Steven C. Boos, USB# 4198
Maya Leonard Kane
Maynes, Bradford, Shipps & Sheftel, LLP
835 East Second Avenue, Suite 123
P.O. Box 2717
Durango, Colorado 81301/2
(970) 247-1755 / Facsimile: (970) 247-8827
E-mail: sboos@mbssllp.com
mkane@mbssllp.com

Eric P. Swenson, USB #3171
1393 East Butler Avenue
Salt Lake City, Utah 84102
Telephone: (801) 521-5674
E-mail: e.swenson4@comcast.net

D. Harrison Tsosie, USB# 7329
Navajo Nation Attorney General
Navajo Nation
Department of Justice
P.O. Box 2010
Window Rock, Arizona 86515-2010
(928) 871-6345 / Facsimile: (928) 871-6177
E-mail: htsosie@nndoj.org

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.

RESPONSE TO SAN JUAN COUNTY'S MOTION TO DISMISS

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

Judge Robert Shelby

Plaintiffs submit this response to San Juan County's Motion to Dismiss.

I. INTRODUCTION

On November 22, 1983, the United States filed a Complaint against San Juan County, Utah (County) and various County officials for declaratory and injunctive relief to remedy violations of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the

Constitution due to the use of at-large voting to elect the three members of the County Commission in violation of the rights of Indian voters. *United States v. San Juan County*, C-83-1286W (1984), Complaint, ¶¶ 31, 32 and 33. The relief requested by the United States narrowly focused on ending the use of at-large voting for elections to the County Commission. Complaint, Prayer for Relief, ¶¶ 2 - 3. The plaintiffs in the present case were not parties to *United States v. San Juan County* and it was not a class-action.

On April 4, 1984, this Court entered an Agreed Settlement and Order[1] in which the County agreed that its process for the selection of Commissioners violated the Voting Rights Act, further agreed that it would continue implementation of a process to adopt a form of County government through which Commissioners would no longer be elected at-large, but instead from single-member election districts, denied the specific allegations of the Complaint and reserved all other issues. The Agreed Settlement and Order did not address any other issues, including the alleged violations of the Fourteenth and Fifteenth amendments. The Court retained jurisdiction in the event the "County should for any reason fail to take action . . . to modify the process leading to the selection of County Commissioners . . . ." Agreed Settlement and Order at 2 – 3. In 1984, the County adopted a system in which Commissioners were henceforth elected from three single-member districts.

The County did not reapportion these single-member Commission election districts until 2011. The County did not reapportion School Board election districts after 1992. Following the 2010 decennial census, both the Commission and School Board election districts were seriously

[1] Inexplicably, the County's Motion entitles the Agreed Settlement and Order as "*Judgment by Consent*", a name that was never used by the Court. This response will use the name adopted by this Court.

mal apportioned and remain mal apportioned to this day. See *Motion for Partial Summary Judgment on Plaintiffs' Second and Third Claims for Relief and Memorandum of Law, Section III, Statement of Elements and Undisputed Material Facts*, which is incorporated herein by reference.

Consequently, on January 12, 2012, the plaintiffs filed a complaint alleging that the County had violated the Voting Rights Act and the Equal Protection Clause through its failure to properly apportion County Commission election districts following each decennial census after 1986 and allowing them to become mal apportioned. Subsequently, on December 28, 2012, plaintiffs filed their Second Amended Complaint adding allegations that the County had also violated the Voting Rights Act and the Equal Protection Clause through its failure to properly reapportion School Board election districts following each decennial census after 1996. The First Claim alleges a violation of the Equal Protection clause and the Second Claim alleges a violation of Section 2 of the Voting Rights Act. Both claims are based on the failure of the County to properly reapportion County Commission election districts.

On February 13, 2014, the County filed a motion to dismiss the First and Second Claims (Motion). As grounds, the Motion cites Rules 12(b)(1), 12(b)(6), 12(b)(7), 12(c), and 19; however, the Motion otherwise contains no specific discussion of Rule 12(b)(6) or 12(c) and provides no supporting authority for those parts of the Motion.[2] The specific grounds cited by the

[2] DUCivR 7-1(a)(1) requires parties to state the "specific grounds for the motion", including supporting authority, and warns that a motion can be denied for failure to comply with this requirement. The requirement to state legal authority is waived in some instances, but not with regard to a motion to dismiss. DUCivR 7-1(a)(2). *Steppes Apartment, LTD., et al. v. Armstrong, et al.,* 188 F.R.D. 642, 643 (D. Utah 1999) (It is not sufficient under DUCivR 7-1 to merely refer to a rule of Civil Procedure and a motion must include a summary or outline of the legal basis for the motion and may be denied if it does not.); see *Rowlett v. Friel*, 2005 WL 2266595, at *6 (D.

