexico Association for Economic Development (AED) and any contractors working on Santa Fe construction, paving, or repaving projects. Ms. Chavez is concerned that the Planning Commission will attempt to resist such production of documents under the doctrine of executive privilege. Ms. Begay would like to raise allegations of bias and conflict of interest against Planning Commission members Elizabeth McMahan and Charles Warren.

**Assess whether the actions of the Planning Commission should be struck down because of any bias or conflict of interest by its members, Elizabeth McMahan or Charles Warren?**

**[END OF PROBLEM 1; PROCEED TO PROBLEM 2 ON NEXT PAGE]**

## **PROBLEM 2**

Total points: 90 points (1/2 total exam grade)

Recommended time to answer Problem 2: 90 minutes

### **Background**

The State of Neverado became a State in 1878. Proud of its progressive past, as a territory, Neverado fought on the side of the Union during the Civil War and was home to a number of prominent abolitionists. In 1905, its Constitution was amended to add the following provision, "No law shall abridge the rights of citizens of this State to vote on account of race, color, or previous condition of servitude, and nothing herein shall be held to permit the use of an at large electoral system, a poll tax, a literacy test, a grandfather clause, or any other test or device intended to disenfranchise another." This was the 30<sup>th</sup> Amendment to the Neverado State Constitution.

In a debate during the state constitutional convention that proposed the adoption of the 30<sup>th</sup> Amendment, the sponsor of the Amendment, State Senator Eldridge Farnsworth, declared, "It has become our unhappy fate to see what happens in the States of our southern brethren, where the man of color has been systematically deprived of his right to vote through the use of devices whose ingenuity, we must all agree, is surpassed only by their shamefulness and iniquity. One of those devices is the use of an at-large electoral system. Our fair Constitution must never be sullied by the presence of such an abomination." The Senate Report accompanying the 30<sup>th</sup> Amendment explained, "This Amendment is intended to ensure that the freed man is able to exercise his right to vote in our State and to prevent discrimination against him." In 1905, Neverado had a predominantly white population.

Over time, the urban areas of Neverado have become increasingly diverse. Howell County contains the largest city in the State, West Lebanon. As a result of the 2000 Census, the State legislature passed new districting schemes for all County Commissions, including Howell County. Disputes over the re-districting of Howell County become the basis for the litigation described in Parts A, B, and C of this Problem.

### **Part A (45 points)**

You are Judge Susan Rossi's permanent law clerk. For the past month, she has heard a voting rights case brought by Hispanic plaintiffs against Howell County in the State of Neverado. The plaintiffs challenge the County's voting plan under Section 2 of the Voting Rights Act, as well as the 14<sup>th</sup> and 15<sup>th</sup> Amendments of the U.S. Constitution. You are the clerk assigned to the case. The Judge hands you a memo with some of her proposed factual findings:

PROPOSED FINDINGS OF FACT<sup>1</sup>

1. The new law plan provides for the election of seven members, each of whom is elected from single-member districts. Each member holds a 4-year term. The elections are staggered. Four members are elected in presidential election years; three members are elected in gubernatorial election years.
2. Exhibit A (attached) is a precinct map of Howell County. The City of West Lebanon occupies the eastern half of the county. There are 21 voting precincts for the County Commission. Precincts 1 through 5 are the western half of Howell County; this area is rural and agrarian. Precincts 6 through 21 represent West Lebanon.
3. The 2000 Census showed that Howell County is 48% white, 42% Hispanic, and 10% Native American. The voting age population (VAP), however, is 57% white, 32% Hispanic, 11% Native American.
4. The new districting law creates two majority-minority Hispanic districts (Districts I and II). In those districts, Hispanics constitute a majority of the total population (88% and 97% respectively) and the VAP (83% and 95% respectively). Creating those two majority-minority Hispanic districts ensures that 28.57% of the Board will be Hispanic (two out of seven seats).
5. Whites constitute a majority of the total population and the VAP in the other five districts. Districts III, IV, and V have minimal minority populations (less than 10%). Hispanics and Native Americans reflect a substantial portion of the population of Districts VI and VII (more than 30% but less than 45%).
6. The County has a total population of 700,000 people. The seven districts contain the following populations:

District I (Precincts 10 & 11):	104,000
District II (Precincts 12 & 13):	104,500
District III (Precincts 18 through 21):	99,000
District IV (Precincts 14 through 17):	95,000
District V (Precincts 4 & 5):	97,500
District VI (Precincts 1 through 3):	100,000
District VII (Precincts 6 through 9):	100,000

This data is reflected in Exhibit A.