County to support its Motion pursuant to Rule 12(b)(1) is that the First and Second Claims are an impermissible collateral attack on the Agreed Settlement and Order. The specific grounds cited by the County in support of its Motion under Rules 12(b)(7) and 19 is that the United States, as one of the parties to the 1983 litigation and a signer of the Agreed Settlement and Order, is an indispensible party to the present case. The County argues that only the United States can challenge the County's unconstitutional failure to reapportion election districts following each decennial census, presumably by re-opening the Agreed Settlement and Order.[3]

II. ARGUMENT

A. The present case does not constitute a collateral attack on the Settlement Agreement and Order in *United States v. San Juan County* and the court has subject matter jurisdiction over this case.

The Motion's first argument asserts that the First and Second Claims should be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) because these claims represent an impermissible collateral attack on a consent decree.[4] The Motion states a general legal rule that

---

Utah Sept. 16, 2005) (unpublished). For this reason alone, the Motion should be summarily denied with regard to its Rule 12(b)(6) and Rule 12(c) grounds. Because there is no argument for the plaintiffs to respond to with regard to these grounds, no response has been provided.

[3] There is actually nothing left for the Court to do in *United States v. San Juan County*. The terms of a settlement agreement will be interpreted in light of common sense and once the purposes of the agreement, as revealed by such common sense interpretation, are accomplished, the courts will not indefinitely retain jurisdiction over the suit that generated the settlement agreement. *Loeffel Steel Products, Inc. v. Delta Brands, Inc., et al.*, 2013 WL 6224489, at *5 (N.D. Ill. December 2, 2013) (unpublished). In *United States v. San Juan County*, the purposes of the Agreed Settlement and Order were fully accomplished and the case ended three decades ago when the County replaced the at-large election system for County Commissioners with single-member election districts.

[4] This section of the Motion fails to provide any legal authorities stating the elements that must be shown for a Rule 12(b)(1) motion. See Fn. 2, above. In assessing this part of the Motion, the Court must accept the allegations of the Complaint as true and then determine whether those

consent decrees are not subject to collateral attack and then, without meaningful analysis of the rule or how it applies to this case, makes a conclusory statement that the Motion must be granted because the present case is a collateral attack on the 1984 Agreed Settlement and Order. A review of the cases discussing the rule against collateral attacks on consent decrees shows that this rule has no application to the present case.

First, the action claimed to be a collateral attack on a consent decree must actually be "an attack on the substance of the consent decree." *Marino, et al. v. Ortiz, et al.*, 806 F.2d 1144, 1147 (2nd Cir. 1986); see *Securities and Exchange Commission v. Thermodynamics, Inc.*, 319 F. Supp. 1380, 1382 (D. Colo. 1970). The Motion immediately fails when this requirement is applied because the First and Second claims do not attack the substance of the 1984 Agreed Settlement and Order.

The substance of the Agreed Settlement and Order was the establishment of an election system in which San Juan County Commissioners were selected from three single-member districts rather than through at-large voting.[5] The First and Second Claims in the present suit do not seek a return to at-large voting and do not seek to displace the system of County government based on three single-member County Commission election districts that were the result of the

---

allegations are sufficient to establish the subject matter jurisdiction of the Court. *Holt v. United States*, 46 F.3d 1000, 1002-1003 (10th Cir. 1995). Here, this determination is limited to an assessment of whether the First and Second Claims are an impermissible collateral attack on the Settlement Agreement and Order and the facial sufficiency of the Second Amended Complaint for establishing subject matter jurisdiction is not otherwise challenged. Disposition of the County's first argument therefore turns entirely on whether the First and Second Claims can be characterized as a collateral attack on the Agreed Settlement and Order.

[5] The Court explicitly identified the "issue of liability" as being "that the current method of electing County Commissioners . . . fails to fully comply with the requirements of Section 2 of the Voting Rights Act . . . ." Agreed Settlement and Order at 2.

Agreed Settlement and Order. Because a judgment on these claims will not alter the substance of the Agreed Settlement and Order in any way, they are not an impermissible collateral attack on that consent decree.

The Motion also fails because a consent decree cannot act as a shield against future suits for conduct that has not occurred at the time the consent decree was signed. See *Ashley et al. v. City of Jackson Mississippi, et al.*, 464 U.S. 900, 902 (1983) (Rehnquist, C.J. & Brennan, J. dissenting from a denial of certiorari). The central issue in this suit is the failure of the County to properly reapportion election districts, in the manner required by the Constitution and the Voting Rights Act, for both the County Commission and the School Board in the three decades *after* the Agreed Settlement and Order was signed. Taking as true the allegations of the Second Amended Complaint, the County Commission election districts became mal apportioned within a few years after the single-member election districts were created and remain mal apportioned to the present date, in violation of the Equal Protection clause and the Voting Rights Act. The County's position is essentially that the Agreed Settlement and Order allows it to opt out of reapportionment after each decennial census and violate the Voting Rights Act and the Equal Protection clause indefinitely and with impunity.[6]

The First and Second claims are based on facts arising after signing of the Agreed

---

[6] "It is well-established that [i]n institutional reform litigation, injunctions should not operate inviolate in perpetuity. This must mean that, notwithstanding the parties' silence or inertia, the district court is not doomed to some Sisyphean fate, bound forever to enforce and interpret a preexisting decree without occasionally pausing to question whether changing circumstances have rendered the decree unnecessary, outmoded, or even harmful to the public interest." *Jones'El v. Schneiter, 2006 WL 2168682, at* *4 (W.D. Wis., 2006) (unpublished) (quoting *In re Pearson*, 990 F. 2d 653, 659-660 (1st Cir. 1993)); *see also Smith v. Chicago*, 457 F.3d 643, 653-654 (7th Cir. 2006).

Settlement and Order: the County's failure to reapportion the three single-member County Commission election districts following each of the decennial censuses since 1984. The Agreed Settlement and Order cannot shield the County from liability for these later constitutional and statutory violations and, therefore, the First and Second Claims do not constitute an impermissible collateral attack on the substance of the Agreed Settlement and Order.

B. The present case does not seek to impose duties on the County that modify the Agreed Settlement and Order.

The Motion's second argument asserts that the Agreed Settlement and Order is a contract between the parties to that document and that additional conditions cannot be imposed on the parties to the contract through a later action, even though the later action involves different parties and unrelated claims. The Motion states that this is a collateral attack on the contract and therefore the plaintiffs' First and Second claims fail to state a claim. But no supporting authority is provided discussing why these claims fail to state a claim for relief.[7] The "additional conditions" claimed by the County to be imposed by the First and Second Claims are changes to the "Commission Election District boundaries agreed upon by the United States of America and the *San Juan Defendants*, and approved by Judge Winder and entered as a *Judgment by Consent* [sic]". Motion at 6.

Contrary to the County's assertion, the Agreed Settlement and Order did not approve or adopt any boundaries for the Commission election districts. Rather, the Settlement Agreement and Order states that the County should pursue "an optional form of government consisting of *fairly drawn* single member districts . . . ." (Emphasis supplied). Agreed Settlement and Order at

---

[7] See Fn. 2, above.

2. There is no provision of the Agreed Settlement and Order that approves any election district boundaries. More importantly, there are no provisions stating that such boundaries would remain unchanged in perpetuity regardless of whether future changes to the population of those districts meant that unchanged boundaries would then violate the Equal Protection clause and the Voting Rights Act. The First and Second Claims in the present suit only seek to ensure that boundaries for election districts that were adopted after signing of the Agreed Settlement and Order are correctly apportioned; these claims do nothing to add to or subtract from the terms of the Agreed Settlement and Order. Thus, the County's second argument is meritless.

The County's assertion that the Agreed Settlement and Order is an immutable contract is effectively an argument that the 1984 order is a final judgment that bars the First and Second Claims. Consequently, the Motion must be analyzed pursuant to the principles of *res judicata* and a determination made whether that earlier judgment precludes these claims. Analysis of the present action under those principles shows that the First and Second Claims are not precluded.

In the Tenth Circuit, *res judicata* precludes future claims when the following three elements are shown to exist: 1) there was a judgment on the merits in the earlier action; 2) there is identity of the parties or their privies in both suits; and 3) there is identity of the cause of action in both suits. *Mitchell v. City of Moore,* 218 F.3d 1190, 1202 (10th Cir. 2000). In *Moore*, the Tenth Circuit Court of Appeals made clear that *no* shared identity of claims (or causes of action) exists where the claims raised in a later suit are based on acts occurring *after* judgment in the earlier suit. *Id*; see *Flying J Inc, et al. v. TA Operating Corporation,* 2008 WL 4923041, at *6 (D. Utah November 14, 2008) (unpublished).

The first element, a judgment on the merits in the earlier action, is met in only one

respect: the Agreed Settlement and Order established that the system of selecting County Commissioners through at-large voting violated Section 2 of the Voting Rights Act. All other issues were reserved. The Agreed Settlement and Order contained no judgment on the merits with respect to whether at-large voting violated the Equal Protection Clause and made no judgment on the merits regarding the election boundaries that were adopted after 1984 for the three single-member Commission election districts resulting from the Agreed Settlement and Order. Consequently, although there was a judgment on one element of the case, there was no judgment on the merits regarding any substantive issues raised by the First and Second Claims in the present suit.