7. Howell County contains 240 square miles. The Hispanic population in Howell County largely lives in the northeast part of West Lebanon, in a 30 square mile area, though there is also a considerable population of Hispanic farmers along the northern

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<sup>1</sup> Unless otherwise noted, please assume that these findings of facts are applicable to Parts B and C of this problem.

boundary of Precincts 1 through 3 (in District VI), as well as in Precincts 6, 7, and 9 of West Lebanon (in District VII).

8. In the last five elections for County Board members, one Hispanic candidate has been elected each time. With one exception, in each instance, the winning Hispanic candidate ran against another Hispanic or was not opposed. In the five instances in which a Hispanic candidate ran head-to-head against a white candidate, the Hispanic candidate has only prevailed once. Given the staggered nature of County Board elections, over the last eight years, there have continuously been two Hispanic members on the seven-person Board.
9. Expert testimony establishes that in the last five elections for County Board members, white voters overwhelmingly vote for white candidates over minority candidates. Similarly, 75 to 80% of all Hispanics voted for the same Hispanic candidate or Hispanic-preferred candidate in a two-way race. (In contrast, the Native-American voters appear to split their vote between white and Hispanic candidates.)
10. The County Board is responsive to the complaints and needs of Hispanic citizens.
11. For the past 20 years the County has played an active role in trying to register voters. The County has never used any of the devices historically used to disenfranchise minority voters, such as literacy tests, poll taxes, grandfather clauses, or the like. Nor have County Board members ever been elected through an at large system. Local political campaigns have carefully avoided any overt or subtle appeals to racism.
12. It is undeniable, however, that while there has been progress Hispanics historically have suffered from discrimination in employment, education, and health care. Unfortunately, effects of that discrimination continue to this day in Howell County.

**Based on the proposed findings of fact, as well as reasonable inferences that can be drawn from them, Judge Rossi asks you to write a clear and concise memorandum deciding the claims raised under the 14<sup>th</sup> and 15<sup>th</sup> Amendments and the Voting Rights Act, Section 2.**

### **Part B (20 points)**

You write the memorandum. The day after you complete it, but before Judge Rossi issues her ruling, the State and plaintiffs reach a settlement. The plaintiffs agree to dismiss their lawsuit if the State creates a third majority-minority Hispanic district. The state legislature meets and repeals the old law. The legislature then passes a bill that creates a third majority-minority district.

Exhibit B (attached) shows the three majority-minority Hispanic districts, including the new District III. District III includes part of Precincts 1, 2, 3, 6, 7, 9, 10, 12, 18, and 19. The new Districts range from a low of 99,000 people to a high of 101,000.



The Conference Committee Report accompanying the re-districting law briefly stated, "In re-districting Howell County, we took into account race but relied upon traditional districting criteria to achieve a fair and constitutional result." During floor debates, in support of the bill, State Representative Sam Johnson, a legislator renowned for his colorful speech and bluntness, stated, "We don't have a choice here. We need to do this. Is race a factor here? You bet it's a factor! It's a very big factor. But we need to get moving on this. I don't have to tell you the election is right around the corner. For those of you who have a problem with this, look at it this way: wake up! Smell the coffee! Or have a banana. Maybe a cream soda, too. Look on the bright side: you're still going to get four seats, and now you won't have to worry about any minorities in your district."

A group of white voters, Citizens for a Democratic America (CDA), files a lawsuit seeking to overturn the law. They only allege violations of the 14<sup>th</sup> Amendment.

**Prior to the start of trial, Judge Rossi asks you to prepare a bench memorandum explaining how the 14<sup>th</sup> Amendment claim should be resolved and why.**

### **Part C (25 points)**

Please assume that a Howell County redistricting scheme is ultimately put into place that passes constitutional muster. A coalition of white and minority state legislators wishes to explore the possibility of returning to an at large electoral scheme for the County Board in Howell County. Some legislators are concerned that the creation of majority-minority districts leads to racial balkanization and gerrymandering; others believe that an at large system would be politically favorable to them as the 2000 Census showed that Howell County was 48% white, 42% Hispanic, and 10% Native American.

**Focusing solely on an interpretation of the 30<sup>th</sup> Amendment of the Neverado State Constitution, would a law that created an at large voting system for Howell County violate the 30<sup>th</sup> Amendment? Why or why not?**

EXHIBIT A

HOWELL COUNTY PRECINCT  
AND DISTRICT MAP

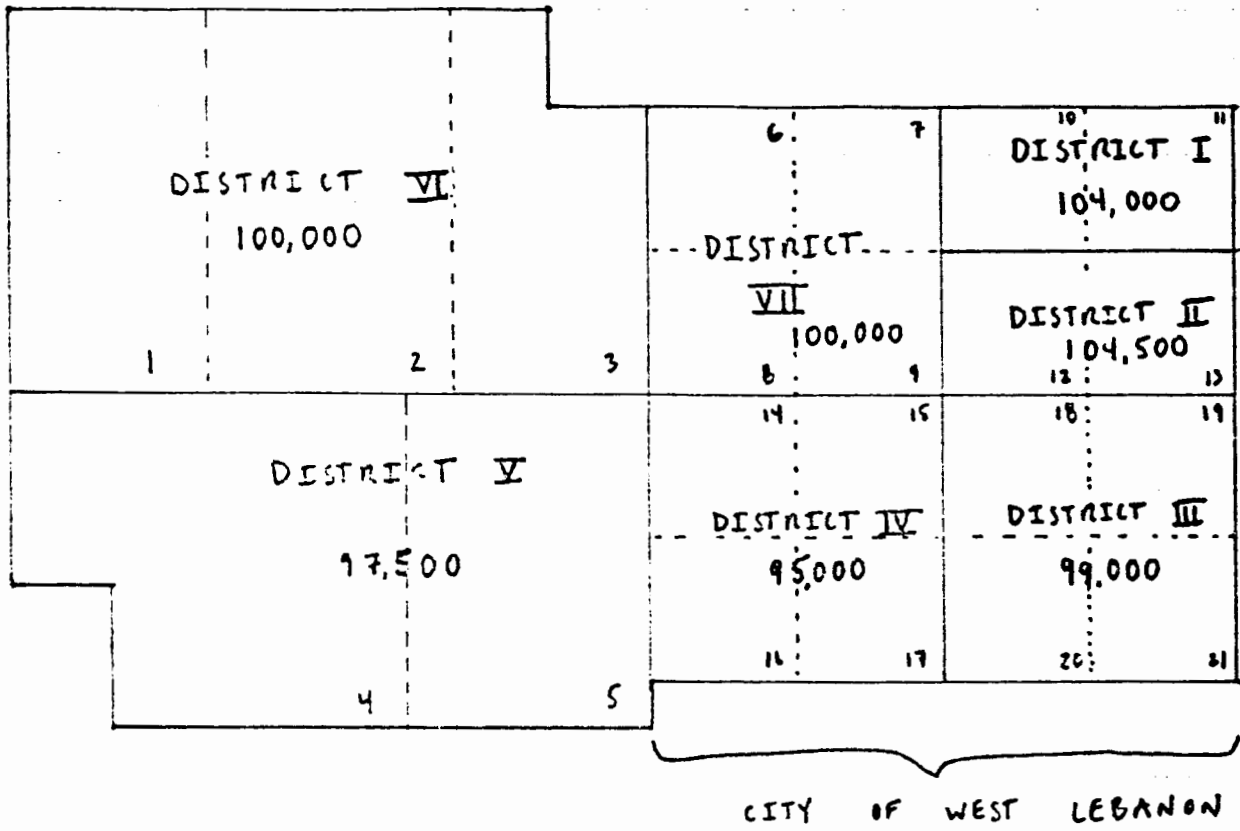


EXHIBIT B

HOWELL COUNTY MAJORITY-MINORITY DISTRICTS  
(FOR PART B)