The second element of a *res judicata* analysis also cannot be met. The plaintiffs in the present action were not parties or the privies of the parties in *United States v. San Juan County*. Nor was that case a class action. The Agreed Settlement and Order only involved the named parties.

Finally, the third element of the *res judicata* analysis cannot be met. As discussed above in Section II(A) of this response memorandum, there is no identity of claims between the claims raised in *United States v. San Juan County* and the First and Second Claims in the present suit. The claims in the former case were focused on establishment of an election system in which County Commissioners were selected from three single-member districts rather than through at-large voting, while the claims in this suit are concerned with the reapportionment of County Commission election districts based on current census data to meet Constitutional standards and comply with the Voting Rights Act.

Consequently, the elements of *res judicata* are not met and the Agreed Settlement and

Order has no preclusive effect on the First and Second Claims in the present suit. The Motion on these grounds must be denied.[8]

C. The United States is not an indispensable party because the First and Second Claims in the present suit do not request any changes to the Agreed Settlement and Order entered in *United States v. San Juan County.*

The County's third argument, that the First and Second Claims should be dismissed pursuant to Rule 12(b)(7) and Rule 19, contains a lengthy discussion of why parties to a contract are indispensible to the judicial modification of the contract; a principle that Plaintiffs do not dispute. However, this principle does not bear on this case and therefore this argument is without merit.

The County's argument is premised on several mischaracterizations of the Agreed Settlement and Order. First, the County asserts that ". . . Plaintiffs now wish to set aside [the Agreed Settlement and Order] by redrawing the San Juan County Election Districts that were agreed to between *San Juan County* and the United States in 1983." Motion at 9. The County also implies that actual district boundaries were approved in the Settlement Agreement and Order when it suggests that the First and Second Claims ask that "Commission Election District boundaries established as a result of the *Judgment by Consent* [sic] need to be redrawn." Motion at 14.

As discussed above in Section II(A) of this response, the Agreed Settlement and Order simply did not establish *any* County Commission election districts, much less boundaries for such districts. The Agreed Settlement and Order merely established that the County "continue

[8] The burden is on the County to show with clarity and certainty that the issues raised by the First and Second Claims in the present suit were determined by the Settlement Agreement and Order and are therefore barred by *res judicata*. See *Illinois Legislative Redistricting Commission, et al. v. LaPaille, et al.*, 786 F. Supp. 704, 709 (N.D. Ill. 1992), *aff'd sub nom. Gardner v. Illinois Legislative Redistricting Commission*, 506 U.S. 948 (1992). The County has not met that burden.

implementation of a process" to adopt a form of County government through which Commissioners would no longer be elected at-large, but instead from single-member districts. Because the First and Second Claims do not seek to alter this basic agreement between the County and the United States, the United States is not an indispensible party to this suit based on the County's contract argument and the Motion on Rule 12(b)(7) and Rule 19 grounds fails.[9]

III. CONCLUSION

Those parts of the Motion that the County supports with legal authority and argument are based on a fundamental mischaracterization of the Agreed Settlement and Order in *United States v. San Juan County*. Each of the County's arguments starts its analysis with an assertion that the Agreed Settlement and Order approved County Commission election district boundaries that are described in and are a part of that document. In fact, no such boundaries are discussed in the Agreed Settlement and Order. The heart of the Agreed Settlement and Order is a promise by the County that it would continue implementation of a process to adopt a form of County government through which Commissioners would no longer be elected at-large, but instead from single-member districts. The present suit has different parties and different claims. Once this premise is accepted, all of the County's arguments fail. The present Motion must therefore be denied.

---

[9] To prevail on a motion pursuant to Rule 12(b)(7), the proponent "has the burden of producing evidence showing the nature of the interest possessed by an absent party and that the protection of that interest will be impaired by the absence." *Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F. 3d 1292, 1293 (10th Cir. 1994). The County has shown that the United States has an interest, through the Agreed Settlement and Order, in the establishment of single-member County Commission election districts, but it has failed to show any impairment to that interest because the First and Second Claims simply do not seek to displace those election districts with some other form of government.

DATED this 6th day of March, 2014.

MAYNES, BRADFORD, SHIPPS & SHEFTEL, LLP

by: */s/ Steven C. Boos*
Steven C. Boos
Eric P. Swenson
Maya L. Kane
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2014, I electronically filed the foregoing **RESPONSE TO SAN JUAN COUNTY'S MOTION TO DISMISS** 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:

Jesse C. Trentadue
Carl F. Huefner
Britton R. Butterfield
SUITTER AXLAND, PLLC
8 East Broadway, Suite 200
Salt Lake City, Utah 84111
E-mail: jesse32@sautah.com
E-Mail: chuefner@sautah.com
E-Mail: bbutterfield@sautah.com

/s/ Steven C. Boos